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VOLUME V.

THE

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ANNOTATIONS.

VOLUME V.

THE ENGLISH AND EMPIRE DIGEST

WITH

COMPLETE AND EXHAUSTIVE

ANNOTATIONS

BEING

A COMPLETE DIGEST OF EVERY ENGLISH CASE REPORTED FROM EARLY TIMES TO THE PRESENT DAY, WITH ADDITIONAL CASES FROM THE COURTS OF SCOTLAND, IRELAND, THE EMPIRE OF INDIA, AND THE DOMINIONS BEYOND THE SEAS,

AND INCLUDING

COMPLETE AND EXHAUSTIVE ANNOTATIONS GIVING ALL THE SUBSEQUENT CASES IN WHICH JUDICIAL OPINIONS HAVE BEEN GIVEN CONCERNING THE ENGLISH CASES DIGESTED.

VOLUME V.

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(PARTS XIX–XXIII.)

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In this Volume English Cases reported up to 1st January, 1920, are included, and other cases are included so far as the Reports of the same were available in London on that date.

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REPORTS INCLUDED IN THIS WORK AND THEIR ABBREVIATIONS

A. C. (preceded by date)	Law Reports, Appeal Cases, House of Lords, since 1890 (*e.g.*, [1891] A. C.)	Eng.
A. Jur. Rep.	Australian Jurist Reports	Aus.
A. L. T.	Australian Law Times	Aus.
A. R.	Ontario Appeals	Can.
Act.	Acton's Reports, Prize Causes, 2 vols., 1809—1841	Eng.
Ad. & El.	Adolphus and Ellis's Reports, King's Bench and Queen's Bench, 12 vols., 1834—1842	Eng.
Adam	Adam's Justiciary Reports (Scotland), 1893—(current)	Scot.
Add.	Addams' Ecclesiastical Reports, 3 vols., 1822—1826	Eng.
Agra	Agra High Court	Ind.
Agra F. B.	Agra High Court, Full Bench	Ind.
Alc. & N.	Alcock and Napier's Reports, King's Bench (Ireland), 1 vol., 1813—1833	Ir.
Alc. Reg. Cas.	Alcock's Registry Cases (Ireland), 1 vol., 1832—1841	Ir.
Aleyn	Aleyn's Reports, King's Bench, fol., 1 vol., 1646—1649	Eng.
All.	New Brunswick Reports (Allen)	Can.
Alta. L. R.	Alberta Law Reports	Can.
Am .	Ambler's Reports, Chancery, 2 vols., 1725—1783	Eng.
And.	Anderson's Reports, Common Pleas, fol., 2 parts in one vol., 1535—1605	Eng.
Andr.	Andrews' Reports, King's Bench, fol., 1 vol., 1737—1740	Eng.
Anst.	Anstruther's Reports, Exchequer, 3 vols., 1792—1797	Eng.
App. Cas.	Law Reports, Appeal Cases, House of Lords, 15 vols., 1875—1890	Eng.
App. Ct. Rep.	Appeal Court Reports	N.Z.
App. D.	South African Law Reports, Appellate Division	S. Af.
Argus L. R.	Argus Law Reports	Aus.
Arkley	Arkley's Justiciary Reports (Scotland), 1 vol., 1846—1848	Scot.
Arm. M. & O.	Armstrong, Macartney, and Ogle's Civil and Criminal Reports (Ireland), 1840—1842	Ir.
Arn.	Arnold's Reports, Common Pleas, 2 vols., 1838—1839	Eng.
Arn. & H.	Arnold and Hodges' Reports, Queen's Bench, 1 vol., 1840—1841	Eng.
Ashb.	Ashburner's Principles of Equity, 1902	Eng.
Asp. M. L. C.	Aspinall's Maritime Law Cases, 1870—(current)	Eng.
Atk.	Atkyns' Reports, Chancery, 3 vols., 1736—1754	Eng.
Ayl. Pan.	Ayliffe's New Pandect of Roman Civil Law	Eng.
Ayl. Par.	Ayliffe's Parergon Juris Canonici Anglicani	Eng.
B.	Barber's Gold Law	S. Af.
B. & Ad.	Barnewall and Adolphus' Reports, King's Bench, 5 vols., 1830—1834	Eng.
B. & Ald.	Barnewall and Alderson's Reports, King's Bench, 5 vols., 1817—1822	Eng.
B. & C.	Barnewall and Cresswell's Reports, King's Bench, 10 vols., 1822—1830	Eng.
B. & C. R. (preceded by date)	Reports of Bankruptcy and Companies Winding up Cases, 1918—(current) (*e.g.*, [1918—19] B. & C. R.)	Eng.
B. & S.	Best and Smith's Reports, Queen's Bench, 10 vols., 1861—1870	Eng.
B. C. R.	British Columbia Reports	Can.
B. Dig.	Bose's Digest	Ind.
B. L. R.	Bengal Law Reports	Ind.
B. L. R. A. C.	Bengal Law Reports, Appeal Cases	Ind.
B. L. R. P. C.	Bengal Law Reports, Privy Council	Ind.
B. L. R. Sup. Vol.	Bengal Law Reports, Supp. Vol.	Ind.
B. W. C. C.	Butterworths' Workmen's Compensation Cases, 1907—(current)	Eng.
Bac. Abr.	Bacon's Abridgment	Eng.

Bail Ct. Cas.	Bail Court Cases (Lowndes and Maxwell), 1 vol., 1852—1854	Eng.
Baild.	Baildon's Select Cases in Chancery (Selden Society, Vol. X.)	Eng.
Ball & B.	Ball and Beatty's Reports, Chancery (Ireland), 2 vols., 1807—1814	Ir.
Bankr. & Ins. R.	Bankruptcy and Insolvency Reports, 2 vols., 1853—1855	Eng.
Bar. & Arn.	Barron and Arnold's Election Cases, 1 vol., 1843—1846	Eng.
Bar. & Aust.	Barron and Austin's Election Cases, 1 vol., 1842	Eng.
Barn. Ch.	Barnardiston's Reports, Chancery, fol., 1 vol., 1740—1741	Eng.
Barn. K. B.	Barnardiston's Reports, King's Bench, fol., 2 vols., 1726—1734	Eng.
Barnes	Barnes' Notes of Cases of Practice, Common Pleas, 1 vol., 1732—1760	Eng.
Batt.	Batty's Reports, King's Bench (Ireland), 1 vol., 1825—1826	Ir.
Beat.	Beatty's Reports, Chancery (Ireland), 1 vol., 1813—1830	Ir.
Beav.	Beavan's Reports, Rolls Court, 36 vols., 1838—1866	Eng.
Beav. & Wal.	Beavan and Walford's Railway Parliamentary Cases, 1 vol., 1846	Eng.
Beaw.	Beawes's Lex Mercatoria	Eng.
Bell, C. C.	T. Bell's Crown Cases Reserved, 1 vol., 1858—1860	Eng.
Bell, Ct. of Sess.	R. Bell's Decisions, Court of Session (Scotland), 1 vol., 1790—1792	Scot.
Bell, Ct. of Sess. fol.	R. Bell's Decisions, Court of Session (Scotland), fol., 1 vol., 1794—1795	Scot.
Bell, Dict. Dec.	S. S. Bell's Dictionary of Decisions, Court of Session (Scotland) 2 vols., 1808—1833	Scot.
Bell, Sc. App.	S. S. Bell's Scotch Appeals, House of Lords, 7 vols., 1842—1850	Scot.
Bellewe	Bellewe's Cases *temp.* Richard II., King's Bench, 1 vol.	Eng.
Belt's Sup.	Belt's Supplement to Vesey Sen., Chancery, 1 vol., 1746—1756	Eng.
Ben. & D.	Benloe and Dalison's Reports, Common Pleas, fol., 1 vol., 1357—1579	Eng.
Benl.	Benloe's (or Bendloe's) Reports, King's Bench and Common Pleas, fol., 1 vol., 1515—1627	Eng.
Ber.	New Brunswick Reports (Berton)	Can.
Bing.	Bingham's Reports, Common Pleas, 10 vols., 1822—1834	Eng.
Bing. N. C.	Bingham's New Cases, Common Pleas, 6 vols., 1834—1840	Eng.
Biss. & Sm.	Bisset and Smith's Digest	S. Af.
Bitt. Prac. Cas.	Bittleston's Practice Cases in Chambers under the Judicature Acts, 1873 and 1875, 1 vol., 1875—1876	Eng.
Bitt. Rep. in Ch.	Bittleston's Reports in Chambers (Queen's Bench Division), 1 vol., 1883—1884	Eng.
Bl. Com.	Blackstone's Commentaries	Eng.
Bl. D. & Osb.	Blackham, Dundas, and Osborne's Reports, Practice and Nisi Prius (Ireland), 1 vol., 1846—1848	Ir.
Bli.	Bligh's Reports, House of Lords, 4 vols., 1819—1821	Eng.
Bli. N. S.	Bligh's Reports, House of Lords, New Series 11 vols., 1827—1837	Eng.
Bluett	Bluett's Isle of Man Cases	I. of M.
Bom.	Bombay High Court Reports	Ind.
Bom. A. C.	Bombay Reports, Appellate Jurisdiction	Ind.
Bom. O. C.	Bombay Reports, Original Civil Jurisdiction	Ind.
Bos. & P.	Bosanquet and Puller's Reports, Common Pleas, 3 vols., 1796—1804	Eng.
Bos. & P. N. R.	Bosanquet and Puller's New Reports, Common Pleas, 2 vols., 1804—1807	Eng.
Bourke	Bourke's Reports	Ind.
Br. & Col. Pr. Cas.	British and Colonial Prize Cases, 3 vols., 1914—1919	Eng.
Bract.	Bracton De Legibus et Consuetudinibus Angliæ	Eng.
Bro. Abr.	Sir J. Brooke's Abridgement	Eng.
Bro. C. C.	W. Brown's Chancery Reports, 4 vols., 1778—1794	Eng.
Bro. Ecc. Rep.	W. G. Brooke's Ecclesiastical Reports, Privy Council, 1 vol., 1850—1872	Eng.
Bro. N. C.	Sir R. Brooke's New Cases, 1 vol., 1515—1558	Eng.
Bro. Parl. Cas.	J. Brown's Cases in Parliament, 8 vols., 1702—1800	Eng.
Bro. Supp. to Mor.	M. P. Brown's Supplement to Morison's Dictionary of Decisions, Court of Session (Scotland), 5 vols.	Scot.
Bro. Synop.	M. P. Brown's Synopsis of Decisions, Court of Session (Scotland), 4 vols., 1532—1827	Scot.
Brod. & Bing.	Broderip and Bingham's Reports, Common Pleas, 3 vols., 1819—1822	Eng.
Brod. & F.	Broderick and Fremantle's Ecclesiastical Reports, Privy Council, 1 vol., 1705—1864	Eng.
Broun	Broun's Justiciary Reports (Scotland), 2 vols., 1842—1845	Scot.
Brown. & Lush.	Browning and Lushington's Reports, Admiralty, 1 vol., 1863—1866	Eng.
Brownl.	Brownlow and Goldesborough's Reports, Common Pleas, 2 parts, 1569—1624	Eng.
Bruce	Bruce's Decisions, Court of Session (Scotland), 1714—1715	Scot
Buch.	Buchanan's Reports of the Supreme Court of the Cape of Good Hope, 1868—1879	S. Af.

Buch. A. C.	Buchanan's Reports of Appeal Court (Cape)	S. Af.
Buchan.	Buchanan's Reports, Court of Session and Justiciary (Scotland), 1806—1813	Scot.
Buck	Buck's Cases in Bankruptcy, 1 vol., 1816—1820	Eng.
Bull. N. P.	Buller's Nisi Prius (published, London, 1772)	Eng.
Bulst.	Bulstrode's Reports, King's Bench, fol., 3 parts in 1 vol., 1610—1626	Eng.
Bunb.	Bunbury's Reports, Exchequer, fol., 1 vol., 1713—1741	Eng.
Burr.	Burrow's Reports, King's Bench, 5 vols., 1756—1772	Eng.
Burr. S. C.	Burrow's Settlement Cases, King's Bench, 1 vol., 1733—1776	Eng.
Burrell	Burrell's Reports, Admiralty, ed. by Marsden, 1 vol., 1648—1840	Eng.
C. A.	Court of Appeal Reports, 3 vols., 1867—1877	N.Z.
C. & P.	Carrington and Payne's Reports, Nisi Prius, 9 vols., 1823—1841	Eng.
C. B.	Common Bench Reports, 18 vols., 1845—1856	Eng.
C. B. N. S.	Common Bench Reports, New Series, 20 vols., 1856—1865	Eng.
C. C. Ct. Cas.	Central Criminal Court Cases (Sessions Papers), 1834—(current)	Eng.
C. L. Ch.	Common Law Chambers	Can.
C. L. J.	Cape Law Journal	S. Af.
C. L. J. N. S.	Canada Law Journal, New Series, 1865—(current)	Can.
C. L. J. O. S.	Canada Law Journal, Old Series, 10 vols., 1855—1864	Can.
C. L. R.	Common Law Reports, 3 vols., 1853—1855	Eng.
C. L. R.	Commonwealth Law Reports	Aus.
C. L. R.	Calcutta Law Reporter	Ind.
C. L. R.	Cape Law Reports	S. Af.
C. L. T.	Canadian Law Times	Can.
C. L. T. Occ. N.	Canadian Law Times, Occasional Notes	Can.
C. P.	Upper Canada Common Pleas	Can.
C. P. D.	Law Reports, Common Pleas Division, 5 vols., 1875—1880	Eng.
C. P. D.	Cape Provincial Division Reports	S. Af.
C. R. [date] A. C.	Canadian Reports, Appeal Cases	Can.
C. T. R.	Cape Times Reports of the Supreme Court of the Cape of Good Hope	S. Af.
C. W. N.	Calcutta Weekly Notes	Ind.
Cab. & El.	Cababé and Ellis's Reports, Queen's Bench Division, 1 vol., 1882—1885	Eng.
Cald. Mag. Cas.	Caldecott's Magistrates' Cases, 1 vol., 1776—1785	Eng.
Calth.	Calthrop's City of London Cases, King's Bench, 1 vol., 1609—1618	Eng.
Cam. Cas.	Cameron's Supreme Court Cases	Can.
Cam. Prac.	Cameron's Supreme Court Practice	Can.
Camp.	Campbell's Reports, Nisi Prius, 4 vols., 1807—1816	Eng.
Can. Com. Cas.	Commercial Law Reports of Canada	Can.
Can. Crim. Cas.	Canadian Criminal Cases, Annotated	Can.
Can. Ry. Cas.	Canadian Railway Cases	Can.
Car. & Kir.	Carrington and Kirwan's Reports, Nisi Prius, 3 vols., 1843—1853	Eng.
Car. & M.	Carrington and Marshman's Reports, Nisi Prius, 1 vol., 1841—1842	Eng.
Carp. Pat. Cas.	Carpmael's Patent Cases, 2 vols., 1602—1842	Eng.
Cart.	Carter's Reports, Common Pleas, fol., 1 vol., 1664—1673	Eng.
Cart.	Cases on British North America Act (Cartwright)	Can.
Carth.	Carthew's Reports, King's Bench, fol., 1 vol., 1687—1700	Eng.
Cary	Cary's Reports, Chancery, 1 vol.	Eng.
Cas. in Ch.	Cases in Chancery, fol., 3 parts, 1660—1697	Eng.
Cas. Pract. K. B.	Cases of Practice, King's Bench, 1 vol., 1655—1775	Eng.
Cas. Sett.	Cases of Settlements and Removals, 1 vol., 1685—1727	Eng.
Cas. *temp.* Finch	Cases *temp.* Finch, Chancery, fol., 1 vol., 1673—1680	Eng.
Cas. *temp.* King	Select Cases *temp.* King, Chancery, fol., 1 vol., 1724—1733	Eng.
Cas. *temp.* Talb.	Cases in Equity *temp.* Talbot, fol., 1 vol., 1730—1737	Eng.
Cass. Dig.	Cassells' Digest	Can.
Ch. (preceded by date)	Law Reports, Chancery Division, since 1890 (*e.g.*, [1891] 1 Ch.)	Eng.
Ch. App.	Law Reports, Chancery Appeals, 10 vols., 1865—1875	Eng.
Ch. Cas. in Ch.	Choyce Cases in Chancery, 1557—1606	Eng.
Ch. Ch.	Upper Canada Chancery Chambers Reports	Can.
Ch. D.	Law Reports, Chancery Division, 45 vols., 1875—1890	Eng.
Ch. Rob.	Christopher Robinson's Reports, Admiralty, 6 vols., 1798—1808	Eng.
Char. Cham. Cas.	Charley's Chamber Cases, 1 vol., 1875—1876	Eng.
Char. Pr. Cas.	Charley's New Practice Reports, 3 vols., 1875—1876	Eng.
Chip.	New Brunswick Reports (Chipman)	Can.
Chit.	Chitty's Practice Reports, King's Bench, 2 vols., 1770—1822	Eng.
Cl. & Fin.	Clark and Finnelly's Reports, House of Lords, 12 vols., 1831—1846	Eng.
Cl. & Sc. Dr. Cas.	Clark and Scully's Drainage Cases	Can.
Clay	Clayton's Reports and Pleas of Assizes at Yorke, 1 vol., 1631—1650	Eng.
Clif. & Rick.	Clifford and Rickards' Locus Standi Reports, 3 vols., 1873—1884	Eng.
Clif. & Steph.	Clifford and Stephens' Locus Standi Reports, 2 vols., 1867—1872	Eng.
Co. A.	Cook's Lower Canada Admiralty Court Cases	Can.
Co. Ent.	Coke's Entries	Eng.
Co. Inst.	Coke's Institutes	Eng.

Co. L. J.	Colonial Law Journal	N.Z.
Co. Litt.	Coke on Littleton (1 Inst.)	Eng.
Co. Rep.	Coke's Reports, 13 parts, 1572—1616	Eng.
Cochran	Nova Scotia Law Reports	Can.
Cockb. & Rowe	Cockburn and Rowe's Election Cases, 1 vol., 1833	Eng.
Coll.	Collyer's Reports, Chancery, 2 vols., 1844—1846	Eng.
Coll. Jurid.	Collectanea Juridica, 2 vols.	Eng.
Colles	Colles' Cases in Parliament, 1 vol., 1697—1713	Eng.
Colt.	Coltman's Registration Cases, 1 vol., 1879—1885	Eng.
Com.	Comyns' Reports, King's Bench, Common Pleas, and Exchequer, fol., 2 vols., 1695—1740	Eng
Com. Cas.	Commercial Cases, 1895—(current)	Eng.
Com. Dig.	Comyns' Digest	Eng.
Comb.	Comberbach's Reports, King's Bench, fol., 1 vol., 1685—1698	Eng.
Con. & Law.	Connor and Lawson's Reports, Chancery (Ireland), 2 vols., 1841—1843	Ir.
Cong. Dig.	Congdon's Digest	Can.
Cooke & Al.	Cooke and Alcock's Reports, King's Bench (Ireland), 1 vol., 1833—1834	Ir.
Cooke, Pr. Cas.	Cooke's Practice Reports, Common Pleas, 1 vol., 1706—1747	Eng.
Cooke, Pr. Reg.	Cooke's Practical Register of the Common Pleas, 1 vol., 1702—1742	Eng.
Coop. G.	G. Cooper's Reports, Chancery, 1 vol., 1792—1815	Eng.
Coop. Pr. Cas.	C. P. Cooper's Reports, Chancery Practice, 1 vol., 1837—1838	Eng.
Coop. *temp.* Brough.	C. P. Cooper's Cases *temp.* Brougham, Chancery, 1 vol., 1833—1834	Eng.
Coop. *temp.* Cott.	C. P. Cooper's Cases *temp.* Cottenham, Chancery, 2 vols., 1846—1848 (and miscellaneous earlier cases)	Eng.
Cor.	Coryton's Reports	Ind.
Corb. & D.	Corbett and Daniell's Election Cases, 1 vol., 1819	Eng.
Correspondances Jud.	Correspondances Judiciaires	Can.
Couper	Couper's Justiciary Reports (Scotland), 5 vols., 1868—1885	Scot.
Cout.	Coutlees' Unreported Cases	Can.
Cout. Dig.	Coutlees' Digest	Can.
Cowp.	Cowper's Reports, King's Bench, 2 vols., 1774—1778	Eng.
Cox & Atk.	Cox and Atkinson's Registration Appeal Cases, 1 vol., 1843—1846	Eng.
Cox, C. C.	E. W. Cox's Criminal Law Cases, 1843—(current)	Eng.
Cox, Eq. Cas.	S. C. Cox's Equity Cases, 2 vols., 1745—1797	Eng.
Cox, M. & H.	Cox, Macrae, and Hertslet's County Courts Cases and Appeals, 1 vol., 1846—1852	Eng.
Cr. & J.	Crompton and Jervis's Reports, Exchequer, 2 vols., 1830—1832	Eng.
Cr. & M.	Crompton and Meeson's Reports, Exchequer, 2 vols., 1832—1834	Eng.
Cr. & Ph.	Craig and Phillips' Reports, Chancery, 1 vol., 1840—1841	Eng.
Cr. App. Rep.	Cohen's Criminal Appeal Reports, 1908—(current)	Eng.
Cr. M. & R.	Crompton, Meeson, and Roscoe's Reports, Exchequer, 2 vols., 1834—1835	Eng.
Craw. & D.	Crawford and Dix's Circuit Cases (Ireland), 3 vols., 1838—1846	Ir.
Craw. & D. Abr. C.	Crawford and Dix's Abridged Cases (Ireland), 1 vol., 1837—1838	Ir.
Cress. Insolv. Cas.	Cresswell's Insolvency Cases, 1 vol., 1827—1829	Eng.
Cripps' Church Cas.	Cripps' Church and Clergy Cases, 2 parts, 1847—1850	Eng.
Cro. Car.	Croke's Reports *temp.* Charles I., King's Bench and Common Pleas, 1 vol., 1625—1641	Eng
Cro. Eliz.	Croke's Reports *temp.* Elizabeth, King's Bench and Common Pleas, 1 vol., 1582—1603	Eng.
Cro. Jac.	Croke's Reports *temp.* James I., King's Bench and Common Pleas, 1 vol., 1603—1625	Eng.
Cru. Dig.	Cruise's Digest of the Law of Real Property, 7 vols.	Eng.
Cunn.	Cunningham's Reports, King's Bench, fol., 1 vol., 1734—1735	Eng.
Curt.	Curteis' Ecclesiastical Reports, 3 vols., 1834—1844	Eng.
D.	Duxbury's Reports of the High Court of the South African Republic	S. Af.
D. C. A.	Dorion's Queen's Bench Reports	Can.
D. L. R.	Dominion Law Reports	Can.
Dalr.	Dalrymple's Decisions, Court of Session (Scotland), fol., 1 vol., 1698—1720	Scot.
Dan.	Daniell's Reports, Exchequer in Equity, 1 vol., 1817—1823	Eng.
Dan. & Ll.	Danson and Lloyd's Mercantile Cases, 1 vol., 1828—1829	Eng.
Dav. & Mer.	Davison and Merivale's Reports, Queen's Bench, 1 vol., 1843—1844	Eng.
Dav. Ir.	Davys' (or Davis' or Davy's) Reports (Ireland), 1 vol., 1604—1611	Ir.
Dav. Pat. Cas.	Davies' Patent Cases, 1 vol., 1785—1816	Eng.
Day	Day's Election Cases, 1 vol., 1892—1893	Eng.
Dea. & Sw.	Deane and Swabey's Ecclesiastical Reports, 1 vol., 1855—1857	Eng

Deac.	Deacon's Reports, Bankruptcy, 4 vols., 1834—1840	Eng.
Deac. & Ch.	Deacon and Chitty's Reports, Bankruptcy, 4 vols., 1832—1835	Eng.
Dears. & B.	Dearsley and Bell's Crown Cases Reserved, 1 vol., 1856—1858	Eng.
Dears. C. C.	Dearsly's Crown Cases Reserved, 1 vol., 1852—1856	Eng.
Deas & And.	Deas and Anderson's Decisions (Scotland), 5 vols., 1829—1832	Scot.
De G.	De Gex's Reports, Bankruptcy, 2 vols., 1844—1848	Eng.
De G. & J.	De Gex and Jones's Reports, Chancery, 4 vols., 1857—1859 ...	Eng.
De G. & Sm.	De Gex and Smale's Reports, Chancery, 5 vols., 1846—1852 ...	Eng.
De G. F. & J.	De Gex, Fisher and Jones's Reports, Chancery, 4 vols., 1859—1862	Eng.
De G. J. & Sm. ...	De Gex, Jones, and Smith's Reports, Chancery, 4 vols., 1862—1865	Eng.
De G. M. & G.	De Gex, Macnaghten and Gordon's Reports, Chancery, 8 vols., 1851—1857	Eng.
Delane	Delane's Decisions, Revision Courts, 1 vol., 1832—1835 ...	Eng.
Den.	Denison's Crown Cases Reserved, 2 vols., 1844—1852	Eng.
Dick.	Dickens' Reports, Chancery, 2 vols., 1559—1798	Eng.
Dig.	Justinian's Digest or Pandects	Eng.
Dirl.	Dirleton's Decisions, Court of Session (Scotland), fol., 1 vol., 1665—1677	Scot.
Dods.	Dodson's Reports, Admiralty, 2 vols., 1811—1822	Eng.
Donnelly	Donnelly's Reports, Chancery, 1 vol., 1836—1837	Eng.
Doug. El. Cas. ...	Douglas' Election Cases, 4 vols., 1774—1776	Eng.
Doug. K. B.	Douglas' Reports, King's Bench, 4 vols., 1778—1785	Eng.
Dow	Dow's Reports, House of Lords, 6 vols., 1812—1818	Eng.
Dow & Cl.	Dow and Clark's Reports, House of Lords, 2 vols., 1827—1832 ...	Eng.
Dow. & L.	Dowling and Lowndes' Practice Reports, 7 vols., 1843—1849 ...	Eng.
Dow. & Ry. K. B. ...	Dowling and Ryland's Reports, King's Bench, 9 vols., 1822—1827	Eng.
Dow. & Ry. M. C. ...	Dowling and Ryland's Magistrates' Cases, 4 vols., 1822—1827	Eng.
Dow. & Ry. N. P. ...	Dowling and Ryland's Reports, Nisi Prius, 1 part, 1822—1823	Eng.
Dowl.	Dowling's Practice Reports, 9 vols., 1830—1841	Eng.
Dowl. N. S.	Dowling's Practice Reports, New Series, 2 vols., 1841—1843 ...	Eng.
Dr. & Wal.	Drury and Walsh's Reports, Chancery (Ireland), 2 vols., 1837—1841	Ir.
Dr. & War.	Drury and Warren's Reports, Chancery (Ireland), 4 vols., 1841—1843	Ir.
Dra.	Draper's King's Bench Reports	Can.
Drew.	Drewry's Reports, Chancery, 4 vols., 1852—1859	Eng.
Drew. & Sm.	Drewry and Smale's Reports, Chancery, 2 vols., 1859—1865 ...	Eng.
Drinkwater	Drinkwater's Reports, Common Pleas, 1 vol., 1840—1841 ...	Eng.
Drury *temp.* Nap. ...	Drury's Reports *temp.* Napier, Chancery (Ireland), 1 vol., 1858—1859	Ir.
Drury *temp.* Sug. ...	Drury's Reports *temp.* Sugden, Chancery (Ireland), 1 vol., 1841—1844	Ir.
Dugd. Orig.	Dugdale's Origines Juridiciales	Eng.
Dunl. (Ct. of Sess.) ...	Dunlop, Court of Session Cases (Scotland), 2nd Series, 24 vols., 1838—1862	Scot.
Dunning	Dunning's Reports, King's Bench, 1 vol., 1753—1754	Eng.
Durie	Durie's Decisions, Court of Session (Scotland), fol., 1 vol., 1621—1642	Scot.
Dyer	Dyer's Reports, King's Bench, 3 vols., 1513—1581	Eng.
E. & A.	Upper Canada Error and Appeal	Can.
E. & B.	Ellis and Blackburn's Reports, Queen's Bench, 8 vols., 1852—1858	Eng.
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E. B. & E.	Ellis, Blackburn, and Ellis's Reports, Queen's Bench, 1 vol., 1858—1860	Eng.
E. D. C.	Reports of the Eastern Districts Court (Cape) from 1880 ...	S. Af.
E. D. L.	South African Law Reports, Eastern Districts Local Division	S. Af.
E. L. R.	Eastern Law Reporter	Can.
E. R. (or Eng. Rep.) ...	English Reports	Eng.
E. R.	Ontario Election Reports	Can.
Eag. & Y.	Eagle and Younge's Tithe Cases, 4 vols., 1204—1825	Eng.
East	East's Reports, King's Bench, 16 vols., 1800—1812	Eng.
East, P. C.	East's Pleas of the Crown	Eng.
Ecc. & Ad.	Spinks' Ecclesiastical and Admiralty Reports, 2 vols., 1853—1855	Eng.
Eden	Eden's Reports, Chancery, 2 vols., 1757—1766	Eng.
Edgar	Edgar's Decisions, Court of Session (Scotland), fol., 1724—1725	Scot.
Edw.	Edwards' Reports, Admiralty, 1 vol., 1808—1812	Eng.
Elchies	Elchies' Decisions, Court of Session (Scotland), 2 vols., 1733—1754	Scot.

Eng. Pr. Cas.	Roscoe's English Prize Cases, 2 vols., 1745—1858	Eng.
Eq. Cas. Abr.	Abridgment of Cases in Equity, fol., 2 vols., 1667—1744	Eng.
Eq. Rep.	Equity Reports, 3 vols., 1853—1855	Eng.
Esp.	Espinasse's Reports, Nisi Prius, 6 vols., 1793—1810	Eng.
Ex. D.	Law Reports, Exchequer Division, 5 vols., 1875—1880	Eng.
Exch.	Exchequer Reports (Welsby, Hurlstone, and Gordon), 11 vols., 1847—1856	Eng.
Exch. C. R.	Exchequer Court Reports	Can.
F. (Ct. of Sess.)	Fraser, Court of Session Cases (Scotland), 5th series, 1898—1906	Scot.
F.	Foord's Reports of the Supreme Court of the Cape of Good Hope, 1879—1880	S. Af.
F. & F.	Foster and Finlason's Reports, Nisi Prius, 4 vols., 1856—1867	Eng.
F. N. D.	Finnemore's Notes and Digest of Natal Cases, 1863—1867	S. Af.
Fac. Coll.	Faculty of Advocates, Collection of Decisions, Court of Session (Scotland), 38 vols., 1752—1841	Scot.
Falc.	Falconer's Decisions, Court of Session (Scotland), 2 vols., fol., 1744—1751	Scot.
Falc. & Fitz.	Falconer and Fitzherbert's Election Cases, 1 vol., 1835—1838	Eng
Fenton	Fenton, Important Judgments	N.Z.
Ferg.	Ferguson's Consistorial Decisions (Scotland), 1 vol., 1811—1817	Scot.
Fitz. Nat. Brev.	Fitzherbert's Natura Brevium	Eng.
Fitz-G.	Fitz-Gibbons' Reports, King's Bench, fol., 1 vol., 1727—1731	Eng.
Fl. & K.	Flanagan and Kelly's Reports, Rolls Court (Ireland), 1 vol., 1840—1842	Ir.
Fonbl.	Fonblanque's Reports, Bankruptcy, 2 parts, 1849—1852	Eng.
For.	Forrest's Reports, Exchequer, 1 vol., 1800—1801	Eng.
Forb.	Forbes' Decisions, Court of Session (Scotland), fol., 1 vol., 1705—1713	Scot.
Fort. De Laud.	Fortesque, De Laudibus Legum Angliæ	Eng.
Fortes. Rep.	Fortescue's Reports, fol., 1 vol., 1692—1736	Eng.
Fost.	Foster's Crown Cases, 1 vol., 1708—1760	Eng.
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Fox & S. Ir.	M. C. Fox and T. B. C. Smith's Reports, King's Bench (Ireland), 2 vols., 1822—1825	Ir.
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Gal. & Dav.	Gale and Davison's Reports, Queen's Bench, 3 vols., 1841—1843	Eng.
Gale	Gale's Reports, Exchequer, 2 vols., 1835—1836	Eng.
Gaz. L. R.	New Zealand Gazette Law Reports	N.Z.
Geld. Dig.	Geldert's Digest	Can.
Gib. Cod.	Gibson's Codex Juris Ecclesiastici Anglicani	Eng.
Giff.	Giffard's Reports, Chancery, 5 vols., 1857—1865	Eng.
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Gl. & J.	Glyn and Jameson's Reports, Bankruptcy, 2 vols., 1819—1828	Eng.
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Har. & W.	Harrison and Wollaston's Reports, King's Bench and Bail Court, 2 vols., 1835—1836	Eng.
Harc.	Harcarse's Decisions, Court of Session (Scotland), fol., 1 vol., 1681—1691	Scot.
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Holt, N. P.	F. Holt's Reports, Nisi Prius, 1 vol., 1815—1817	Eng.
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Hop. & Colt.	Hopwood and Coltman's Registration Cases, 2 vols., 1868—1878	Eng.
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Hud. & B.	Hudson and Brooke's Reports, King's Bench and Exchequer (Ireland), 2 vols., 1827—1831	Ir.
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Hut.	Hutton's Reports, Common Pleas, fol., 1 vol., 1617—1638	Eng
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I L. R. (Vol.) Lah.	Indian Law Reports, Lahore	Ind.
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James	Nova Scotia Law Reports (James)	Can.
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Jebb & S.	Jebb and Symes' Reports, Queen's Bench (Ireland), 2 vols., 1838—1841	Ir.
Jebb, C. C.	Jebb's Crown Cases Reserved (Ireland), 1 vol., 1822—1840	Ir.
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Jenk.	Jenkins' Reports, 1 vol., 1220—1623	Eng.
Jo. & Car.	Jones and Carey's Reports, Exchequer (Ireland), 1 vol., 1838—1839	Ir.
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K. B. (preceded by date)	Law Reports, King's Bench Division, since 1900 (*e.g.*, [1901] 2 K. B.)	Eng.
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Kames, Rem. Dec.	Kames, Remarkable Decisions, Court of Session (Scotland), 2 vols., 1716—1752	Scot.
Kames, Sel. Dec.	Kames, Select Decisions, Court of Session (Scotland), 1 vol., 1752—1768	Scot.
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Kel.	Sir John Kelyng's Reports, Crown Cases, fol., 1 vol., 1662—1707	Eng.
Kel. W.	W. Kelynge's Reports, fol., 1 vol., Chancery, 1730—1732; King's Bench, fol., 1731—1734	Eng.
Keny.	Kenyon's Notes of Cases, King's Bench, 2 vols., 1753—1759	Eng.
Keny. Ch.	Chancery Cases in Vol. II. of Kenyon's Notes of Cases, 1753—1754	Eng.
Kerr	New Brunswick Reports (Kerr)	Can.
Kilkerran	Kilkerran's Decisions, Court of Session (Scotland), fol., 1 vol., 1738—1752	Scot.
Kn. & Omb.	Knapp and Ombler's Election Cases, 1 vol., 1834—1835	Eng.
Knapp	Knapp's Reports, Privy Council, 3 vols., 1829—1836	Eng.
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Konst. & W. Rat. App.	Konstam and Ward's Reports of Rating Appeals, 1 vol., 1909—1912	Eng.
Konst. Rat. App.	Konstam's Reports of Rating Appeals, 2 vols., 1894—1904	Eng.
L. & G. *temp.* Plunk.	Lloyd and Goold's Reports *temp.* Plunkett, Chancery (Ireland), 1 vol., 1834—1839	Ir.
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L. C. R.	Lower Canada Reports	Can.
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L. T. O. S.	Law Times Reports, Old Series, 34 vols., 1843—1860	Eng.
L. Th.	La Themis	Can.
Lane	Lane's Reports, Exchequer, fol., 1 vol., 1605—1611	Eng.
Lat.	Latch's Reports, King's Bench, fol., 1 vol., 1625—1628	Eng.
Laws. Reg. Cas.	Lawson's Registration Cases, 1895—(current)	Eng.
Ld. Raym.	Lord Raymond's Reports, King's Bench and Common Pleas, 3 vols., 1694—1732	Eng.
Le. & Ca.	Leigh and Cave's Crown Cases Reserved, 1 vol., 1861—1865	Eng.
Leach	Leach's Crown Cases, 2 vols., 1730—1814	Eng.
Lee	Sir G. Lee's Ecclesiastical Judgments, 2 vols., 1752—1758	Eng.
Lee *temp.* Hard.	T. Lee's Cases *temp.* Hardwicke, King's Bench, 1 vol., 1733—1738	Eng.
Leg. Rep.	Legal Reporter	Ir.
Legge	Legge's Reports	Aus.
Leon.	Leonard's Reports, King's Bench, Common Pleas and Exchequer, fol., 4 parts, 1552—1615	Eng.
Lev.	Levinz's Reports, King's Bench and Common Pleas, fol., 3 vols., 1660—1696	Eng.
Lew. C. C.	Lewin's Crown Cases on the Northern Circuit, 2 vols., 1822—1838	Eng.
Ley	Ley's Reports, King's Bench, fol., 1 vol., 1608—1629	Eng.
Lib. Ass.	Liber Assisarum, Year Books, 1—51 Edw. III.	Eng.
Lilly	Lilly's Reports and Pleadings of Cases in Assize, fol., 1 vol.	Eng.
Litt.	Littleton's Reports, Common Pleas, fol., 1 vol., 1627—1631	Eng.
Lloyd, L. R.	Lloyd's List Law Reports, 1919—(current)	Eng.
Lloyd, Pr. Cas.	Lloyd's Reports of Prize Cases, 5 vols., 1914—1918	Eng.
Lofft	Lofft's Reports, King's Bench, foll., 1 vol., 1772—1774	Eng.
Long. & T.	Longfield and Townsend's Reports, Exchequer (Ireland), 1 vol., 1841—1842	Ir.

Lords Journals	Journals of the House of Lords	Eng.
Lud. E. C.	Luder's Election Cases, 3 vols., 1784—1787	Eng.
Lumley, P. L. C. ...	Lumley's Poor Law Cases, 2 vols., 1834—1842	Eng.
Lush.	Lushington's Reports, Admiralty, 1 vol., 1859—1862	Eng.
Lut.	Sir E. Lutwyche's Entries and Reports, Common Pleas, 2 vols., 1682—1704	Eng.
Lut. Reg. Cas. ...	A. J. Lutwyche's Registration Cases, 2 vols., 1843—1853 ...	Eng.
Lynd.	Lyndwood, Provinciale, fol., 1 vol.	Eng.
M.	Menzie's Reports of the Supreme Court of the Cape of Good Hope, 1828—1850	S. Af.
M. & S.	Maule and Selwyn's Reports, King's Bench, 6 vols., 1813—1817	Eng.
M. & W.	Meeson and Welsby's Reports, Exchequer, 16 vols., 1836—1847	Eng.
M. C. R.	Montreal Condensed Reports	Can.
M. H. C. R.	Madras High Court Reports	Ind.
M. L. R. (Vol.) K. B. or Q. B.	Montreal Law Reports, King's Bench or Queen's Bench ...	Can.
M. L. R. (Vol.) S. C. ...	Montreal Law Reports, Superior Court	Can.
M. M. Cas.	Martin's Reports of Mining Cases	Can.
Mac.	Macassey's New Zealand Reports	N.Z.
Mac. & G.	Macnaghten and Gordon's Reports, Chancery, 3 vols., 1849—1852	Eng.
Mac. & H.	Macrae and Hertslet's Insolvency Cases, 1 vol., 1847—1852 ...	Eng.
M'Cle	M'Cleland's Reports, Exchequer, 1 vol., 1824	Eng.
M'Cle. & Yo.	M'Cleland and Younge's Reports, Exchequer, 1 vol., 1824—1825	Eng.
Macfarlane	Macfarlane's Jury Trials, Court of Session (Scotland), 3 parts, 1838—1839	Scot.
Macl. & Rob.	Maclean and Robinson's Scotch Appeals (House of Lords), 1 vol., 1839	Scot.
Macph. (Ct. of Sess.) ...	Macpherson, Court of Session (Scotland), 3rd series, 11 vols., 1862—1873	Scot.
Macq.	Macqueen's Scotch Appeals, House of Lords, 4 vols., 1849—1865	Scot.
Macr.	Macrory's Patent Cases, 2 parts, 1847—1856	Eng.
Mad.	Madras High Court Reports	Ind.
Madd.	Maddock's Reports, Chancery, 6 vols., 1815—1821	Eng.
Madd. & G.	Maddock and Geldart's Reports, Chancery, 1 vol., 1819—1822 (Vol. VI. of Madd.)	Eng.
Madox	Madox's Formulare Anglicanum	Eng.
Madox, Exch.	Madox's History and Antiquities of the Exchequer, 2 vols. ...	Eng.
Mag.	Magistrate and Municipal and Parochial Lawyer, London, 5 vols., 1848—1852	Eng.
Man. & G.	Manning and Granger's Reports, Common Pleas, 7 vols., 1840—1845	Eng.
Man. & Ry. K. B. ...	Manning and Ryland's Reports, King's Bench, 5 vols., 1827—1830	Eng.
Man. & Ry. M. C. ...	Manning and Ryland's Magistrates' Cases, 3 vols., 1827—1830 ...	Eng.
Man. L. J.	Manitoba Law Journal	Can.
Man. L. R.	Manitoba Law Reports	Can.
Man. R. *temp.* Wood ...	Manitoba Reports *temp.* Wood	Can.
Mans.	Manson's Bankruptcy and Company Cases, 21 vols., 1893—1914	Eng.
Mar. L. C.	Maritime Law Reports (Crockford), 3 vols., 1860—1871 ...	Eng.
March	March's Reports, King's Bench and Common Pleas, 1 vol., 1639—1642	Eng.
Marr.	Marriott's Decisions, Admiralty, 1 vol., 1776—1779	Eng.
Marsh.	Marshall's Reports, Common Pleas, 2 vols., 1813—1816 ...	Eng.
Marsh.	Marshall's Reports	Ind.
Mayn.	Maynard's Reports, Exchequer Memoranda of Edw. I. and Year Books of Edw. II., Year Books, Part I., 1273—1326	Eng.
Meg.	Megone's Companies Acts Cases, 2 vols., 1889—1891	Eng.
Men.	Menzie's Reports of the Supreme Court of the Cape of Good Hope, 1828—1850	S. Af.
Mer.	Merivale's Reports, Chancery, 3 vols., 1815—1817	Eng.
Milw.	Milward's Ecclesiastical Reports (Ireland), 1 vol., 1819—1843	Ir.
Mod. Rep.	Modern Reports, 12 vols., 1669—1755	Eng.
Mol.	Molloy's Reports, Chancery (Ireland), 3 vols., 1808—1831 ...	Ir.
Mont.	Montagu's Reports, Bankruptcy, 1 vol., 1829—1832	Eng.
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Mont. & M.	Montagu and Macarthur's Reports, Bankruptcy, 1 vol., 1826—1830	Eng.
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Moo. & P.	Moore and Payne's Reports, Common Pleas, 5 vols., 1827—1831	Eng.
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Mood. & R.	Moody and Robinson's Reports, Nisi Prius, 2 vols., 1830—1844	Eng.
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Moore, K. B.	Sir F. Moore's Reports, King's Bench, fol., 1 vol., 1485—1620	Eng.
Mor. Dict.	Morison's Dictionary of Decisions, Court of Session (Scotland), 43 vols., 1532—1808	Scot.
Morr.	Morrell's Reports, Bankruptcy, 10 vols., 1884—1893	Eng.
Mos.	Moseley's Reports, Chancery, fol., 1 vol., 1726—1730	Eng.
Mun. Rep.	Municipal Reports	Can.
Murd. Epit.	Murdoch's Epitome	Can.
Murp. & H.	Murphy and Hurlstone's Reports, Exchequer, 1 vol., 1837	Eng.
Murr.	Murray's Reports, Jury Court (Scotland), 5 vols., 1816—1830	Scot.
My. & Cr.	Mylne and Craig's Reports, Chancery, 5 vols., 1835—1841	Eng.
My. & K.	Mylne and Keen's Reports, Chancery, 3 vols., 1832—1835	Eng.
N. A. C.	Native Appeal Cases	S. Af.
N. & S.	Nichols and Stop's Reports (Tasmania)	Tasmania.
N. B. Dig.	New Brunswick Digest (Stevens)	Can.
N. B. Eq. Rep.	New Brunswick Equity Reports	Can.
N. B. R.	New Brunswick Reports	Can.
N. B. R. (All.)	New Brunswick Law Reports (Allen)	Can.
N. B. R. (Ber.)	New Brunswick Law Reports (Berton)	Can.
N. B. R. (Chip.)	New Brunswick Reports (Chipman)	Can.
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Ont. Dig.	Digest of Ontario Case Law, 4 vols., 1823—1900	Can.
Owen	Owen's Reports, King's Bench and Common Pleas, fol., 1 vol., 1557—1614	En
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Peake	Peake's Reports, Nisi Prius, 1 vol., 1790—1794	Eng.
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Per. & Dav.	Perry and Davison's Reports, Queen's Bench, 4 vols., 1838—1841	Eng.
Per. & Kn.	Perry and Knapp's Election Cases, 1 vol., 1833	Eng.
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R.	The Reports, 15 vols., 1893—1895	Eng.
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Rep. in C. of A.	Reports in Courts of Appeal	N.Z.
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Ridg. *temp.* H.	Ridgeway's Reports *temp.* Hardwicke, 1 vol., King's Bench, 1733—1736 ; Chancery, 1744—1746	Eng.
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S.	Searle's Reports of the Supreme Court of the Cape of Good Hope	S. Af.
S. A. L. J.	South African Law Journal	S. Af.
S. A. L. R.	South Australian Law Reports	Aus.
S. A. L. R.	South African Law Reports	S. Af.
S. A. R.	Reports of the High Court of the South African Republic, 1881—1892	S. Af.
S. C.	Reports of the Supreme Court of the Cape of Good Hope from 1880	S. Af.
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S. C. R.	Canada, Supreme Court Reports	Can.
S. L. T.	Scots Law Times, 1893 (current)	Scot.
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S. R.	Reports of the High Court of Southern Rhodesia	S. Af.
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S. R. Q.	Queensland Reports, Supreme Court	Aus.
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Sask. L. R.	Saskatchewan Law Reports	Can.

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Sh. Teind Ct.	P. Shaw's Teind Court Decisions (Scotland), 1 vol., 1821—1831	Scot.
Shep. Touch.	Sheppard's Touchstone of Common Assurances	Eng.
Show.	Shower's Reports, King's Bench, 2 vols., 1678—1695	Eng.
Show. Parl. Cas.	Shower's Cases in Parliament, fol., 1 vol., 1694—1699	Eng.
Sid.	Siderfin's Reports, King's Bench, Common Pleas and Exchequer, fol., 2 vols., 1657—1670	Eng.
Sim.	Simons' Reports, Chancery, 17 vols., 1826—1852	Eng.
Sim. & St.	Simons and Stuart's Reports, Chancery, 2 vols., 1822—1826	Eng.
Sim. N. S.	Simons' Reports, Chancery, New Series, 2 vols., 1850—1852	Eng.
Skin.	Skinner's Reports, King's Bench, fol., 1 vol., 1681—1697	Eng.
Sm. & Bat.	Smith and Batty's Reports, King's Bench (Ireland), 1 vol., 1824—1825	Ir.
Sm. & G.	Smale and Giffard's Reports, Chancery, 3 vols., 1852—1857	Eng.
Smith, K. B.	J. P. Smith's Reports, King's Bench, 3 vols., 1803—1806	Eng.
Smith, L. C.	Smith's Leading Cases, 2 vols.	Eng.
Smith, Reg. Cas.	C. L. Smith's Registration Cases, 1895—(current)	Eng.
Smythe	Smythe's Reports, Common Pleas (Ireland), 1 vol., 1839—1840	Ir.
Sol. Jo.	Solicitors' Journal, 1856—(current)	Eng.
Spence	Spence's Equitable Jurisdiction of the Court of Chancery	Eng.
Spinks	Spinks' Prize Court Cases, 2 parts, 1854—1856	Eng.
St. R. Qd. (preceded by date)	Queensland State Reports, since 1902 (*e.g.*, [1902] St. R. Qd.)	Aus.
Stair Rep.	Stair's Decisions, Court of Session (Scotland), fol., 2 vols., 1661—1681	Scot.
Stark.	Starkie's Reports, Nisi Prius, 3 vols., 1814—1823	Eng.
State Tr.	State Trials, 34 vols., 1163—1820	Eng.
State Tr. N. S.	State Trials, New Series, 8 vols., 1820—1858	Eng.
Stewart	Stewart's Nova Scotia Admiralty Reports, 1803—1813	Can.
Stockton	Stockton's Vice-Admiralty Report and Digest	Can.
Story	Story's Commentaries on Equity Jurisprudence	Eng.
Stra.	Strange's Reports, 2 vols., 1716—1747	Eng.
Stu. M. & P.	Stuart, Milne, and Peddie's Reports (Scotland), 2 vols., 1851—1853	Scot.
Stuart	Sessions Cases (Stuart)	Scot.
Stuart, Adm.	Stuart's Vice-Admiralty (Lower Canada) Cases, 1836—1856	Can.
Stuart, Adm. N. S.	Stuart's Vice-Admiralty (Lower Canada) Cases, 2nd series, 1859—1874	Can.
Stuart, K. B.	Stuart's Reports of Cases in King's Bench, etc. (Lower Canada), 1810—1835	Can.
Sty.	Style's Reports, King's Bench, fol., 1 vol., 1646—1655	Eng.
Sw.	Swabey's Reports, Admiralty, 1 vol., 1855—1859	Eng.
Sw. & Tr.	Swabey and Tristram's Reports, Probate and Divorce, 4 vols., 1858—1865	Eng.
Swan.	Swanston's Reports, Chancery, 3 vols., 1818—1821	Eng.
Swin.	Swinton's Justiciary Reports (Scotland), 2 vols., 1835—1841	Scot.
Syme	Syme's Justiciary Reports (Scotland), 1 vol., 1826—1829	Scot.

T. & M.	Temple and Mew's Criminal Appeal Cases, 1 vol., 1848—1851	Eng.
T. H.	Reports of the Witwatersrand High Court (Transvaal Colony), 1902—1909	S. Af.
T. Jo.	Sir T. Jones's Reports, King's Bench and Common Pleas, fol., 1 vol., 1667—1685	Eng.
T. L.	Reports of the Witwatersrand High Court (Transvaal Colony), 1910—(current)	S. Af.
T. L. R.	The Times Law Reports, 1884—(current)	Eng.
T. P.	Reports of the Supreme Court of the Transvaal, 1910—(current)	S. Af.
T. P. D.	South African Law reports, Transvaal Provincial Division	S. Af.
T. Raym.	Sir T. Raymond's Reports, King's Bench, fol., 1 vol., 1660—1683	Eng.
T. S.	Reports of the Supreme Court of the Transvaal, 1902—1909	S. Af.
Taml.	Tamlyn's Reports, Rolls Court, 1 vol., 1829—1830	Eng.
Tas. L. R.	Tasmanian Law Reports	Aus.
Taunt.	Taunton's Reports, Common Pleas, 8 vols., 1807—1819	Eng.
Tax Cas.	Tax Cases, 1875—(current)	Eng.
Tay.	Taylor's King's Bench Reports	Can.
Temp. Wood	Manitoba Reports *temp.* Wood	Can.
Term Rep.	Term Reports (Durnford and East), fol., 8 vols., 1785—1800	Eng.
Terr. L. R.	Territories Law Reports	Can.
Thom.	Nova Scotia Reports (Thomson)	Can.
Toth.	Tothill's Transactions in Chancery, 1 vol., 1559—1646	Eng.
Town. St. Tr.	Townsend, Modern State Trials	Eng.
Trist.	Tristram's Consistory Judgments, 1 vol., 1872—1890	Eng.
Tudor, L. C. Merc. Law.	Tudor's Leading Cases on Mercantile and Maritime Law	Eng.
Tudor, L. C. Real. Prop	Tudor's Leading Cases on Real Property	Eng.
Turn. & R.	Turner and Russell's Reports, Chancery, 1 vol., 1822—1825	Eng.
Tyr.	Tyrwhitt's Reports, Exchequer, 5 vols., 1830—1835	Eng.
Tyr. & Gr.	Tyrwhitt and Granger's Reports, Exchequer, 1 vol., 1835—1836	Eng.
U. C. Jur.	Upper Canada Jurist	Can.
U. C. L. J. N. S.	Canada Law Journal, New Series, 1865—(current)	Can.
U. C. L. J. O. S.	Canada Law Journal, Old Series, 10 vols., 1855—1864	Can.
U. C. R.	Upper Canada Reports, Queen's Bench	Can.
Udal	Fiji Law Reports (Udal)	Fiji.
V. L. R.	Victorian Law Reports	Aus.
V. R.	Victorian Reports	Aus.
V. R. (Adm.)	Victorian Reports (Admiralty)	Aus.
Vaugh.	Vaughan's Reports, Common Pleas, fol., 1 vol., 1666—1673	Eng.
Vent.	Ventris' Reports (Vol. I., King's Bench; Vol. II., Common Pleas), fol., 2 vols., 1668—1691	Eng.
Vern.	Vernon's Reports, Chancery, 2 vols., 1680—1719	Eng.
Vern. & Scr.	Vernon and Scriven's Reports, King's Bench (Ireland), 1 vol., 1786—1788	Ir.
Ves.	Vesey Jun.'s Reports, Chancery, 19 vols., 1789—1817	Eng.
Ves. & B.	Vesey and Beames's Reports, Chancery, 3 vols., 1812—1814	Eng.
Ves. Sen.	Vesey Sen.'s Reports, 2 vols., 1747—1756	Eng.
Vin. Abr.	Viner's Abridgment of Law and Equity, fol., 22 vols.	Eng.
Vin. Supp.	Supplement to Viner's Abridgment of Law and Equity, 6 vols.	Eng.
W.	Watermeyer's Reports of the Supreme Court of the Cape of Good Hope, 1857	S. Af.
W. A. L. R.	West Australian Law Reports	Aus.
W. A'B. & W.	Webb, A'Beckett and Williams' Victorian Reports	Aus.
W. & W.	Wyatt and Webb	Aus.
W. C. C.	Workmen's Compensation Cases (Minton-Senhouse), 9 vols., 1898—1907	Eng.
W. H. C.	South African Law Reports, Witwatersrand High Court	S. Af.
W. Jo.	Sir W. Jones's Reports, King's Bench and Common Pleas, fol., 1 vol., 1620—1640	Eng.
W. L. D.	South African Law Reports, Witwatersrand Local Division	S. Af.
W. L. R.	Western Law Reporter	Can.
W. L. T.	Western Law Times	Can.
W. N. (preceded by date)	Law Reports, Weekly notes, 1866—(current) (*e.g.*, [1866] W. N.)	Eng.
W. N.	Calcutta Weekly Notes	Ind.
W. R	Weekly Reporter, 54 vols., 1852—1906	Eng.
W. R.	Sutherland's Weekly Reporter	Ind.
W. R.	Weekly Reporter, reporting cases in the Cape Provincial Division	S. Af.
W. W. & A'B.	Wyatt, Webb and A'Beckett	Aus.
W. W. R.	Western Weekly Reports	Can.
Wallis	Wallis' Reports, Chancery (Ireland), 1 vol., 1766—1791	Ir.
Web. Pat. Cas.	Webster's Patent Cases, 2 vols., 1602—1855	Eng.
Welsh, Reg. Cas.	Welsh's Registry Cases (Ireland), 1 vol., 1832—1840	Ir.
Went. Off. Ex.	Wentworth's Office and Duty of Executors	Eng.

West	West's Reports, House of Lords, 1 vol., 1839—1841	Eng.
West *temp.* Hard. ...	West's Reports *temp.* Hardwicke, Chancery, 1 vol., 1736—1740	Eng.
West. Tithe Cas. ...	Western's London Tithe Cases, 1 vol., 1592—1822	Eng.
White	White's Justiciary Reports (Scotland), 3 vols., 1886—1893 ...	Scot.
White & Tud. L. C. ...	White and Tudor's Leading Cases in Equity, 2 vols.	Eng.
Wight.	Wightwick's Reports, Exchequer, 1 vol., 1810—1811	Eng.
Will. Woll. & Dav. ...	Willmore, Wollaston, and Davison's Reports, Queen's Bench and Bail Court, 1 vol., 1837	Eng.
Will. Woll. & H. ...	Willmore, Wollaston, and Hodges' Reports, Queen's Bench and Bail Court, 2 vols., 1838—1839	Eng.
Willes	Willes' Reports, Common Pleas, 1 vol., 1737—1758	Eng.
Wilm.	Wilmot's Notes of Opinions and Judgments, 1 vol., 1757—1770	Eng.
Wils.	G. Wilson's Reports, King's Bench and Common Pleas, fol., 3 vols., 1742—1774	Eng.
Wils & S.	Wilson and Shaw's Scotch Appeals, House of Lords, 7 vols., 1825—1835	Scot.
Wils. Ch.	J. Wilson's Reports, Chancery, 2 vols., 1818—1819	Eng.
Wils. Ex.	J. Wilson's Reports, Exchequer in Equity, 1 part, 1817 ...	Eng.
Win.	Winch's Reports, Common Pleas, fol., 1 vol., 1621—1625 ...	Eng.
Wm. Bl.	William Blackstone's Reports, King's Bench and Common Pleas, fol., 2 vols., 1746—1779	Eng.
Wm. Rob.	William Robinson's Reports, Admiralty, 3 vols., 1838—1850 ...	Eng.
Wms. Saund.	Williams' Notes to Saunders' Reports, 2 vols.	Eng.
Wolf. & B.	Wolferstan and Bristowe's Election Cases, 1 vol., 1859—1864	Eng.
Wolf. & D.	Wolferstan and Dew's Election Cases, 1 vol., 1857—1858 ...	Eng.
Woll.	Wollaston's Reports, Bail Court and Practice, 1 vol., 1840—1841	Eng.
Wood	Wood's Tithe Cases, Exchequer, 4 vols., 1650—1798	Eng.
Y A D.	Young's Vice-Admiralty Reports	Can.
Y. & C. Ch. Cas. ...	Younge and Collyer's Reports, Chancery Cases, 2 vols., 1841—1843	Eng.
Y. & C Ex.	Younge and Collyer's Reports, Exchequer in Equity, 4 vols., 1833—1841	Eng.
Y. & J.	Younge and Jervis' Reports, Exchequer, 3 vols., 1826—1830 ...	Eng.
Y. B.	Year Books	Eng.
Yelv.	Yelverton's Reports, King's Bench, fol., 1 vol., 1602—1613 ...	Eng.
You.	Younge's Reports, Exchequer in Equity, 1 vol., 1830—1832 ...	Eng.

ABBREVIATIONS

USED IN THIS WORK.

(For Abbreviations used in citing Reports, *see* pp. xiii.—xxviii., *ante*.)

A.-G.	for Attorney-General.
Act.	,, Actiengesellschaft.
Admlty.	,, Admiralty.
Affd.	,, Affirmed.
Affg.	,, Affirming
Akt.	,, Aktiengesellschaft ; Aktiebolaget ; Aktieselskabet.
Anon.	,, Anonymous.
Apld.	,, Applied.
Appct.	,, Applicant.
Appln.	,, Application.
Appln.	,, Application to Register a Trade Mark.
Applt.	,, Appellant.
Apprvd.	,, Approved.
Arbn.	,, Arbitration.
Archbp.	,, Archbishop.
Art.	,, Article.
Assce.	,, Assurance.
Assocn.	,, Association.
B. C.	,, Borough Council.
Bkpcy.	,, Bankruptcy.
Bkpt.	,, Bankrupt.
Bldg. Soc.	,, Building Society.
Bp.	,, Bishop.
C. A.	,, Court of Appeal.
C. & S. L. Ry. Co.	,, City & South London Railway Co.
C. C. A.	,, Court of Criminal Appeal.
C. C. R.	,, County Court Rules.
C. C. R.	,, Court of Crown Cases Reserved.
C. L. P. Act	,, Common Law Procedure Act.
C. L. Ry. Co.	,, Central London Railway Co.
C. S. U. C.	,, Consolidated Statutes of Upper Canada.
Cale. Ry. Co.	,, Caledonian Railway Co.
Ct.	,, Court.
Ct. of Eq.	,, Court of Equity.
Ct. of R.	,, Court of Review.
Co.	,, Company.
Co-op. Assocn.	,, Co-operative Supply Association.
Comrs.	,, Commissioners.
Consd.	,, Considered.
Corpn.	,, Corporation.
D. C.	,, Divisional Court.
Dbtd.	,, Doubted.
Deft.	,, Defendant.
Distd.	,, Distinguished.
Eccl Comrs.	,, Ecclesiastical Commissioners.
Eccl. Ct.	,, Ecclesiastical Court.
Ex. Ch.	,, Exchequer Chamber.
Ex p.	,, *Ex parte*.
Exch.	,, Exchequer.

Exor.	for Executor.
Exorship.	,, Executorship.
Expld.	,, Explained.
Extd.	,, Extended.
Extrix.	,, Executrix.
Folld.	,, Followed.
G. & S. W. Ry. Co.	,, Glasgow & South Western Railway Co.
G. C. Ry. Co.	,, Great Central Railway Co.
G. E. Ry. Co.	,, Great Eastern Railway Co.
G. N. of Scotland Ry. Co.	,, Great North of Scotland Railway Co.
G. N. Picc. & Brompton Ry. Co.	,, Great Northern, Piccadilly & Brompton Railway Co.
G. N. Ry. Co.	,, Great Northern Railway Co.
G. S. & W. Ry. Co. of Ireland	,, Great Southern & Western Railway Co. of Ireland.
G. W. Ry. Co.	,, Great Western Railway Co.
Govt.	,, Government.
Grdns.	,, Guardians or Guardians of the Poor.
H. C. of A.	,, High Court of Australia.
H. L.	,, House of Lords.
I. R. Comrs.	,, Inland Revenue Commissioners.
Insce.	,, Insurance.
JJ.	,, Justices.
Jud. Act	,, Judicature Act.
L. & B. Ry. Co.	,, London & Brighton Railway Co.
L. & N. W. Ry. Co.	,, London & North Western Railway Co.
L. & S. W. Ry. Co.	,, London & South Western Railway Co.
L. & Y. Ry. Co.	,, Lancashire & Yorkshire Railway Co.
L. B.	,, Local Board.
L. B. & S. C. Ry. Co.	,, London, Brighton & South Coast Railway Co.
L.C.	,, Lord Chancellor.
L. C. & D. Ry. Co.	,, London, Chatham & Dover Railway Co.
L. C. C.	,, London County Council.
L. Elec. Ry. Co.	,, London Electric Railway Co.
L. G. Board	,, Local Government Board.
L.J.	,, Lord Justice.
L.JJ.	,, Lords Justices.
L. T. & S. Ry. Co.	,, London, Tilbury & Southend Railway Co.
M. S. Act	,, Merchant Shipping Act.
M. S. & L. Ry. Co.	,, Manchester, Sheffield & Lincolnshire Railway Co.
Mags.	,, Magistrates.
Mentd.	,, Mentioned.
Met. Dist. Ry. Co.	,, Metropolitan District Railway Co.
Met. Ry. Co.	,, Metropolitan Railway Co.
Mid. G. W. Ry. Co.	,, Midland Great Western Railway Co.
Mid. Ry. Co.	,, Midland Railway Co.
Mtge.	,, Mortgage.
Mtgee.	,, Mortgagee.
Mtgor.	,, Mortgagor.
N. B. Ry. Co.	,, North British Railway Co.
N. E. Ry. Co.	,, North Eastern Railway Co.
N. F.	,, Not Followed.
N. P.	,, Nisi Prius.
O.	,, Order.
O. H.	,, Outer House.
Overd.	,, Overruled.
P. C.	,, Privy Council.
Petn.	,, Petition or Election Petition.
Pltf.	,, Plaintiff.
R. C.	,, Rural Council.
R. D. C.	,, Rural District Council.
R. S. A.	,, Rural Sanitary Authority.
R. S. C.	,, Revised Statutes of Canada.
R. S. C.	,, Rules of the Supreme Court, 1883.
Refd.	,, Referred.
Regn. of Trade Mk.	,, Registration of Trade Mark.
Regr. of Trade Mks.	,, Registrar of Trade Marks.
Resp.	,, Respondent.
Restg.	,, Restoring.
Revsd.	,, Reversed.

Revsg.	for Reversing.
Ry. Co.	,, Rail. Co. or Railway Co.
S. C.	,, Same Case.
S. C. (name of colony following)	,, Supreme Court of a Colony.
S. E.	,, Settled Estates.
S. E. & C. Ry. Co.	,, South Eastern & Chatham Railway Co
S. E. Ry. Co.	,, South Eastern Railway Co.
S. P.	,, Same Point.
S.S. Co.	,, Steamship Co.
Sect.	,, Section.
Set. Land Act	,, Settled Land Act.
Settlmt.	,, Settlement.
Soc.	,, Society.
Soc. Anon.	,, Société Anonyme, etc.
Solr.	,, Solicitor.
Trade Mk.	,, Trade Mark.
Tram. Co.	,, Tramways Company.
U. C.	,, Urban Council.
U. D. C.	,, Urban District Council.
U. S. A.	,, United States of America.
Union Assmt. Com.	,, Union Assessment Committee.
Urban S. A.	,, Urban Sanitary Authority.
V. A. C.	,, Vice-Admiralty Court.
V.-C.	,, Vice-Chancellor.

MEANING OF TERMS

USED IN CLASSIFYING ANNOTATING CASES.

THE different expressions used to describe the effect of the annotating cases have the following meanings, and the classification of the annotating cases has been done strictly in accordance with these meanings. The annotating cases are listed chronologically except such as are classified as " Referred to " or " Mentioned." These come at the end and are arranged *inter se* in chronological order. The terms used in classifying the annotating cases are as follows :—

" APPLIED " (Apld.).—This expression is used to denote the fact that the principle of law enunciated in the annotated case has been applied to a new set of facts and circumstances in the annotating case.

" APPROVED " (Apprvd.).—This expression is used to denote the fact that the annotated case has been considered to be good law in the annotating case where the latter is in a higher court than the former.

" CONSIDERED " (Consd.).—This expression is used where the remarks in the annotating case are devoid of adverse criticism and merely denote the giving of more or less careful consideration to the annotated case.

" DISTINGUISHED " (Distd.).—This expression is used where the earlier case is not necessarily doubted, but where some essential difference (either on the facts or in law) between it and the annotated case is pointed out.

" DOUBTED " (Dbtd.).—This expression is used where the court in the annotating case, without definitely going to the length of saying that the annotated case is wrong, adduces reasons which seem to show that it is not accurate.

" EXPLAINED " (Expld.).—This expression is used where the earlier case is not necessarily doubted, but the decision arrived at is justified or accounted for by calling attention to some point of fact or of law which is usually, but not necessarily, one not obvious on the face of the report.

" EXTENDED " (Extd.).—Compare " APPLIED," *supra*.

" FOLLOWED " (Folld.).—This expression is used to denote that the same principles of law are applied in the two cases. It does not necessarily imply that the facts are substantially identical in the two cases.

" NOT FOLLOWED " (N.F.).—Compare " FOLLOWED," *supra*, to which it is the adverse.

" OVERRULED " (Overd.).—This expression is used where the annotating case is on substantially identical facts with the annotated case and in a higher court and the rule in the latter case is held to be wrong.

" REFERRED " (Refd.).—This expression is used only where the annotating case deals with the point of the Digest paragraph and is without comment of any definite character on the case annotated, and where there is no delicate shade of approval or disapproval which would justify the use of any of the foregoing words.

" MENTIONED " (Mentd.).—This expression is used only where none of the foregoing terms apply. In other words, it is used only where the case annotated is cited on a point having nothing to do with the point in the Digest paragraph.

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Statutes of Limitation	,, LIMITATION OF ACTIONS.
Winding up Unincorporated Associations	,, SPECIFIC TITLES.

NOTE.—*The Act now in force in England is Bankruptcy Act*, 1914 (*c.* 59), *herein referred to as* 1914 *Act. In considering the cases set out in this title regard must be had to their date, the Act under which they were decided, and the effect of the subsequent Acts.*

Part XIX.—Statement of Affairs & Discovery of Property.

SECT. 1.—STATEMENT OF AFFAIRS.

5460. Nature of statement—Not statement made in compulsory examination—Admissible in evidence to prove misappropriation of trust funds.]—The statement of affairs made by bkpt. in compliance with 1883 Act, s. 16, is not a statement made in a compulsory examination within 1890 Act, s. 27 (2); & it is admissible in evidence against bkpt. charged with appropriating trust money to his own use under Larceny Act, 1861 (c. 96), s. 80.—R. *v.* PIKE, [1902] 1 K. B. 552; 71 L. J. K. B. 287; 86 L. T. 205; 66 J. P. 296; 50 W. R. 672; 18 T. L. R. 285; 46 Sol. Jo. 268; 20 Cox, C. C. 164; 9 Mans. 121, C. C. R.

5461. What it must contain—Everything saleable for debtor's benefit — Officer's half-pay.]—Debtor must include in his schedule everything that he can sell for his own benefit; but the half-pay of an officer is not the subject of sale, & need not be included.—FLARTY *v.* ODLUM (1790), 3 Term Rep. 681; 100 E. R. 801.

Annotations:—**Refd.** *Re* Battine (1833), 1 Nev. & M. K. B. 579. **Mentd.** Lidderdale *v.* Montrose (1791), 4 Term Rep. 248; Stone *v.* Lidderdale (1795), 2 Anst. 533; Arbuckle *v.* Cowtan (1803), 3 Bos. & P. 321; Palmer *v.* Bale (1821), 2 Brod. & Bing. 673; *Ex p.* Ricketts (1836), 4 Ad. & El. 999; Wells *v.* Foster (1841), 8 M. & W. 149; Carew *v.* Cooper (1863), 4 Giff. 619; Gathercole *v.* Smith (1881), 44 L. T. 439, C. A.; Lucas *v.* Harris (1886), 18 Q. B. D. 127, C. A.; Apthorpe *v.* Apthorpe (1887), 12 P. D. 192, C. A.; *Re* Fitzgerald, Surman *v.* Fitzgerald, [1904] 1 Ch. 573, C. A.; Hollinshead *v.* Hazleton (1915), 85 L. J. P. C. 60, H. L.

5462. —— Contingent liabilities—As contributory to company.]—Debtor, who is liable as a contributory to a limited co. in course of winding up, ought to enter the co. in his statement of affairs as a creditor for the estimated amount of future calls.—*Re* PICKERING, *Ex p.* PICKERING (1868), 4 Ch. App. 58; 19 L. T. 369; 17 W. R. 38, L. JJ.

Annotations:—**Refd.** *Re* China S.S. Co., *Ex p.* Mackenzie (1869), L. R. 7 Eq. 240; Financial Corpn. *v.* Lawrence (1869), L. R. 4 C. P. 731; McEwen's Case (1871), 6 Ch. App. 582, L. JJ.

5463. —— State of affairs at date of filing petition—Whether interest calculated from that date.]—In debtor's statement of his affairs presented to the first meeting of his creditors under a liquidation petition under 1869 Act, he is bound only to show the state of his affairs at the date of the filing of the petition, & is not bound to calculate interest on interest-bearing debts beyond that date.—*Re* SNEYD, *Ex p.* FEWINGS (1883), 25 Ch. D. 338; 53 L. J. Ch. 545; 50 L. T. 109; 32 W. R. 352, C. A.; *revsg.* S. C. *sub nom. Re* SNEYD, *Ex p.* OXFORD (BP.), 52 L. J. Ch. 724.

Annotations:—**Mentd.** Arbuthnot *v.* Bunsilall (1890), 62 L. T. 234; Faber *v.* Lathom, Gye, Third Party (1897), 77 L. T. 168; Economic Life Assce. Soc. *v.* Usborne, [1902] A. C. 147, H. L.; Wales *v.* Carr, [1902] 1 Ch. 860.

See, now, 1915 Rules, Form No. 34.

5464. —— Petition filed by partner — Joint & several assets & liabilities — Account between himself & partner.]—Debtor, who carries on one business alone, & another in partnership, must when he files a liquidation petition (his partner being solvent) set forth in his statement of affairs the assets & liabilities of the partnership business in detail, as well as his own separate assets & liabilities, *i.e.*, in each case he must give the names of the creditors, with the amount due to each & the names of debtors, with the amount due from each. He must also state the account between himself & his partner, so as to show the balance (if any) due to him.—*Re* AMOR, *Ex p.* AMOR (1882), 21 Ch. D. 594; 52 L. J. Ch. 138; 48 L. T. 16; 31 W. R. 282, C. A.

5465. —— Petition filed by continuing partner after dissolution of firm — Joint & several assets & liabilities to be distinguished.]—Debtor filed a liquidation petition describing himself as carrying on business alone. He had formerly been in partnership, but the partnership had come to an end more than a year before the petition was filed. There were debts of the firm remaining unpaid. Debtor's statement did not show which were his joint & which were his separate assets or debts:—*Held*: it was the duty

PART XIX. SECT. 1.

5462 i. *What it must contain—Future liabilities.*]—The amount to become due at a future date under a mtge., & the amount of statutory exemption are properly included in debtor's liabilities.—BROWN *v.* LEONOFF (1915), 31 W. L. R. 621; 24 D. L. R. 180; 25 Man. L. R. 548; 8 W. W. R. 966.—CAN.

of debtor in his statement of affairs to distinguish between his joint & separate assets & liabilities.—*Re* COCKAYNE, *Ex p.* COCKAYNE (1873), L. R. 16 Eq. 218; 42 L. J. Bcy. 71; 28 L. T. 678; 21 W. R. 749.

Annotations :—**Apprvd.** *Re* Webb, *Ex p.* Gibbs (1875), 10 Ch. App. 382. **Distd.** *Re* Webb, *Ex p.* Walter (1876), 2 Ch. D. 326, C. A.. **Refd.** *Re* Aaronson, *Ex p.* Aaronson (1878), 7 Ch. D. 713, C. A.

5466. —— —— —— Or statement that no joint assets or liabilities.]—Debtor, who has been in partnership, ought in his statement of affairs to distinguish between his joint & separate debts & assets, or to state expressly that no debts & no assets of the former partnership exist.—*Re* BUCKLEY, *Ex p.* BUCKLEY (1881), 16 Ch. D. 513; 44 L. T. 39; 29 W. R. 920, C. A.

5467. Sufficiency of statement—Debt on bill of exchange—Bill of exchange transferred.]—If an insolvent debtor knows, at the time of filing his schedule, that a bill of exchange has been indorsed to a particular person some time before, he is bound to give notice to that person, although he cannot tell whether he continues to be holder at the time of filing the schedule.—PUGH *v.* HOOKHAM (1832), 5 C. & P. 376.

Annotations :—**Folld.** Lambert *v.* Smith (1851), 11 C. B. 358. **Refd.** Romellio *v.* Halaghan (1861), 1 B. & S. 279.

See, also, No. 5640, *post.*

5468. —— —— ——.]—The requirements of 1869 Act, as to the entry in a statement of affairs of a debt due upon a bill of exchange, where the holder is unknown to debtor, are substantially complied with if it can be proved that the entry was such, that notices sent in accordance therewith were actually received by the creditor.—WOOD *v.* BATES (1882), 46 J. P. 280.

See, also, cases in Part XVIII., Sect. 7, sub-sect. 2, C., *ante.*

5469. Evidence of inaccuracy—What amounts to.]—Registration of the resolutions passed by the creditors under a liquidation petition having been refused, leave was given to debtor, a trader, to summon a fresh first meeting of the creditors. The fresh meeting was held more than two months after the original meeting, but debtor produced the same statement of his affairs, as he had produced at the original meeting :—*Held :* there being no evidence that the state of debtor's affairs had changed in the interval, it could not be taken that the statement was necessarily inaccurate.—*Re* GOLDING, *Ex p.* EARLY (1879), 13 Ch. D. 300; 42 L. T. 298; 28 W. R. 310, C. A.

Annotations :— **Mentd.** *Re* Sharpe, *Ex p.* Mathewes (1881), 16 Ch. D. 655, C. A.; *Re* Williams, *Ex p.* Williams (1881), 18 Ch. D. 495, C. A.; *Re* Woodhouse, *Ex p.* Kershaw (1881), 45 L. T. 687.

See, also, No. 5640, *post.*

SECT. 2.—FILING ACCOUNTS.

See, now, 1914 Act, s. 22 (2), & 1915 Rules, r. 325.

5470. Discretion of court—To be exercised only in special circumstances.]—The ct. has jurisdiction to order bkpt. to file a cash account of his receipts & payments for a specified period before his bkpcy., & where the file of proceedings shows a state of circumstances calling for such an order, the ct. has power to make it without further evidence. Such power, however, is discretionary, & is only exercised in special circumstances.—*Re* MOIR, *Ex p.* MOIR (1882), 21 Ch. D. 61; 51 L. J. Ch. 931; 47 L. T. 267; 30 W. R. 738, C. A.

5471. In what cases—Important items concerned with partnership dissolved several years previously.]—Bkpt. four years previously to his bkpcy. had been engaged in a partnership business, & two important items in his accounts were connected with the transactions of that partnership business :—*Held :* the trustee was entitled to demand a cash account of that business, notwithstanding the lapse of time.—*Re* CRAWFORD, *Ex p.* CRAWFORD (1873), 28 L. T. 244; 21 W. R. 509.

Annotation :—**Apprvd.** *Re* Moir, *Ex p.* Moir (1882), 21 Ch. D. 61, C. A.

5472. —— Company promoter keeping no books.]—Bkpt., who had been engaged in an extensive business as a promoter of public cos., had kept no accounts, & could produce no record whatever of his transactions, except his bankers' pass-book, & some counterfoils of recent cheques :—*Held :* this was a sufficient reason for ordering him under 1869 Act, s. 19, to file a cash account of his receipts & payments for two years before his bkpcy.—*Re* MOIR, *Ex p.* MOIR (1882) 21 Ch. D. 61; 51 L. J. Ch. 931; 47 L. T. 267; 30 W. R. 738, C. A.

5473. —— Business alleged to belong to bankrupt's wife.]—At the public examination of an undischarged bkpt., he was questioned about a business, which it was alleged that he had, since the date of the receiving order, been carrying on under a name not his own. He asserted that this business was not his, but was his wife's, & that he had only acted as her clerk. The registrar did not believe bkpt's statements, &, on the application of the official receiver, ordered bkpt. to file an account of his dealings in the business in question. This order was made without any notice to bkpt's wife, who was not present :—*Held :* the registrar had jurisdiction to make the order, which did not amount to a final adjudication upon the title to the business.—*Re* CRONMIRE, *Ex p.* CRONMIRE, [1894] 2 Q. B. 246; 63 L. J. Q. B. 616; 70 L. T. 610; 42 W. R. 417; 10 T. L. R. 389; 38 Sol. Jo. 386; 1 Mans. 79; 9 R. 376, C. A.

5467 i. *Sufficiency of statement—Debt on bill of exchange—Creditor described without being named.*]—*Semble :* it is not sufficient for insolvent to insert in his sched. merely the description of a creditor, without also adding his name, although, in the case of negotiable instruments, some allowance will be made in cases where it is impracticable for insolvent to ascertain the name of the present holder, provided the name of the holder last, known to insolvent as such, be correctly given.—DINNEN *v.* JAMES (1854), 7 Ir. Jur. 28.—**IR.**

a. *Effect of statement — Not evidence of insolvency.*]—Insolvent's sched. :—*Held :* not sufficient evidence of insolvency, under 3 & 4 Vict. c. 107, s. 94.—ROACH *v.* GERNON (1846), Bl. D. & Osb. 9.—**IR.**

b. —— *Not acknowledgment of debt within Statute of Limitations.*]—An admission in bkpt.'s sched. does not take a debt out of Stat. Limitations as against bkpt.'s assignees.—*Re* CLENDENNING, *Ex p.* ANDERSON (1859), 9 I. Ch. R. 284.—**IR.**

c. —— *On secured creditor—Statement as to sufficiency of security.*]—A statement by bkpt. in his list of assets & liabilities, as to the sufficiency of certain securities, cannot be assumed to be made with intent to induce the person holding the securities to give up his claims or alter his position for the worse, & bkpt. is not estopped from disputing the validity of the securities.—HURREY *v.* BANK OF NEW SOUTH WALES (1883), 1 N. Z. L. R. C. A. 115.—**N.Z.**

See, generally, Part IX., *ante.*

d. *Time for inspection by creditors —Computation of time.*]—Law 13 of 1895, s. 3, provided that the scheds. of insolvent should lie for the inspection of creditors "at all times during office hours for fourteen days from the date of the *Gazette* in which the first publication was made" :—*Held :* it meant from 9 a.m. on the day after the first publication.—*Ex p.* HASSIM (1916), T. P. D. 617; 7 Biss. & Sm. 283.—**S. AF.**

f. *New schedule—First schedule imperfect—Facts disclosed at hearing.*]—When the absence of books & documents causes a sched. to be prepared so imperfectly as not to give a true account of insolvent's dealings, but during the investigation of the case there are disclosed facts which will enable the solr. to prepare a more correct sched., the ct. will, without dismissing the petition, allow such a sched. to be filed.—*Re* TRAIN (1868), 2 I. L. T. Jo. 247.—**IR.**

SECT. 3.—PUBLIC EXAMINATION.

5474. Service of order to attend—Out of jurisdiction.]—The Bkpcy. Ct. has no power to allow service out of the jurisdiction of an order that bkpt. do attend the ct. for his public examination. —*Re* WENDT, *Ex p.* OFFICIAL RECEIVER (1889), 22 Q. B. D. 733; 61 L. T. 286; 37 W. R. 721; 6 Morr. 127, C. A.

See, now, 1915 Rules, r. 183.

5475. —— **Personal service unnecessary—Prepaid registered letter to last known address.**]—Under 1886 Rules, r. 186, the copy of an order appointing the time & place for holding the public examination of debtor need not be served personally on debtor, but may be sent by a prepaid registered letter to debtor's last known address.—*Re* MCGRATH, *Ex p.* OFFICIAL RECEIVER (1890), 24 Q. B. D. 406; 62 L. T. 122; 38 W. R. 416; 6 T. L. R. 153; 7 Morr. 20.

5476. Time of examination—Between declaration of bankruptcy—& sittings at Guildhall.]—*Held:* where the comrs. had full evidence of bkpt.'s intention to remove & conceal his effects, they might examine him in the intermediate time between the declaration of bkpcy., & the sittings at Guildhall.—*Ex p.* LINGOOD (1742), 1 Atk. 240; 26 E. R. 154, L. C.

Annotation:—**Consd.** Crowley's Case (1818), 2 Swan. 1, L. C.

See, now, 1914 Act, s. 25.

5477. Attendance of debtor—Undergoing criminal sentence.]—Where bkpt. is in custody under a criminal sentence for a misdemeanour, a warrant may issue for his being brought up to be examined touching his estate & effects.—*Re* BANISTER (1847), 9 L. T. O. S. 412.

5478. —— **Freedom from arrest.**]—Bkpt. is protected in his attendance on the comrs., at a meeting for declaring a dividend after his last examination has been concluded, though only summoned verbally by the messenger.—ARDING *v.* FLOWER (1800), 3 Esp. 117; *subsequent proceedings*, 8 Term. Rep. 534.

Annotations;—**Apprvd.** *Ex p.* Donlevy (1802), 7 Ves. 317, L. C. **Consd.** *Ex p.* King (1802), 7 Ves. 312, L. C.

5479. —— ——.]—Bkpt. is protected from arrest under an extent, while attending the comrs. on the day appointed for his examination & remaining in another room in the same house during an interval of adjournment on that day, on the general principle of law, protecting a witness, the order to discharge being made on the gaoler, not, as in the case of a private creditor, on the party.—*Ex p.* RUSSELL (1812), 19 Ves. 163; 1 Rose, 278; 34 E. R. 479, L. C.

Annotations:—**Consd.** *Ex p.* Temple (1814), 2 Ves. & B. 391. **Folld.** *Re* Helsby (1832), 1 L. J. Bcy. 5, Ct. of R.

5480. —— ——.]—Bkpt. attending the comrs. & taken on a *capias utlagatum* in an action for debt is entitled to his discharge.—*Re* HELSBY (1832), 1 L. J. Bcy. 5, Ct. of R.

5481. —— ——.]—Bkpt. was, on his return home from his examination, arrested on an attachment for not paying money pursuant to an order of the Ct. of Ch.:—*Held:* he was protected from arrest.

An attachment for contempt for non-payment of money is in the nature of civil process, & the invariable rule is that whoever is attending a ct. of justice, either as a party, or as a witness brought there not by his own voluntary act, but by a subpœna, or other legal mandate requiring his attendance, is protected at common law, *eundo, morando, et redeundo* (LORD BROUGHAM, C.).—*Ex p.* JEYES (1834), 3 Deac. & Ch. 764, L. C.

5482. —— —— **Limited to actual attendance.**] —The Crown not being bound by the Statutes of Bkpcy., the protection of bkpt. from an extent is limited to actual attendance, upon the common law privilege of a witness or party, & does not extend through the intervals of adjournment by the statute.—*Ex p.* TEMPLE (1814), 2 Ves. & B. 391; 35 E. R. 367, L. C.

5483. —— —— **Deviation.**]—*Qu.:* whether a deviation by bkpt., returning from examination, for the purpose of leaving his books at the house of the assignee, will deprive him of his privilege. —*Ex p.* DONLEVY (1802), 7 Ves. 317; 32 E. R. 129, L. C.

5484. —— **Security for.**]—If the description of property mentioned in the form of a recognisance for insolvent's appearance be insufficient in value, the ct. will accept a deposit of money to the amount required in lieu thereof, with an undertaking that in the event of insolvent not appearing the money deposited shall be forfeited.—ANON. (1849), 13 L. T. O. S. 530.

5485. Conduct of examination—Power of registrar—To stop examination—To order trustee to deliver requisitions.] — A trustee in bkpcy. examined bkpt. at his public examination concerning certain alleged fraudulent transactions, on which he had previously examined him in private, but failed to obtain satisfactory explanation. The registrar, against the wish of the trustee, stopped the public examination, considering that it was a waste of public time, & adjourned it to a future day, ordering the trustee in the meantime to deliver written requisitions to bkpt. as to the points on which he required information:—*Semble:* the registrar had no power to order the trustee to deliver such written requisitions.—*Re* HENDREY, *Ex p.* CRUMP (1876), 1 Ch. D. 530; 45 L. J. Bcy. 98; 34 L. T. 12; 24 W. R. 557, C. A.

PART XIX. SECT. 3.

g. *Necessity for — On debtor's petition.*]—The examination of insolvent under Civil Procedure Code, s. 350, is only necessary where the judgment debtor is declared an insolvent upon his own application, not where he is adjudicated an insolvent at the instance of the judgment creditor. —GOURI KANT BURMAN *v.* DAMODAR DAS BURMAN (1900), 5 C. W. N. 90.—IND.

5474 i. *Service of order to attend—Out of jurisdiction.*]—As soon as the estate of debtor has been sequestrated either voluntarily or compulsorily, all the provisions of Insolvency Stat., 1871, necessary for the purpose of forcing an examination into his affairs are applicable to his case, whether he be resident in Victoria or abroad, & the Ct. of Insolvency may issue a summons under s. 133 commanding his appearance for examination, & on proof of personal service, whether effected in or out of Victoria may issue a warrant for his arrest, where he does not attend.—*Re* THONEMAN (1887), 13 V. L. R. 162, 204.—AUS.

5474 ii. —— *Service of appointment of examiner—Whether service of original appointment necessary.*]—On the examination of an assignor for creditors under Assignments & Preferences Act, R. S. O., 1897 (c. 147), ss. 34, 35, 37 (1), it is sufficient to serve a copy of the appointment of the special examiner upon the assignor, & it is not necessary to show him the original appointment unless sight of it is demanded. Circumstances amounting to a waiver of any such objection to the regularity of service of the appointment.—*Re* FERGUSON (1908), 17 O. L. R. 576; 12 O. W. R. 1143.—CAN.

5477 i. *Attendance of debtor—In prison under ca. sa.*]—Where insolvent is in prison under a *ca. sa.*, & omits to file a sched. after a vesting order is obtained against him on a creditor's petition, the ct. will not make an order to have him brought up for examination with regard to his property.—*Re* WALKER (1868), I. R. 2 Eq. 224.—IR.

5477 ii. —— *In prison for attempt to abscond.*]—An order for a warrant to bring up to the ct. for examination bkpt., who had been committed to gaol as having been about to leave the country, was granted, petitioning creditor's solr. undertaking to pay the expenses of bringing him up.—*Re* BEAHAN (1874), 8 I. L. T. Jo. 486. —IR.

5486. —— Who may examine debtor—Solicitor of creditor — Whether authority must be in writing.]—*Held:* a solr. appearing for a creditor at the public examination of bkpt., for the purpose of examining bkpt. as to his affairs, need not be authorised in writing, as the words in 1883 Act, s. 17 (4), were not intended to operate so as to exclude a solr. who appeared for a creditor.—*Re* LANDROCK (1884), 1 Morr. 21.

5487. ——————————.]—A solr., who appears at a bkpcy. ct. for a creditor who has tendered a proof, is the creditor's representative & is not entitled to question debtor without being authorised in writing & producing his authority, if required by the ct. so to do.—R. *v.* GREENWICH COUNTY COURT REGISTRAR (1885), 15 Q. B. D. 54; 54 L. J. Q. B. 392; 53 L. T. 902; 33 W. R. 671; 1 T. L. R. 479; 2 Morr. 175, C. A.

See, now, 1914 Act, s. 15 (4), & 1915 Rules, r. 194.

5488. —— Resembling cross-examination by adverse counsel.]—An examination should not present the appearance of a cross-examination by adverse counsel.—*Re* LEE, *Ex p.* LEE (1834), 2 Mont. & A. 15.

5489. —— What questions debtor must answer—All questions concerning estate & effects—Answer establishing act of bankruptcy.]—Bkpt. is bound to disclose to the comrs. all circumstances respecting his property notwithstanding that such disclosure may tend to establish an act of bkpcy.—PRATT'S CASE (1820), 1 Gl. & J. 58.

Annotation:—**Consd.** *Re* Kirby & Thomas, *Ex p.* Kirby (1829), Mont. & M. 212.

5490. —— —— —— Answer incriminating debtor.]—Bkpt. cannot refuse to discover his estate & effects & the particulars relating thereto, although such information may tend to show that he has committed a criminal act.—*Re* WORRALL, *Ex p.* COSSENS (1820), Buck, 531, L. C.

Annotations:—**Consd.** *Re* Kirby & Thomas, *Ex p.* Kirby (1829), Mont. & M. 212, L. C.; *Re* Heath (1833), 2 Deac. & Ch. 214, Ct. of R.; R. *v.* Scott (1856), Dears. & B. 47, C. C. R. **Refd.** *Re* Smith (1833), 2 Deac. & Ch. 230, Ct. of R.; R. *v.* Sloggett (1856), Dears. C. C. 656, C. C. R.; *Re* A Solicitor (1890), 25 Q. B. D. 17; R. *v.* Erdheim, [1896] 2 Q. B. 260, C. C. R. **Mentd.** Bickford *v.* D'Arcy & Beachy (1866), 4 H. & C. 534.

5491. ——————————.]—Bkpt. must answer all questions concerning his estate & effects, & cannot demur to such questions, on the ground that his answer may subject him to a prosecution for felony, for having given false answers on his last examination.—*Re* SMITH (1833), 2 Deac. & Ch. 230; Mont. & B. 203; 2 L. J. Bcy. 33, Ct. of R.

Annotation:—**Folld.** *Re* Heath, *Ex p.* Heath (1833), 2 L. J. Bcy. 27, Ct. of R.

5492. —— —— —— ——.]—*S.P. Re* HEATH (1833), 2 Deac. & Ch. 214; Mont. & B. 184; 2 L. J. Bcy. 27, Ct. of R.

Annotations:—**Mentd.** *Re* Feaks (1833), Mont. & B. 215, Ct. of R.; *Re* Smith (1833), 2 Deac. & Ch. 230, Ct. of R.

5493. ——————————.]—Bkpt. upon an examination, is bound to answer all questions relating to his trade dealings or estate, or which may tend to disclose any secret grant, conveyance, or concealment of his lands, tenements, goods, money, or debts, although his answers may criminate himself; & such answers may afterwards be given in evidence against him upon a criminal charge.—R. *v.* SCOTT (1856), Dears & B. 47; 25 L. J. M. C. 128; 27 L. T. O. S. 254; 20 J. P. 435; 2 Jur. N. S. 1096; 4 W. R. 777; 7 Cox, C. C. 164, C. C. R.

Annotations:—**Folld.** R. *v.* Cross & Leyland (1856), 7 Cox, C. C. 226, C. C. R. **Consd.** R. *v.* Skeen & Freeman (1859), 28 L. J. M. C. 91, C. C. R. **Folld.** R. *v.* Robinson (1867), L. R. 1 C. C. R. 80, C. C. R.; R. *v.* Widdop (1872), L. R. 2 C. C. R. 3, C. C. R. **Apld.** R. *v.* Hillam (1872), 12 Cox, C. C. 174; R. *v.* Coote (1873), 9 Moo. P. C. C. N. S. 463, P. C. **Folld.** *Re* A Solicitor (1890), 25 Q. B. D. 17, C. A.; R. *v.* Erdheim, [1896] 2 Q. B. 260, C. C. R.; *Re* Atherton, [1912] 2 K. B. 251. **Refd.** *Re* Royal British Bank (1857), 29 L. T. O. S. 148; Goode *v.* Job (1858), 5 Jur. N. S. 145; *Re* Firth, *Ex p.* Schofield (1877), 6 Ch. D. 230, C. A.

5494. —— —— —— ——.]—1869 Act is so far analogous to 1849 Act, that the Cts. of Bkpcy. have power to compel bkpts. to give answers to questions criminating themselves.—R. *v.* HILLAM (1872), 12 Cox, C. C. 174.

5495. ——————————.]—Bkpt. being under a personal obligation to make a full disclosure of his property to his creditors, must answer all questions put to him about his property, whatever the consequences to himself may be.—*Re* FIRTH, *Ex p.* SCHOFIELD (1877), 6 Ch. D. 230; 46 L. J. Bcy. 112; 37 L. T. 281; 26 W. R. 9, C. A.

Annotations:—**Mentd.** Lamb *v.* Munster (1882), 10 Q. B. D. 110; *Re* Reynolds, *Ex p.* Reynolds (1882), 20 Ch. D. 294, C. A.

See, further, Part XVI., Sect. 3, sub-sect. 3, *ante.*

5496. —— —— All matters considered on application for discharge — Not limited to offences under Debtors Act, 1869 (c. 62), or Bankruptcy Acts.] — Debtor, in custody or under remand on a criminal charge, is bound at his public examination to answer all questions touching his conduct, dealings, & property as the ct. may put or allow to be put to him, even although the answers may incriminate him; & the scope of the inquiry is not limited to offences under Debtors Act, 1869, s. 11, or in connection with his bkpcy., but extends to all matters which the ct. may take into consideration on the application for his discharge.—*Re* ATHERTON, [1912] 2 K. B. 251; 81 L. J. K. B. 791; 106 L. T. 641; 28 T. L. R. 339; 56 Sol. Jo. 446; 19 Mans. 126.

See, now, 1914 Act, s. 15.

5497. —— —— —— Vexatious questions.] — Under 1869 Act, s. 125 (3), debtor is only bound to answer such questions as are properly put for the purpose of showing the state of the assets; he is not bound to answer vexatious questions, or questions put by a creditor for the purpose of obtaining information to be used in a matter not affecting the interest of the creditors.—*Re* HOPE, *Ex p.* HOPE (1878), 9 Ch. D. 398; 47 L. J. Bcy. 78; 38 L. T. 762; 27 W. R. 7, C. A.

Annotations:—**Mentd.** *Re* Sharpe, *Ex p.* Mathewes (1881), 16 Ch. D. 655, C. A.; *Re* Tilley, *Ex p.* Solomon (1882), 47 L. T. 57, C. A.

See, now, 1914 Act, s. 15.

5498. —— —— Question as to receipt of money for resignation of public office.]—Where a petition

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h. *Conduct of examination—Right of debtor to professional assistance.*]—The examination of a judgment debtor is a personal examination, & he is not entitled to the assistance of counsel to take part in such examination, but he can have counsel to advise him privately.—BANK OF MONTREAL *v.* MAJOR & ELDRIDGE (1896), 5 B. C. R. 156.—**CAN.**

k. —— ——.]—Debtor has a right to the assistance of his solr. on his examination before the official assignee.—*Re* HODD, *Ex p.* OFFICIAL ASSIGNEE (1889), 7 N. Z. L. R. 337.—**N.Z.**

5489 i. —— *What questions debtor must answer—All questions concerning estate & effects.*]—*Held:* questions put to bkpt. in reference to the preparation of his sched. were legal questions, within 6 Will. 4, c. 14, s. 49.—*Re* DOWNING (1845), 8 I. L. R. 494.—**IR.**

5490 i. —— —— —— *Answer incriminating debtor.*]—On a motion to commit A. for his refusal to answer questions upon his examination held under Assignments & Preferences Act, R. S. O., 1914 (c. 134), s. 38, A.'s solr. swore that he considered it impossible for A. to be examined in the matter without informing the private prosecutors of evidence, which would expose him to a criminal prosecution:—*Held:* the privilege to refuse to answer, which formerly existed, had been abrogated by the legislature. A. must answer all questions touching the disposition of his property, with the right to object so as to secure the immunity provided by the legislature.—*Re* GINSBERG (1917), 11 O. W. N. 345; 40 O. L. R. 136.—**CAN.**

Sect. 3.—Public examination.]

prayed that the creditors might be at liberty to examine bkpt. whether he, or any persons in trust for him, had received, or were to receive money for his having resigned the office of town clerk, it was dismissed.—*Re* WORRALL, *Ex p.* COSSENS (1820), Buck, 531, L. C.

Annotations:—**Consd.** *Re* Kirby & Thomas, *Ex p.* Kirby (1829), Mont. & M. 212, L. C. **Apld.** *Re* Smith (1833), 2 L. J. Bcy. 33. **Apprvd.** R. *v.* Scott (1856), 27 L. T. O. S. 254, C. C. R. **Distd.** *Re* Sankey, *Re* Solicitors Act, 1888 (1890), 59 L. J. Q. B. 238, C. A. **Refd.** R. *v.* Sloggett (1856), Dears. C. C. 656, C. C. R.; R. *v.* Erdheim, [1896] 2 Q. B. 260, C. C. R.

See, now, 1914 Act, s. 25.

5499. —— —— —— Questions in regard to property out of jurisdiction.]—Debtor cannot refuse to answer questions put to him at his public examination, on the ground that the property to which such questions relate is out of the jurisdiction of the ct., but it is the duty of debtor to make a full disclosure of his property.—*Re* BUTTERFIELD (1890), 7 Morr. 293.

5500. Evidence of admission by bankrupt—Failure to deny or qualify statements of third parties quoted in question put to him.]—Bkpt. answering a question embodying a statement relative to the acts of a third party, without denying or qualifying that statement, is not understood as admitting it.—CROWLEY'S CASE (1818), 2 Swan, 1; Buck, 264; 36 E. R. 514, L. C.

Annotations:—**Refd.** *Re* Leak (1829), 3 Y. & J. 46; *Re* Venables, *Ex p.* Bardwell (1834), 1 Mont. & A. 193, L. C.; *Re* Martin (1847), 16 L. J. Bcy. 6. **Mentd.** Canadian Prisoner's Case, Watson's Case, *Re* Parker, *R. v.* Batcheldor (1839), 3 State Tr. N. S. 963; *Re* Belson (1850), 7 Moo. P. C. C. 114.

5501. Adjournment of examination—Duty of court to adjourn—Statement of affairs insufficient.]—It is the duty of the ct. to adjourn the public examination of bkpt., if the statement of his affairs be insufficient to inform the trustee of all the facts relating to the estate & bkpt.'s dealings therewith.—*Re* DENTON, *Ex p.* MILNE (1873), 28 L. T. 175; 21 W. R. 435.

See, also, 1915 Rules, r. 195.

5502. —— —— Conditions imposed.]—The examination ought to be adjourned till bkpt. has done all that is required by the Act & the Rules, & if any conditions are to be imposed, the examination ought to be adjourned till they have been complied with.—*Re* ANGERSTEIN, *Ex p.* SMITH (1872), 7 Ch. App. 662; 41 L. J. Bcy. 44; 27 L. T. 330; 20 W. R. 851, L. JJ.

See, now, 1914 Act, s. 15 (8), & 1915 Rules, r. 195.

5503. —— Debtor's conduct—Failure to account for assets.]—Bkpts. failed to account for the loss of a sum of £9,000 to their estate, & in their examination stated that they did not know what had become of the amount:—*Held:* their last examination had been properly adjourned *sine die.*—*Re* BROOK & CROSLAND, *Ex p.* BROOK (1863), 8 L. T. 375, L.C.

5504. —— Pending criminal proceedings.]—An application by debtor for the postponement of his public examination, till after the trial of criminal proceedings pending against him, must be made to the registrar.—*Re* BUTTERFIELD (1890), 7 Morr. 293.

5505. —— —— When granted—Debtor likely to be extradited.]—The usual practice of not pressing against debtor, in custody or under remand on a criminal charge incriminating questions in relation to the alleged offence while the criminal charge is hanging over debtor, but of adjourning the public examination until after the trial, is only a rule of convenience.

There may be occasions where it will be desirable not to follow [the above rule of convenience]. Such an occasion would occur where bkpt. is likely to be extradited or to be handed over to colonial authorities under Fugitive Offenders Act, 1881

l. —— —— —— *Questions as to property of wife.*]—Debtor upon his examination refused to answer questions as to his wife's property:—*Held:* his refusal was justifiable.—MONKMAN *v.* ROBINSON (1886), 3 Man. L. R. 640. —CAN.

5501 i. *Adjournment of examination—Duty of court to adjourn—To compel discovery.*]—An adjournment *sine die* ought to be confined to the purpose of compelling discovery as to the property of bkpt., & ample time will be given for that purpose.—*Re* BECK (1867), 1 I. L. T. Jo. 543.—IR.

m. —— *Discretion of court to adjourn—Notwithstanding full disclosure—Fraudulent circumstances.*]—The ct. is not bound to pass the final examination of bkpt., merely because he has made a full disclosure of his affairs, if there be fraudulent circumstances in his conduct which, in the opinion of the ct. would disentitle him to his certificate, as the time to consider such circumstances is at the passing the final examination, it being impossible to refuse the certificate after the final examination has been passed. —*Re* KEON (1860), 10 I. Ch. R. 111; 12 Ir. Jur. 107.—IR.

n. —— —— —— *Fabricated accounts & criminal conduct.*]—If a trader, to obtain forbearance & fresh credit submits fabricated accounts & is guilty of criminal acts, the ct. is not bound to pass the examination, although he may account fully.—*Re* LYSTER (1863). 15 Ir. Jur. 176.—IR.

p. —— —— —— *Reckless trading, forgery, & fraud.*]—If bkpt. makes a full disclosure, but has been guilty of reckless trading, of forgery, & of fraud upon his general creditors, the ct. is not bound to pass the final examination, which would entitle him to his certificate at the end of three years at the farthest, but the ct. has perfect jurisdiction, in any state of facts, to adjourn the examination *sine die.*—*Re* M'ILROY (1863), 15 Ir. Jur. 218.—IR.

r. —— —— —— *Misconduct.*]—*Semble:* the ct. has no power to adjourn the final examination of bkpt. *sine die* for any misconduct of bkpt., if his disclosures be full & true.—*Re* BURKE (1863), 14 I. Ch. R. 107.—IR.

s. —— *Pending appeal against arrangement being turned into bankruptcy.*]—An arrangement case was turned by the ct. into bkpcy., & the trader appealed against that ruling. The appeal not having yet been heard, the trader did not attend on the day named for surrender & final examination. The ct. recorded his non-attendance, & adjourned the case for a month to give time for the appeal to be heard.—*Re* M'CLELAND (1868), 2 I. L. T. Jo. 689.—IR.

t. —— *To rectify omission to send notices to examination.*]—Where the ct. has made an order for the public examination of bkpt., & the official assignee has omitted to send notices by post-card to all the creditors of the time & place appointed, the omission may be rectified by the ct. under 1883 Act, s. 216, & the public examination of bkpt. adjourned for the purpose.—*Re* SLATER, *Ex p.* OFFICIAL ASSIGNEE (1890), 8 N. Z. L. R. 717.—N.Z.

5503 i. —— *Debtor's conduct—Failure to account for assets.*]—When there is a deficiency unaccounted for, the examination will be adjourned *sine die.*—*Re* CLEARY (1869), 3 I. L. T. Jo. 253.—IR.

5503 ii. —— —— —— *After removal of property.*]—Property was removed, but there was evidence that it had all been replaced. The creditors were unable to trace any other property, or give evidence of its removal, but a deficiency unaccounted for remained. Bkpt.'s evidence was contradicted, & his only explanation was that he did not remember. The examination was adjourned *sine die,* with liberty to reopen it when bkpt. could make a better case, & satisfy the creditors that all the property had been restored.—*Re* HENNESSY (1863), 15 Ir. Jur. 139.—IR.

5503 iii. —— —— —— *Loss from alleged theft.*]—A trader, having engagements to meet in England, started for London, carrying £1,390 in gold & £100 in notes, in a carpet bag. He stated in his examination that the bag was stolen, & on several occasions positively stated that he could give no other account of the loss. In all other respects his sched. was accurately vouched, & his general conduct satisfactory. The ct., being dissatisfied with the account of the loss, & the conduct of bkpt. in relation thereto, refused to pass the final examination.—*Re* COOTE (1861), 12 I. Ch. R. 454.—IR.

a. —— —— *Absconding & not surrendering.*]—When bkpt. has absconded & never surrendered, the practice is to adjourn the hearing *sine die,* when the case comes on for final examination.—*Re* STEPHENS (1869), 3 I. L. T. Jo. 449.—IR.

b. —— —— *Betting losses.*]—Where an attorney was adjudicated bkpt. as a bill broker, & he had lost large sums by betting, his examination was adjourned *sine die.*—*Re* PARSONS (1862), 14 Ir. Jur. 206.—IR.

(c. 69). In such a case bkpt. might leave the country & perhaps not come within the jurisdiction again. There it would be the duty of the official receiver to examine him before he leaves the country (PHILLIMORE, J).—*Re* ATHERTON, [1912] 2 K. B. 251; 81 L. J. K. B. 791; 106 L. T. 641; 28 T. L. R. 339; 56 Sol. Jo. 446; 19 Mans. 126.

5506. —— To day fixed with liberty to apply for earlier day — Notices of such earlier day to all creditors.] — Where the public examination of bkpt. has been adjourned to a day fixed, with liberty to apply for an earlier day upon payment of a sum named, & bkpt. applies for & has an earlier day appointed upon which to pass his public examination, the notices required by 1870 Rules, r. 111, must be given to each creditor.—*Re* WOODHOUSE, *Ex p.* HEAVEY (1883), 48 L. T. 912.

5507. Order concluding examination—Declaration must be previously sworn.]—It is a necessary preliminary to an order that bkpt. do pass his public examination that he should have sworn the required declaration.—*Re* ANGERSTEIN, *Ex p.* SMITH (1872), 7 Ch. App. 662; 41 L. J. Bcy. 44; 27 L. T. 330; 20 W. R. 851, L. JJ.

5508. —— ——.]—The order concluding the public examination will not be drawn up until debtor has sworn the necessary declaration.—*Re* RIGG (1891), 7 T. L. R. 423.

5509. —— Adjourned first meeting of creditors not concluded.]—If the first meeting of creditors has been adjourned, the public examination cannot be concluded until the adjourned first meeting has been concluded.—Re WILLIAMS (1884), 1 Morr. 16.

See 1914 Act, s. 15 (9).

5510. —— Form of—Should not be conditional.] —The ct. has no power to make an order that bkpt. do pass his public examination conditional on his doing certain acts.—*Re* ANGERSTEIN, *Ex p.* SMITH (1872), 7 Ch. App. 662; 41 L. J. Bcy. 44; 27 L. T. 330; 20 W. R. 851, L. JJ.

5511. Contract to suppress evidence—Against policy of bankruptcy laws.]—A promise made by a friend of bkpt. that, in consideration that the assignees & comrs. would forbear to examine him touching certain sums which he was charged with having received & not accounted for, he would pay such sums as bkpt. had received & not accounted for is void, as being against the policy of the bkpcy. laws.—NEROT *v.* WALLACE (1789), 3 Term Rep. 17; 100 E. R. 432.

Annotations:—**Distd.** Kaye *v.* Bolton (1795), 6 Term Rep. 134. **Apld.** *Re* McHenry, McDermott *v.* Boyd, [1894] 2 Ch. 428. **Distd.** *Re* McHenry, McDermott *v.* Boyd, Levita's Claim, [1894] 3 Ch. 365, C. A. **Mentd.** Bowen *v.* Morris (1810), 2 Taunt. 374, Ex. Ch.; Jackson *v.* Pesked (1813), 1 M. & S. 234; Whitehead *v.* Greetham (1825), M'Cle. & Yo. 205, Ex. Ch.

5512. —— Whether money paid thereunder recoverable—Contract partly performed.]—Defts. were solrs. to petitioning creditor in certain bkpcy. proceedings, & had incurred costs which were to be paid out of the estate. Pltf., a friend of bkpt., offered to pay to defts. a sum of money for these costs, which had not been paid owing to want of assets, on their undertaking not to appear at the public examination of bkpt. Defts., with the consent of their client, agreed to this, & received the money. They did not appear at the public examination of bkpt., &, before any application for his discharge had been made, pltf. brought an action to recover back the money from defts.:—*Held:* though the contract was illegal, the partial performance of it prevented pltf. from recovering back the money paid under it.—KEARLEY *v.* THOMSON (1890), 24 Q. B. D. 742; 59 L. J. Q. B. 288; 63 L. T. 150; 54 J. P. 804; 38 W. R. 614; 6 T. L. R. 267, C. A.

Annotations:—**Consd.** Hermann *v.* Charlesworth (1905), 74 L. J. K. B. 620, C. A. **Apld.** Apthorpe *v.* Neville

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c. —— —— *Failure to keep proper accounts.*]—Regular accounts not kept, & the entire accounts not satisfactory:—*Held:* evidence that a true disclosure had not been made, & examination adjourned *sine die*.—*Re* LYSTER (1863), 15 Ir. Jur. 176.—**IR.**

d. —— —— *Failure to disclose property.*]—Under 12 & 13 Vict. c. 107, s. 56, the comrs. will close the examination of bkpt. & disqualify him from applying for a certificate, if it appear to them that there is any reason to doubt the truth or fulness of the discovery he has made of his dealings.—*Re* FURLONG & SHIELDS (1850), 2 Ir. Jur. 266.—**IR.**

f. —— —— *Forgery — False entries in books—Credit obtained by fraud.*]—Where bkpt. is charged with forgery, & with making false entries in his books, & obtaining credit by false representations, his examination will be adjourned *sine die*.—*Re* M'NEVIN (1864), 16 Ir. Jur. 197 (B).—**IR.**

g. —— —— *Issuing fictitious bills of exchange.*]—Where bkpt. had systematically issued bills of exchange with fictitious names thereon, the ct. postponed the final examination *sine die*.—*Re* KEON (1860), 10 I. Ch. R. 111; 12 Ir. Jur. 107.—**IR.**

h. —— —— *Manufacturing accommodation bills.*]—Where a trader's books had been accurately kept, & he had accounted fairly & vouched his sched., but he had carried on a system of manufacturing accommodation bills, the ct. adjourned the examination *sine die*.—*Re* ASKEN MORRISON (1865), 17 Ir. Jur. 197.—**IR.**

j. —— —— *Removal of property —Under collusive agreement with creditor —Non-production of books.*]—Where bkpt. comes up for final examination, & evidence is given that he made a collusive arrangement with one creditor to enable him to obtain a judgment & execution, under which all his property was sold, the other creditors getting nothing, the ct. will not pass the final examination, & where evidence was given that property had been removed, which was positively denied by bkpt., the ct. adjourned the examination *sine die*, bkpt. producing no books to prove the truth of the case he submitted to the ct.—*Re* STEWART (1867), 1 I. R. Eq. 223; 1 I. L. T. Jo. 281.—**IR.**

k. —— —— —— *Pending arrangement—No books kept.*]—A trader petitioned under the arrangement clauses, & upon untrue statements obtained protection for person & property. Pending the arrangement, he disposed of his property, & kept no books. On adjournment into bkpcy. the final examination was adjourned *sine die*.—*Re* KELLY (1862), 14 Ir. Jur. 122.—**IR.**

l. —— —— *Reckless trading.*]—Where a trader's books had been accurately kept, & he had accounted fairly & vouched his sched., but he had traded recklessly, the ct. adjourned the examination *sine die*.—*Re* ASKEN MORRISON (1865), 17 Ir. Jur. 197.—**IR.**

m. —— —— ——.]—The final examination of bkpt., whose case presented a disastrous course of trading, was adjourned *sine die*.—*Re* O'DWYER (1874), 8 I. L. T. Jo. 401.—**IR.**

n. —— —— —— *Credit obtained by fraud.*]—Where bkpt. had traded recklessly, by means of accommodation bills, & had got extensive credit by representations that he was solvent, & that the bills were for value, the ct. adjourned his final examination *sine die*, upon the state of facts disclosed by his sched.—*Re* LOCKHART (1860), 11 I. Ch. R. 68.—**IR.**

p. —— —— *Unfounded criminal charge put forward—Absence of books.*]—Where bkpt. put forward an unfounded & impudent imputation of forgery, & kept no books, the passing of his final examination was suspended for four months.—*Re* DEVLIN (1867), 1 I. L. T. Jo. 634.—**IR.**

r. —— *To enable committed debtor to be released from custody.*]—A., a bkpt., was committed to prison for unsatisfactory answering with respect to the removal of property by himself & his shop assistants, & failing to discover or disclose a portion of such property:—*Held:* bkpt.'s final examination should be postponed, & bkpt. discharged from custody to enable him to make such inquiries as might lead to the discovery of the missing property.—*Re* CUMMINS (1871), 5 I. L. T. 85.—**IR.**

s. —— *On debtor's undertaking to assist trustee to realise estate.*]—The final examination was allowed to be passed upon a distinct undertaking by bkpts. that they would assist the assignees in every way in winding up the matter & realising the outstanding state.—*Re* SPOTTEN & CO. (1876), 10 I. L. T. Jo. 402.—**IR.**

t. —— *Application by debtor for —When granted—Debts contracted before full age.*]—The final examination of bkpt. was adjourned on his application, it being stated that the debts, in respect of which the adjudication took place, had been contracted when the bkpt. was an infant.—*Re* DOHERTY (1877), 11 I. L. T. Jo. 41.—**IR.**

Sect. 3.—*Public examination. Sect.* 4: *Sub-sect.* 1.]

(1907), 23 T. L. R. 575. **Refd.** Barclay *v.* Pearson, [1893] 2 Ch. 154; Gordon *v.* Metropolitan Police Chief Comr., [1910] 2 K. B. 1080, C. A.; Tingley *v.* Müller, [1917] 2 Ch. 144, C. A. **Mentd.** *Re* Cronmire, *Ex p.* Waud, [1898] 2 Q. B. 383, C. A.; Bonnard *v.* Dott, [1906] 1 Ch. 740, C. A.; Petherpermal Chetty *v.* Muniandy Servai (1908), 24 T. L. R. 462, P. C.

5513. Offer of bribe to suppress evidence—Contempt of court.]—It is a contempt of ct. to offer money to bkpt., to induce him at his public examination to suppress evidence which, although capable of satisfactory explanation, would be liable to misconstruction, & which might damage a limited liability co., of which the offerer is a director.—*Re* HOOLEY, RUCKER'S CASE (1898), 79 L. T. 306; 15 T. L. R. 16; 5 Mans. 331.

Annotation:—**Mentd.** *Re* Pickard, *Ex p.* Official Receiver, [1912] 1 K. B. 397.

5514. Costs of petitioning creditor—Jurisdiction to allow out of estate.]—The ct. has power to order petitioner's costs incidental to the public examination of debtor to be paid out of the estate.—*Re* STRAND, *Ex p.* BOARD OF TRADE (1884), 13 Q. B. D. 492; 53 L. J. Q. B. 563; 1 Morr. 196, D. C.

See 1914 Act, s. 109, & 1915 Rules, App. Part II.

5515. —— Successive adjournments at instance of official receiver.]—Special costs incurred, owing to adjournments at the instance of the official receiver, were disallowed, the county ct. judge having made no special order under 1883 Act, s. 105, as to the items.—*Re* ALISON, *Ex p.* JAYNES, [1892] 2 Q. B. 587; 66 L. T. 688; 36 Sol. Jo. 526; *sub nom. Re* ALLINSON, *Ex p.* JAYNES *v.* BOARD OF TRADE, 61 L. J. Q. B. 526; *sub nom. Re* ALLISON, *Ex p.* JAYNES, 40 W. R. 624; 9 Morr. 180.

Annotation:—**Refd.** *Re* Beeston, *Ex p.* Board of Trade (1899), 68 L. J. Q. B. 344.

5516. Court fees—When payable.]—*Held:* the ct. fee payable in respect of public sittings held in any bkpcy. before Oct. 12, 1861, when 1861 Act came into operation, was due immediately upon the sitting being held, & the mere fact of the taxation being deferred till after that date made no difference.—ANON. (1861), 5 L. T. 367.

SECT. 4.—PRIVATE EXAMINATION OF DEBTOR AND OTHER PERSONS.

SUB-SECT. 1.—SUMMONS FOR EXAMINATION.

5517. Jurisdiction of court—1869 Act, s. 96—To order examination of trustee in bankruptcy.]—The ct. has power under the above Act, to order the examination of the trustee in bkpcy.—*Re* TAYLOR, *Ex p.* CROSSLEY (1872), L. R. 13 Eq. 409; 41 L. J. Bcy. 35; 20 W. R. 400.

5518. —— —— To order examination of stranger to bankruptcy — Irrespective of utility of examination.] — The trustee in a liquidation sought to impeach a transaction entered into by the liquidating debtor with F., on the ground that it was a fraud upon the creditors, & issued a summons for the private examination of F., under 1869 Act, s. 96:—*Held:* the ct. had jurisdiction to order the examination for the purpose of discovery, irrespective of any consideration as to whether the ct. would entertain subsequent proceedings arising out of such examination.—*Re* LEWTAS, *Ex p.* ECKERSLEY (1883), 48 L. T. 832.

5519. —— Limited to places abroad within jurisdiction of Crown.] — The power of the ct. to make an order for the private examination of witnesses is limited as to places abroad within the jurisdiction of the British Crown.—*Re* DRUCKER, *Ex p.* BASDEN, [1902] 2 K. B. 210; 71 L. J. K. B. 688; 86 L. T. 692; 50 W. R. 592; 46 Sol. Jo. 570; 9 Mans. 241.

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v. —— *Grounds of application treated as settled by previous proceedings.*]—In the course of bkpcy. proceedings, in consequence of what had happened in the early stages thereof, the official assignee filed a charge to which were filed several discharges, & when same came on for hearing, on May 5, 1905, the matter was settled on the dischargeants undertaking to pay into ct. £150, & observe certain terms contained in a written undertaking, & in a report of the chief registrar, & in a report of the official assignee, the matter, so far as realisation was concerned, was treated as having been settled. When the matter came before the ct. on the final examination, it was contended by the official assignee that, notwithstanding what occurred in May, 1905, the ct. should take into consideration the general conduct of bkpt., & as that was unsatisfactory the final examination should be adjourned, with a view to making further inquiries with respect to bkpt.'s property:—*Held:* the ct. was precluded from going into earlier transactions, & there was no sufficient reason for adjourning the final examination.—*Re* HESKIN (BANKRUPT) (1908), 42 I. L. T. 161.—**IR.**

w. —— *Reopening examination — On debtor's return from abroad.*]—Where bkpt. in 1810, after he had surrendered himself, but before he had passed his final examination absconded, & did not return until 1828, he was allowed, on petition, the Attorney-General not opposing it, at his own peril & the peril of all consequences, to call a meeting of the comrs., & also to tender himself for further examination.—*Ex p.* MULLAY (1828), 3 Mol. 70; 2 Ir. L. Rec. 1st Ser. 209.—**IR.**

x. —— —— ——.]—Application by bkpt., after an absence of eight years in America, for liberty to surrender himself to the commission, & pass his final examination, refused, petitioner not having used due diligence since his return, in communicating with his assignee, or seeking personal interviews with his creditors.—*Re* WYSE, *Ex p.* WYSE (1841), 3 I. Eq. R. 361.—**IR.**

y. —— —— *After committal for giving unsatisfactory answers.*]—A bkpt., on examination before the comr., gave such unsatisfactory evidence that his examination was adjourned *sine die.* On petition, stating that his state of mind while undergoing examination was such as to impair his intellect, that he had not wilfully omitted or concealed any evidence, that he aided the assignee to make his estate available, &, if allowed, would give such explanations, & make such amendments in the evidence, as would satisfy the comr., & cause him to close bkpt.'s final examination, the assignees not opposing, the Lord Chancellor directed the re-examination to proceed.—*Re* WALL, *Ex p.* WALL (1851), 3 Ir. Jur. 137.—**IR.**

a. *Order concluding examination—Previous mistake in schedule—Explanatory affidavit by trustee necessary.*]—Where a final examination had been adjourned *sine die* & an order was thereafter obtained that the examination might be reopened, on the ground of mistake in the sched., a wrong explanation being there given of matters since cleared up to the satisfaction of both the official & creditors' assignee, the ct. refused to pass the final examination without an affidavit from the creditors' assignee explaining the grounds of the change in his opinion.—*Re* DODD (1859), 9 I. Ch. R. 191.—**IR.**

b. *Costs of debtor—Whether expenses may be claimed before being sworn—Time for examination.*]—WORTHINGTON *v.* TAYLOR (1874), 10 C. L. J. N. S. 304.—**CAN.**

PART XIX. SECT. 4, SUB-SECT. 1.

a. *Jurisdiction of court — Acting in aid of another court.*]—The Victorian Insolvency Ct. requested the New South Wales Bkpcy. Ct. to act in aid & be auxiliary to the Victorian Ct., for the purpose of examining certain persons with a view to discovering assets belonging to the estate of insolvent:—*Held:* the registrar had power & jurisdiction to issue a summons, calling upon the witnesses to submit to examination in pursuance of such request.—*Re* NALL (1899), 20 N. S. W. B. 25.—**AUS.**

5519 i. —— *To order examination outside jurisdiction.*]—No order can be made under Queen's Bench Act, 1895, r. 733, for the examination out of the jurisdiction of an officer of a judgment debtor corporation for discovery of assets, etc., & it is doubtful whether, under r. 732, an individual judgment debtor, who is resident abroad, can be so examined, unless he comes within the jurisdiction.—GREY *v.* MANITOBA & NORTH WESTERN RY. CO. (1897), 12 Man. L. R. 32.—**CAN.**

5519 ii. —— *Judge Ordinary in Scotland—To order examination of English bankrupt.*]—A certified English bkpt. cannot be examined at the instance of the assignees, before the Judge Ordinary in Scotland, as to the fulness of the disclosure made by him before the comrs. in England.—PATON *v.* GAIRDNER (1816), 19 Fac. Coll. 86.—**SCOT.**

5520. Discretion of registrar—Application by creditor—To order examination of bankrupt—Appeal pending.]—The registrar has discretion, on the application of a creditor, to allow the examination of bkpt. under 1883 Act, s. 27, while an appeal is pending.—*Re* COX, *Ex p.* TRUSTEE (1887), 3 T. L. R. 818, C. A.

5521. In what cases—1869 Act, s. 96—Liquidation by arrangement.] — The above sect. applies to liquidation by arrangement as well as to bkpcy., & if the trustee in a liquidation by arrangement is dissatisfied with the information given to him by debtor as to his debts & assets, he is entitled to summon debtor for examination before the ct., & is not bound, before he can proceed with the examination, to show that debtor has made default in giving him the information which he is entitled to require.—*Re* BENNETT & GLAVE, *Ex p.* CLOSE (1877), 5 Ch. D. 145; 46 L. J. Bcy. 81; 36 L. T. 429; 25 W. R. 504, C. A.

5522. —— 1883 Act, s. 27—Composition.]—*Held:* the above sect., did not apply to the trustee under a composition or scheme of arrangement duly approved by the ct. under s. 18 of the Act.—*Re* GRANT, *Ex p.* WHINNEY (1886), 17 Q. B. D. 238; 55 L. J. Q. B. 369; 54 L. T. 632; 34 W. R. 539; 3 Morr. 118, C. A.

Annotation:—**Refd.** *Re* Aylmer, *Ex p.* Bischoffsheim (1887), 19 Q. B. D. 33, C. A.

See, now, 1914 Act, s. 16 (17).

5523. —— —— Administration of insolvent estate.]—*Held:* 1883 Act, s. 27, did not apply to an administration of the estate of a person dying insolvent under s. 125 of the Act, & there was no power in cases of such administration, either under s. 127 or under 1883 Rules, r. 58, to summon a person to be examined for the purpose of discovery of deceased debtor's estate.—*Re* HEWITT, *Ex p.* HEWITT (1885), 15 Q. B. D. 159; 54 L. J. Q. B. 402; 53 L. T. 156; 2 Morr. 184, D. C.

Annotation:—**Distd.** *Re* Bradbrook, *Ex p.* Hawkins (1889), 23 Q. B. D. 226, C. A.

See, now, 1914 Act, s. 130 (5), & 1915 Rules, r. 66.

5524. At whose instance—Creditor.]—The ct. will make an order for the examination of the trustee in bkpcy. under 1869 Act, s. 96, upon the application of a creditor.—*Re* TAYLOR, *Ex p.* CROSSLEY (1872), L. R. 13 Eq. 409; 41 L. J. Bcy. 35; 20 W. R. 400.

5525. —— ——.]—The ct. has power to summon a witness to be examined privately on the application of a creditor.—*Re* EASTON, *Ex p.* DAVIS (1891), 64 L. T. 798; 7 T. L. R. 514; 8 Morr. 168, D. C.

5526. —— —— On making out primâ facie case.]—Where a person is entitled to stand as a creditor of debtor whose estate is being wound-up in liquidation, he is entitled to have an order for the examination of debtor under 1869 Act, s. 96, on making out a *primâ facie* case for such examination.—*Re* RUSSELL, *Ex p.* SWIFT (1872), 26 L. T. 226, C. A.

Annotation:—**Extd.** *Re* Wright, *Ex p.* Willey (1883), 23 Ch. D. 118, C. A. In *Ex p. Swift* there was a question of examining the debtor; I take it you could always examine the debtor (JESSEL, M.R.).

5527. —— —— —— Trustee declining to examine.]—Where the trustee declines to examine, & a creditor applies to the ct. for leave to summon witnesses for examination as to a bkpt., his trade dealings or property, the creditor is bound to show a *primâ facie* probability that some benefit will result to the estate or to the creditors from the proposed examination.—*Re* WILLSON, *Ex p.* NICHOLSON (1880), 14 Ch. D. 243; 49 L. J. Bcy. 68; 43 L. T. 266; 28 W. R. 936, C. A.

5528. —— —— Not set out in list of creditors—Property sold to bankrupt's brother at price sufficient to pay listed creditors.]—The trustee sold bkpt.'s property to bkpt.'s brother, for sufficient to pay in full all the creditors whose debts were set out in the statement of affairs. A creditor, whose debt was not so set out, applied for an examination of the trustee, bkpt. & his brother as to the sale:—*Held:* the creditor was entitled to apply for the examination.—*Re* WHICHER, *Ex p.* STEVENS (1888), 5 Morr. 173, D. C.

5529. Service of notice of application—For examination of trustee.]—Where application is made under 1883 Act, s. 27, for the examination of a trustee in bkpcy.:—*Semble:* notice of such application should be served on the trustee.—*Re* WHICHER, *Ex p.* STEVENS (1888), 5 Morr. 173, D. C.

5530. Who may oppose application—For examination of witness—Trustee.]—The trustee in bkpcy. has no interest in a creditor's application for leave to summon witnesses, except for the purpose of saying whether he is willing to conduct the examination himself:—*Semble:* he ought not to file affidavits in opposition to the application.—*Re* WILLSON, *Ex p.* NICHOLSON (1880), 14 Ch. D. 243; 49 L. J. Bcy. 68; 43 L. T. 266; 28 W. R. 936, C. A.

5520 i. *Discretion of court—Estate not likely to benefit.*]—The ct., which has a discretion under Insolvency Act (32 of 1916), s. 130, should only grant a commission to examine witnesses where it appears likely that the estate will benefit as a result thereof.—WOLPERT BROTHERS TRUSTEE *v.* MAISETS (1917), W. L. D. 136.—S. AF.

5521 i. *In what cases—Assignment for benefit of creditors.*]—The making of an assignment for the benefit of creditors under R. S. O. 1897 (c. 147), does not deprive a judgment creditor of the assignor of his right to examine him, although it may in some cases furnish a reason why an order for such examination should not be made.—MCEACHERN *v.* GORDON (1899), 18 P. R. 459.—CAN.

5524 i. *At whose instance—Creditor—On making out primâ facie case—Trustee declining to examine.*]—When the official assignee makes or supports an application to examine witnesses under Indian Insolvency Act, s. 36, such an application should be readily granted. When it is made by any other person, the grounds of the application should be carefully sifted, & the ct. should satisfy itself that the inquiry will probably lead to some benefit to the creditors or estate, & is not merely made to harass & annoy the persons proposed to be examined.

A. became insolvent in 1866 & fled out of the jurisdiction. In Aug., 1866, a person, alleging himself to be a creditor of insolvent's estate, obtained an order, directing the examination of insolvent's son & daughter, R. & L., with a view to the discovery of certain property of insolvent which might be made available for the creditors. R. & L. alleged that A.'s application was the result of a family quarrel, & was made merely from motives of ill-will. The order for examination was supported by the C. Bank, which was admittedly a *bonâ fide* creditor:—*Held:* the official assignee not supporting the application, & the affidavits showing feeling & bias, the ct. would have hesitated to admit the application for the order, if it stood alone, but the fact that the C. Bank supported the application, altered the case, & the examination ought to be allowed, which should not be conducted by A., & the C. Bank should apply to the official assignee to conduct the inquiry, & if he declined to do so, the bank should do it.—*Re* ALLADINBHOY HUBIBHOY, *Ex p.* RAHMUBHOY HUBIBHOY (1886), I. L. R. 11 Bom. 61.—IND.

d. *Who may be examined & in respect of what matters—Insolvent—In regard to claim in action by insolvent's father.*]—Pltf., the father of an insolvent trader, sued the assignee for the benefit of the creditors, claiming a declaration of right to rank on the estate for a large sum. The assignee was instructed by the creditors to resist the claim & had himself no personal knowledge of it, & could find no entry of it in the books or papers of the insolvent. In such circumstances an order for the examination of insolvent by deft., for the purposes of discovery before the trial, was affirmed.—MURRAY *v.* WARNER (1886), 11 P. R. 440.—CAN.

Sect. 4.—Private examination of debtor and other persons: Sub-sect. 1.]

5531. Who may be summoned & in respect of what matters—Creditor—To prove act of bankruptcy.]—Persons who had refused obedience to the warrant of the comrs., upon the ground that they were creditors & incompetent as witnesses, were ordered to attend to prove an act of bkpcy., & the fact that a party was a creditor, was not a preliminary objection to his being examined, inasmuch as the result of the examination might establish that he was not a creditor.—*Re* GOOLDIE (1815), 2 Rose, 330.

5532. —— Executors of bankrupt's father—In regard to bankrupt's interest in partnership.]—Testator directed his exors. to carry on his business, & gave his son when he attained twenty-one a fourth share, on performing certain conditions. The son entered into the business shortly before he was twenty-one, & after he became of age became bkpt. He had never claimed his fourth share or performed the conditions:—*Held:* his assignees had a right to examine the exors. of the will as to affairs of the partnership, & to inquire as to the value of bkpt.'s interest:—*Re* MARKS, *Ex p.* MARKS (1832), 1 Deac. & Ch. 499; 1 L. J. Bcy. 111, Ct. of R.

5533. —— Former partner having possession of books—In regard to dealings of bankrupt.]—In 1811 A. & B. entered into partnership, which was dissolved in 1818, & wound up except as to some outstanding debts. In 1820 a deed of release was executed, excluding these debts. The books were allowed to remain in A.'s hands, & all the outstanding debts were subsequently settled. In 1830 B. became bkpt., between 1820 & which time he had never called for the books:—*Held:* A. & B. continued tenants in common of them, & length of time & absence of charge of fraud in settled account notwithstanding, the comr. had jurisdiction to call A. & examine him relative to former dealings of bkpt.—*Re* MARTINDALE, *Ex p.* TRUEMAN (1832), 1 Deac. & Ch. 464, Ct. of R.

5534. —— Creditors having bankrupt's property in possession—As trustees under deed of arrangement.]—The ct., on the application of petitioning creditor in bkpcy., before the choice, will sanction the examination of two creditors having property of bkpt. in their possession, notwithstanding that they are trustees under a deed of arrangement.—*Re* ATKINS (1862), 7 L. T. 171.

5535. —— Personal representative of mortgagee—In regard to his claim to prove.]—Debtor became bkpt. in 1872, & his assets were found sufficient to pay in full all creditors who had proved, & to leave a considerable surplus, but no dividend had been paid. In Nov., 1875, G., the personal representative of a mtgee. who had obtained in 1869 an absolute order for foreclosure, came in to prove for £21,000, the balance of the mtge. debt, after deducting the estimated value of the property. If this proof had been admitted, the assets would not have been sufficient to pay the creditors in full. The trustees, with the sanction of the committee of inspection, made an arrangement with G. to admit the proof at £20,000 on the terms that he was to receive nothing till the other creditors had received 18*s.* in the pound, after which he was to receive 18*s.* in the pound, & after this all the creditors, including G., were to rank *pari passu*. Bkpt. applied for an order to have a private sitting appointed for the examination of G.:—*Held:* in the peculiar circumstances of the case bkpt. ought to have an opportunity of investigating the claim, & an order ought to be made for the examination of G.—*Re* AUSTIN, *Ex p.* AUSTIN (1876), 4 Ch. D. 13; 46 L. J. Bcy. 1; 35 L. T. 529; 25 W. R. 51, C. A.

Annotation:—**Refd.** *Re* Wright, *Ex p.* Willey (1883), 52 L. J. Ch. 546, C. A.

5536. —— Bankrupt's brother—In regard to sale by trustee to him.]—Circumstances (*see* No. 5528, *ante*) in which the ct. made an order directing the examination of bkpt.'s brother in respect of a sale of property by the trustee to the brother.—*Re* WHICHER, *Ex p.* STEVENS (1888), 5 Morr. 173, D. C.

5537. —— Creditor under default judgment—In regard to debt on which judgment founded.]—The registrar refused to issue a summons for the examination under 1883 Act, s. 27, of a creditor upon a judgment obtained by default. Debtor alleged nothing was due, but that on the contrary the creditor was indebted to the estate, & other creditors objected to the proof:—*Held:* the trustee was entitled to know on what the creditor's supposed judgment by default was based, & an order for the examination of the creditor should be made.—*Re* MOYCE, [1917] 1 K. B. 561 n., D. C.

Annotation:—**Refd.** *Re* A Debtor, *Ex p.* Goldstein, [1917] 1 K. B. 558.

5538. —— Defendant in action by trustee.]—Where an action has been commenced by the trustee in bkpcy. against a person who is a stranger to the bkpcy. with respect to property alleged to be part of bkpt.'s estate, the ct. will not, in the absence of special circumstances, allow the trustee to examine such person under 1883 Act, s. 27, with the view of obtaining information in relation to the matter in dispute beyond such discovery as can be obtained under the ordinary procedure of the High Ct. Circumstances in which the ct. directed that the examination should be postponed, for the trustee to give the witness notice in writing of the admissions of fact desired, on the answers to which would depend whether the ct. would direct the examination to proceed.—*Re* FRANKS, *Ex p.* GITTINS, [1892] 1 Q. B. 646; 66 L. T. 30; 40 W. R. 384; 36 Sol. Jo. 275; 9 Morr. 90, C. A.

Annotation:—**Apprvd.** *Re* Aarons (1914), 111 L. T. 411, C. A.

5531 i. —— *Creditor.*]—A witness summoned by assignees must answer questions regarding transactions with insolvents, although he claims a set-off to his indebtedness.—*Re* HAMILTON & DAVIS, 1 C. L. J. N. S. 52.—**CAN.**

e. —— *Debtor to bankrupt.*]—If upon application for payment by the assignee's agent, to a party returned as debtor to bkpt., no satisfactory explanation be given, a summons will be issued, requiring the party to attend at his own expense before the comrs., & give every information respecting the debt. If the debt be not due, an acquittance of it can be proved.—*Re* O'CONNOR (1841), 3 I. Eq. R. 363, 364.—**IR.**

f. —— —— *Debt denied — Day appointed for trial.*]—Where parties returned as debtors to bkpt.'s estate are summoned with a view of having an admission of the debts, & where some are denied, the ct. will, with the consent of the assignees & alleged debtors, appoint a day to try such disputed claims.—*Re* M'PARLAND (1867), 1 I. L. T. Jo. 369.—**IR.**

g. —— *Bankrupt's widow.*]—Insolvent's widow, married to him out of community of property, was alleged to have had no property of her own at the marriage, & could not, it was alleged, have derived any apart from deceased, but the books showed insolvent to be in her debt at his death, & that whilst he had invested a large sum in shares & in loans to a certain co., he appeared to have died without interest of any sort in that co., whilst his widow was found to be a large creditor & shareholder:—*Held:* there being no other remedy, an application for a commission under Law 13 of 1895, s. 163, the estate being indemnified against costs, should be granted.—STEINWEISS *v.* AARON'S TRUSTEE (1914), W. L. D. 57.—**S. AF.**

5539. —— Respondent to motion for injunction by trustee—Exceptional circumstances.]—As a general rule the trustee will not be allowed to launch a motion & then examine resp. under 1883 Act, s. 27, to elicit facts in support of his case.

A trustee, to obtain an *interim* injunction, was compelled to serve a notice of motion upon resp. :—*Held :* the circumstances were exceptional & the hearing of the motion adjourned to enable the trustee to examine resp. under s. 27.—*Re* AARONS (1914), 111 L. T. 411 ; 58 Sol. Jo. 581.

Annotation :—**Refd.** *Re* Debtor (No. 3 of 1909), *Ex p.* Goldstein (1917), 116 L. T. 379.

5540. —— Defendant in action by creditor applying for examination.]—The power of the ct. to summon a witness to be examined privately on the application of a creditor, is not to be used for the purpose of enabling the creditor to obtain materials to assist him in a private action, which he has against the witness whom he is seeking to examine.—*Re* EASTON, *Ex p.* DAVIS (1891), 64 L. T. 798 ; 7 T. L. R. 514 ; 8 Morr. 168, D. C.

5541. —— ——.]—The private examination of a witness, who is also deft. in an action by petitioning creditor, must not be employed to obtain evidence for use in the action.—*Re* DESPORTES, *Ex p.* OFFICIAL RECEIVER (1893), 68 L. T. 233 ; 10 Morr. 40 ; 5 R. 221.

5542. Grounds for refusal of order for examination—That bankrupt knows as much as witness—That witness arbitrator in contract to be inquired into.]—The ct. will not refuse to issue a summons for the attendance of a witness for examination by the trustee under 1883 Act, s. 27, either upon the ground that bkpt. knows as much about the matters to be inquired into as the witness, or upon the ground that the witness is the arbitrator under a contract entered into by bkpt. as to which the trustee wishes to make inquiries.—*Re* MACDONALD, DEAKIN & JONES, *Ex p.* TRUSTEE (1914), 58 Sol. Jo. 798, D. C.

5543. —— No evidence that creditor able to give information.]—A receiving order having been made against a debtor, a scheme of arrangement was submitted & accepted, the receiving order was rescinded, & the official receiver became the trustee under the scheme. A proof was lodged by a creditor, who was the holder of certain bills of exchange drawn upon & accepted by debtor & indorsed to a third person who transferred them for value to the creditor. On the application of the official receiver under 1914 Act, s. 25 (1), an order was made by a county ct. for the examination of the creditor. There was no evidence that he was capable of giving any information respecting debtor, his dealings or property :—*Held :* an order for his examination could not properly be made under the sect.—*Re* A DEBTOR (No. 3 OF 1909), *Ex p.* GOLDSTEIN, [1917] 1 K. B. 558; 86 L. J. K. B. 705 ; 116 L. T. 379 ; 62 Sol. Jo. 71 ; [1917] H. B. R. 155, D. C.

5544. —— No evidence of trustee's mala fides.]—The trustee sold bkpt.'s property to bkpt.'s brother, for sufficient to pay in full all the creditors, whose debts were set out in the statement of affairs. A creditor, whose debt was not so set out, applied for an examination of the trustee, bkpt. & his brother as to the sale. A better price might possibly have been obtained :—*Held :* the ct. would not make an order against the trustee in the absence of *primâ facie* evidence of his *mala fides*.—*Re* WHICHER, *Ex p.* STEVENS (1888), 5 Morr. 173, D. C.

5545. Form of order for examination—Should not be optional.]—An order cannot be made in an optional form, *e.g.*, that the person should be examined "if he thinks fit to submit."—*Re* DRUCKER, *Ex p.* BASDEN, [1902] 2 K. B. 210 ; 71 L. J. K. B. 688 ; 86 L. T. 692 ; 50 W. R. 592 ; 46 Sol. Jo. 570 ; 9 Mans. 241.

5546. Appeal from refusal to make order for examination—Unwillingness of court to interfere with registrar's discretion.]—When the registrar, in the exercise of his judicial discretion, has refused an application by a creditor to summon witnesses for examination, the Ct. of Appeal will not readily interfere.—*Re* WILLSON, *Ex p.* NICHOLSON (1880), 14 Ch. D. 243 ; 49 L. J. Bcy. 68 ; 43 L. T. 266 ; 28 W. R. 936, C. A.

5547. Rescission of order for examination—Order wrongly made.]—A creditor, for whose examination an order had been made by a county ct., applied to the county ct. to rescind the order for his examination. That ct. refused the application :—*Held :* the creditor had taken the proper course in applying to rescind the order, & the order must be rescinded.—*Re* A DEBTOR (No. 3 OF 1909), *Ex p.* GOLDSTEIN, [1917] 1 K. B. 558 ; 86 L. J. K. B. 705 ; 116 L. T. 379 ; 62 Sol. Jo. 71 ; [1917] H. B. R. 155, D. C.

5548. Service of summons or order for examination—Discretion of court in regard to.]—The judge of a county ct. has a discretion to direct whether a summons for examination under 1869 Act, s. 69, shall be served by the solr. of the person applying for it, or by the High Bailiff.—*Re* HOLDEN, *Ex p.* BOLLAND (1874), L. R. 19 Eq. 131 ; 44 L. J. Bcy 9 : 31 L. T. 415 ; 23 W. R. 24.

Annotation :—**Mentd.** *Re* Lancaster, *Ex p.* Lancaster (1876), 3 Ch. D. 498.

5549. —— Personal service unnecessary.]—Personal service of a summons for the private examination of a witness is not necessary ; it may be sent by registered post.—*Re* WEINBERG, *Ex p.* OFFICIAL RECEIVER (1907), 96 L. T. 790 ; 51 Sol. Jo. 388 ; 14 Mans. 277.

See, now, 1914 Act, ss. 25, 146, & 1915 Rules, r. 90.

Tender of expenses.]—*See* Nos. 5616, 5617, *post.*

5550. Failure to comply with order for examination—Peremptory summons.]—Where a witness, after having been duly summoned, does not attend, the ct. will issue a peremptory summons.—*Re* ANON. (1863), 9 L. T. 206.

See, now, 1914 Act, s. 25.

5551. —— Effect of 1883 Act, s. 27.]—The procedure of the above sect. is primarily intended to apply to the case of a recalcitrant witness, & is only

h. —— *Bankrupt's trustee & solicitor.*]—On a certificate being sent to the Lord Chancellor, stating that the assignee of bkpt. & his solr. had been summoned & did not attend the comrs., they were ordered to attend the Ct. of Ch. on a particular day.—*Re* BRENNAN (1828), 1 Ir. L. Rec. 1st ser. 210.—IR.

k. —— *Former employee of firm—Of which debtor was member.*]—When a partnership has been dissolved a former employee or servant of the firm may be examined, under Assignments & Preferences Act, R. S. O. 1897 (c. 147), s. 34, by the assignee of the separate estate of one of the partners, as to the affairs of such estate.—*Re* GUINANE (1898), 18 P. R. 208.—CAN.

l. —— *Plaintiff in action against trustee.*]—*Held :* (1) under Ord. 6 of 1843, s. 65 the ct. might, in special circumstances, grant an application by the trustee to examine a person in reference to his dealings with insolvent, even although an action was pending between that person & the trustee, & the object was to obtain information ; (2) the death of insolvent, the obscurity of insolvent's transactions & the absence of prejudice to the parties, constituted such special circumstances. —JACOBS *v.* ESTATE DE LEEUW (1917), C. P. D. 2.—S. AF.

Sect. 4.—Private examination of debtor and other persons: Sub-sects. 1 & 2.]

one of the methods by which the official receiver or trustee is enabled to obtain discovery of debtor's property.—*Re* GEIGER (1913), 109 L. T. 224, D. C.
Annotation :—**Distd.** *Re* Ash (1913), 110 L. T. 48, D. C.

See, also, No. 5610, *post.*

—— **Committal.**]—*See* Sect. 7, *post.*

SUB-SECT. 2.—CONDUCT OF EXAMINATION AND POSITION OF WITNESSES.

5552. Conduct of examination generally—Rests with court.]—The power of examination is expressly vested in the ct. by 1883 Act, s. 27, & the person summoned is not in the ordinary position of a witness called by a litigant party in order that he may be examined by the two litigant parties before the ct., but he is the witness of the ct., & although it is the common (& a convenient) practice to allow the counsel or other representative of the trustee or the official receiver to put the questions, the conduct of the examination rests with the ct.—*Re* SCHARRER, *Ex p.* TILLY (1888), 20 Q. B. D. 518; 59 L. T. 188; 36 W. R. 388; 4 T. L. R. 250; 5 Morr. 79, C. A.
Annotation :—**Mentd.** *Re* North Australian Territory Co. (1890), 38 W. R. 561, C. A.

See, now, 1915 Rules, r. 86.

5553. —— Must be in actual presence of judge or registrar.]—The private examination of a witness by the ct., or by a registrar, cannot be proceeded with in the absence of the judge or the registrar, & when a witness is sworn before the ct., but examined in a separate room, it is not a sufficient compliance with 1883 Act, s. 27 (3), that the judge or registrar may be ready & willing to come into the examination when requested.—R. *v.* LLOYD (1887), 19 Q. B. D. 213; 56 L. J. M. C. 119; 56 L. T. 750; 52 J. P. 86; 35 W. R. 653; 3 T. L. R. 701, C. C. R.

5554. —— May take place at witness's house—In case of illness—Before officer of court.]—Where, on application by the trustee an order is made under 1883 Act, s. 27, summoning a person to attend the ct. to be examined respecting debtor, his dealings or property, the ct. has power, in the event of the witness being prevented by illness from attending before it, to direct such examination to be conducted at the witness's own residence before an officer of the ct. or some other person appointed for the purpose.—*Re* BRADBROOK, *Ex p.* HAWKINS (1889), 23 Q. B. D. 226; 61 L. T. 584; 37 W. R. 700; 6 Morr. 188, C. A.

See, also, 1915 Rules, r. 66.

5555. Who may attend — Debtor.] — *Held :* debtor had no right to be present when witnesses were examined under 1883 Act, s. 27.—*Re* BEALL, *Ex p.* BEALL, [1894] 2 Q. B. 135; 63 L. J. Q. B. 425; 70 L. T. 643; 1 Mans. 203; 9 R. 475, C. A.
Annotations :—**Mentd.** *Re* Standard Gold Mining Co., [1895] 2 Ch. 545; *Re* Merchants' Fire Office, [1899] 1 Ch. 432.

5556. Power of court to exclude parties—Solicitor for both bankrupt & witness.]—If the ct. has good reason to apprehend that the object of a private sitting may be defeated by the presence of a person, who is solr. both for bkpt. & the witness, it may order him to withdraw.—*Re* TOWSEY, *Ex p.* ASSIGNEES (1863), 9 L. T. 613.
Annotation :—**Apld.** *Re* London & Northern Bank, Haddock's Case, Hoyle's Case, [1902] 2 Ch. 73, C. A.

5557. —— One of several joint debtors.]—An inquiry was directed by LORD ELDON, C. before the comrs., whether there were any joint estate of A., B., & C., debtors, & during two examinations before the comrs. C. was present. At a subsequent meeting the counsel of A. & Co. insisted that C. should be excluded, & the comrs. directed him to retire, but he declined to do so. The assignees of A. & Co. did not intend to call C. as a witness, nor did the assignees of C., but the joint creditor said that he should reserve to himself the right to examine C., if it should appear expedient to him :—*Held :* C. should be permitted to attend, &, in the peculiar circumstances of the case, whether he was to be examined as a witness or not.—*Ex p.* EARDLEY (1835), 2 Mont. & A. 85, n., L. C.

5558. —— Petitioner.]—During the examination of witnesses petitioner did not retire when witnesses were ordered to withdraw from the ct. :—*Held :* without laying down any general rule, petitioner ought to be allowed to remain.—*Re* AUGHTIE, *Ex p.* DUGARD (1835), 4 Deac. & Ch. 524; 2 Mont. & A. 84, Ct. of R.

5559. Questions put to witnesses—Duty of registrar to control.]—In the case of a private examination before the registrar it is the duty of the registrar to exercise some control over the persons who are conducting such examination, & if the questions put to a witness are such as ought not to be put & are clearly irrelevant or calculated to mislead such witness, it is the duty of the registrar to interpose (LORD ESHER, M.R.).—*Re* PENNINGTON, *Ex p.* PENNINGTON (1888), 5 Morr. 268, C. A.

5560. —— Refusal of court to restrain—Petition by witness to be examined on interrogatories.]—A witness, a banker, instead of attending comrs., petitioned that he might be examined upon interrogatories, & have a copy thereof, & a month's time to prepare himself, & that the comrs. might be restrained from asking him particular questions in his business of a banker :—*Held :* the ct. would not restrain comrs. in their examinations, as it would be attended with expense & inconvenience from applications of this kind.—*Ex p.* BLAND (*circa* 1747), 1 Atk. 205; 26 E. R. 133.

See 1914 Act, s. 25 (3).

5561. —— —— Allegation that object to procure evidence as to penalties incurred.]—The ct. refused to restrain the comrs. in their examination, upon an allegation that the object of the examination was to procure evidence against the parties examined as to penalties incurred by gaming.—*Re* ABITHOL, *Ex p.* BURLTON (1821), 1 Gl. & J. 30.

5562. —— As to when & where he last saw debtor's wife.]—Comrs. of bkpt. are authorised to examine a witness concerning the person, trade,

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a. —— *Defendant in action by insolvent.*]—B. filed a suit against C., D., & I. C. & D. filed their written statements, but I. did not file his written statement or his affidavit of documents. On July 28, 1897, B. was adjudicated an insolvent. On Oct. 4, H., a creditor, obtained an order for the examination of C., D., & I. with reference to the estate & effects of B. : *Held :* (1) C. & D. ought not to be prejudiced in their defence in the suit brought against them by insolvent by being subjected to an examination until that case was heard, & by filing their written statements & giving inspection of documents, they had given all the information they could be required to give until the hearing should take place; (2) as to I., an order for examination should be confirmed, he not having filed any defence in the civil suit nor given inspection.—*Re* BHAGWANDAS NAROTAMDAS (1897), I. L. R. 22 Bom. 447.—**IND.**

PART XIX. SECT. 4, SUB-SECT. 2.

5560 i. *Questions put to witnesses—Refusal of court to restrain—How objection to questions should be raised.*]—The proper mode for a person brought before the comrs. to be examined, if the question does not relate to the matter of the bkpcy., is to demur, & not to apply to the Ct. of Ch. by petition to restrain the comrs. from putting such questions.—*Re* COPPERTHWAITE (1809), 2 Mol. 443.—**IR.**

dealings, estate & effects, of bkpt., & incidentally to this power they may examine him also respecting other individuals, through whom they may be likely to obtain information on those points. A witness was asked questions as to when & where he last saw bkpt.'s wife :—*Held :* such questions were legal & material.—*Re* EHRENSTROM, *Ex p.* VOGEL (1818), 2 B. & Ald. 219 ; 106 E. R. 347.

Annotations :—**Folld.** *Re* Cathcart, *Ex p.* Campbell (1870), 5 Ch. App. 705, L. J. **Refd.** *Re* Venables, *Ex p.* Bardwell (1834), Coop. *temp.* Brough. 440. **Mentd.** *Re* Reay (1847), 8 L. T. O. S. 476.

5563. —— Residence of party likely to be able to give information.]—A witness summoned for examination, as a person believed to be capable of giving information in regard to the estate or dealings of bkpt., may properly be asked the residence of some other person who is likely to be able to give such information.—*Re* CATHCART, *Ex p.* CAMPBELL (1870), 5 Ch. App. 703 ; 23 L. T. 289 ; 18 W. R. 1056, L. JJ.

Annotations :—**Mentd.** Crawcour *v.* Salter (1881), 18 Ch. D. 30, C. A. ; Bursill *v.* Tanner (1885), 16 Q. B. D. 1, C. A. ; *Re* Arnott, *Ex p.* Chief Official Receiver (1888), 60 L. T. 109 ; Young *v.* Gentle, [1915] 2 K. B. 661 ; Colchester Brewing Co. *v.* Tendring Division of Essex Licensing JJ., [1916] 2 K. B. 126, C. A.

5564. —— To whom goods sold—Purchaser from debtor at under value.]—Where bkpt. has sold goods to a party for a price considerably lower than what he gave for them, the purchaser, when summoned before the comr. for examination, is bound to answer the question " to whom did you subsequently sell these goods," for it materially concerns the estate of bkpt. to ascertain whether the sale by him was *bonâ fide*.—*Re* FALK (1832), 2 Deac. & Ch. 415, Ct. of R.

5565. —— Incriminating questions.]—A mere witness summoned for examination as to the property of bkpt., is entitled to refuse to answer a question on the ground that his answer would tend to criminate himself.—*Re* FIRTH, *Ex p.* SCHOFIELD (1877), 6 Ch. D. 230 ; 46 L. J. Bcy. 112 ; 37 L. T. 281 ; 26 W. R. 9, C. A.

Annotations :—**Consd.** *Re* Reynolds, *Ex p.* Reynolds (1882), 20 Ch. D. 294, C. A. **Refd.** Lamb *v.* Munster (1882), 10 Q. B. D. 110.

5566. —— —— Satisfaction of court as to danger.]—Where a witness at a private examination objects to answer questions on the ground that his answers may tend to criminate him, the mere statement of his own belief that they may do so is not sufficient to excuse him. To entitle him to silence, the ct. must be satisfied, from the circumstances of the case & the nature of the evidence which the witness is called to give, that there is reasonable ground to apprehend danger from his being compelled to answer. If it is apparent that the witness is in danger, great latitude must be allowed him in judging for himself of the effect of his answer to any particular question ; but, subject to this reservation, the ct. will insist on a witness answering, unless it is satisfied that his doing so will tend to place him in peril.—*Re* REYNOLDS, *Ex p.* REYNOLDS (1882), 20 Ch. D. 294 ; 51 L. J. Ch. 756 ; 46 L. T. 508 ; 46 J. P. 533 ; 30 W. R. 651 ; 15 Cox, C. C. 108, C. A.

Annotations :—**Folld.** *Re* Genese, *Ex p.* Gilbert (1886), 3 Morr. 223, C. A. **Refd.** National Assocn. of Operative Plasterers *v.* Smithies, [1906] A. C. 434, H. L. **Mentd.** *Re* North Australian Territory Co. (1890), 38 W. R. 561, C. A.

5567. —— —— ——.]—A witness, at a private examination cannot refuse to answer an innocent question, merely because he alleges a belief that his answer may incriminate him. He must satisfy the ct. that there is a reasonable probability of its so doing.—*Re* GENESE, *Ex p.* GILBERT (1886), 3 Morr. 223, C. A.

5568. —— Solicitor as witness—First transaction in which he acted for debtor.]—At a private examination of the solr. to debtor the ct. allowed the following question to be put : " Which was the first transaction in which you acted for debtor in connection with the P. Club ? " The solr. declined to answer such question on the ground that to do so would be to disclose communications made by his client to him for the purpose of obtaining his professional advice :—*Held :* the question was not one in respect of which any privilege could attach, & the solr. was bound to answer it.—*Re* WELLS, *Ex p.* TRUSTEE (1892), 9 Morr. 116.

5569. —— —— Client's address.]—A solr. examined as a witness is not protected from disclosing the residence of his client by the mere circumstance that it became known to him only in his character of solr. To be entitled to claim such a protection the client's residence must have been made known to him in professional confidence for the purpose of obtaining professional advice.—*Re* CATHCART, *Ex p.* CAMPBELL (1870), 5 Ch. App. 703 ; 23 L. T. 289 ; 18 W. R. 1056, L. JJ.

Annotations :—**Folld.** Crawcour *v.* Salter (1881), 18 Ch. D. 30. **Apprvd.** Bursill *v.* Tanner (1885), 16 Q. B. D. 1, C. A. **Folld.** *Re* Arnott, *Ex p.* Chief Official Receiver (1888), 60 L. T. 109. **Refd.** Young *v.* Gentle, [1915] 2 K. B. 661, D. C. ; Colchester Brewing Co. *v.* Tendring Division of Essex Licensing JJ., [1916] 2 K. B. 126, C. A.

5570. —— —— ——.]—Debtor departed from his dwelling-house & took with him all his furniture. He had an interview with his solr., who was unaware that an act of bkpcy. had been committed, in order to obtain his advice. The solr.'s clerk was examined as a witness, & declined to disclose debtor's address, on the ground " that it had been communicated confidentially to him, as debtor's solr., for the purpose of advising his client in reference to these proceedings, & that such address had not been, so far as he believed, communicated by debtor to the rest of the world " : —*Held :* the address was in the circumstances a privileged communication, & as such need not be disclosed.—*Re* ARNOTT, *Ex p.* CHIEF OFFICIAL RECEIVER (1888), 60 L. T. 109 ; 37 W. R. 223 ; 5 Morr. 286.

5571. —— Objections to—How taken.]—If objection be made to a question put to a witness at a private examination, the proper course is for the witness to retire until the propriety of putting the question is discussed & settled.

Any question which may be considered necessary during the examination, by way of explanation, should at the end of the examination be submitted to the ct. which will exercise its discretion upon the point.—*Re* TOWSEY, *Ex p.* ASSIGNEES (1863), 9 L. T. 613.

Annotation :—**Mentd.** *Re* London & Northern Bank, Haddock's Case, Hoyle's Case, [1902] 2 Ch. 73, C. A.

5572. —— Appeal from refusal to make witness answer.]—When an appeal is brought against the refusal of the ct. to order a witness to answer questions put to him during his examination, the witness cannot be made a party to the appeal.—*Re* SCHARRER, *Ex p.* TILLY (1888), 20 Q. B. D. 518 ; 59 L. T. 188 ; 36 W. R. 388 ; 4 T. L. R. 250 ; 5 Morr. 79, C. A.

Annotation :—**Refd.** *Re* North Australian Territory Co. (1890), 38 W. R. 561, C. A.

5565 i. —— *Incriminating questions.*] —*Held :* Insolvency Act, 1874, s. 115, did not operate so as to render unlawful questions put to a person under examination under s. 114, which tended to criminate him of a felony.—R. *v.* KING (1876), Q. L. R. 73 (Beor). —AUS.

Sect. 4.—*Private examination of debtor and other persons: Sub-sect.* 2. *Sect.* 5.]

5573. Cross-examination of witness—Right to cross-examine.]—When a witness is summoned for examination concerning debtor's dealings or property, the judge is not bound to accept at once as conclusive the denial of the witness that he has dealt with such property, but the witness may be further questioned in order to test his credibility.—*Re* SCHARRER, *Ex p.* TILLY (1888), 20 Q. B. D. 518; 59 L. T. 188; 36 W. R. 388; 4 T. L. R. 250; 5 Morr. 79, C. A.

Annotation:—**Mentd.** *Re* North Australian Territory Co. (1890), 38 W. R. 561, C. A.

5574. —— By whom—Debtor.]—*Held:* debtor had no right to cross-examine witnesses examined under 1883 Act, s. 27, as to the truth of what they said, or as to their character.—*Re* BEALL, *Ex p.* BEALL, [1894] 2 Q. B. 135; 63 L. J. Q. B. 425; 70 L. T. 643; 1 Mans. 203; 9 R. 475, C. A.

Annotations:—**Refd.** *Re* Standard Gold Mining Co., [1895] 2 Ch. 545. **Mentd.** *Re* Merchant's Fire Office, [1899] 1 Ch. 432.

5575. —— As to what—Previous evidence.]—Where debtor is called as a witness as to any matter arising in his bkpcy., it is open to any party, including the party calling him, to elicit from him in cross-examination what account he has given of the matter on a previous occasion.—*Re* CUNNINGHAM, *Ex p.* OFFICIAL RECEIVER *v.* CUNNINGHAM (1898), 80 L. T. 503; 43 Sol. Jo. 480; 6 Mans. 199.

5576. Evidence of witness—Value of—Answers suggested by counsel.]—Where the answers of a witness examined at a private sitting are put in evidence the ct. will look carefully to see whether the language used in answer to the questions is suggested by the counsel & merely re-echoed by the witness, or whether it is the language of the witness in order to express his own idea; & when the ct. finds that the language of the answer has been put into the mouth of the witness by reason of the form of the question, it will take this into account in considering the value to be placed upon such answer.—*Re* TILLETT, *Ex p.* HARPER (1890), 7 Morr. 286.

5577. —— Depositions—Should be filed as "proceeding"—Cannot be taken off file at instance of debtor.]—Every step taken in a bkpcy. for the purpose of enabling the ct. to come to a final determination ought to be placed on the file. Depositions, taken at a private examination, are a proceeding of the ct. within 1886 Rules, r. 12, & should be placed on the file, & will not be taken off on the application of bkpt.—*Re* BEALL, *Ex p.* BEALL, [1894] 2 Q. B. 135; 63 L. J. Q. B. 425; 70 L. T. 643; 1 Mans. 203; 9 R. 475, C. A.

Annotations:—**Refd.** *Re* Standard Gold Mining Co., [1895] 2 Ch. 545; *Re* Merchants' Fire Office, [1899] 1 Ch. 432.

See, also, No. 5624, *post.*

5578. Rights & privileges of witnesses at examination — Freedom from arrest.] — A person attending under a summons of comrs. of bkpcy. is privileged from arrest.—*Ex p.* KING (1802), 7 Ves. 312; 32 E. R. 127, L. C.

Annotations:—**Distd.** *Ex p.* Cobbett (1857), 5 W. R. 708. **Expld.** Mountague *v.* Harrison (1857), 3 C. B. N. S. 292. **Mentd.** *Ex p.* Donlevy (1802), 7 Ves. 317, L. C.; *Re* Britten, *Ex p.* Britten (1840), 9 L. J. Bcy. 38, Ct. of R.; Ockford *v.* Freston, Chapman *v.* Freston (1861), 6 H. & N. 466.

5579. —— —— Attendance without summons.]—A person attending comrs. of bkpcy., without a summons, swearing that he was a material witness, & not contradicted:—*Held:* protected from arrest, while remaining, though having left the room by order for the purpose of separate examination, & while returning. *Qu.:* whether so protected while going.—*Ex p.* BYNE (1813), 1 Ves. & B. 316; 1 Rose, 451; 35 E. R. 123.

Annotations:—**Apld.** McGeath *v.* Geraghty (1866), 15 W. R. 127. **Refd.** *Re* Britten, *Ex p.* Britten (1840), 1 Mont. D. & De G. 278.

5580. —— Liability to furnish accounts.] — There is no jurisdiction to order a witness to furnish an account in writing (not on oath) of money transactions between himself & bkpt., or property of bkpt. received by him.—*Re* REYNOLDS, *Ex p.* REYNOLDS (1882), 21 Ch. D. 601; 52 L. J. Ch. 223; 47 L. T. 495; 31 W. R. 187, C. A.

5581. —— Right to professional assistance of solicitor & counsel—To take notes.]—The practice in bkpcy. appears to be that the party is entitled to have the professional assistance of counsel or solr., but the solr. of the witness is not allowed to take notes of the examination, & even any notes of points which he may have made cannot be taken away by him without the consent of the other party (CHITTY, J.).—*Re* GREYS BREWERY CO. (1883), 25 Ch. D. 400; 53 L. J. Ch. 262; 50 L. T. 14; 32 W. R. 381; 28 Sol. Jo. 104.

Annotations:—**N.F.** *Re* Walker, *Ex p.* Childe (1909), 100 L. T. 860. **Mentd.** *Re* Norwich Equitable Fire Assce. (1884), 51 L. T. 404, C. A.; *Re* London & Lancashire Paper Mills Co. (1888), 57 L. J. Ch. 766; Learoyd *v.* Halifax Joint Stock Banking Co., [1893] 1 Ch. 686; North Australian Territory Co. *v.* Goldsborough, Mort, [1893] 2 Ch. 381, C. A.; *Re* Standard Gold Mining Co. (1895), 2 Mans. 463; *Re* London & Northern Bank, Haddock's Case, Hoyle's Case, [1902] 2 Ch. 73, C. A.; *Re* Appleton, French & Scrafton, [1905] 1 Ch. 749.

5582. —— —— ——.]—C. was summoned under 1883 Act, s. 27 (1), to give information respecting debtors, their dealings & property. During his examination, his counsel took notes of the questions & answers. Counsel for the trustee in bkpcy. objected, & the registrar sanctioned the objection:—*Held:* the registrar, having allowed C. to be represented by counsel, must allow counsel to make a note to aid his memory & enable him to advise & protect his client.—*Re* WALKER, *Ex p.* CHILDE (1909), 100 L. T. 860; 25 T. L. R. 528; 53 Sol. Jo. 486; 16 Mans. 207.

Cf. similar practice in winding up in COMPANIES.

5583. Rights of witnesses after examination—Right to copy of depositions.]—Depositions made before comrs. in bkpcy. are not of a public nature, & the ct. will not order a copy of them to be given to the deponent.—BRACY'S CASE (1696), 1 Ld. Raym. 153; 91 E. R. 1000.

5584. —— —— Discretion of Lord Chancellor.] —It is in the discretion of the Lord Chancellor to permit or refuse deft. at law to have copies of his examination before the comrs.—*Re* CROSBY, *Ex p.* CHATER (1818), 1 Buck, 290, L.C.

Annotation:—**Refd.** *Re* Standard Gold Mining Co., *Ex p.* Mee (1895), 64 L. J. Ch. 790.

5585. —— —— Discretion of registrar—No notice of intention to read deposition.] — A creditor, who has proved in the bkpcy. & had been examined under 1869 Act, s. 96, applied for a copy of his deposition, the trustee having given notice of his intention to apply for an order for restoration of goods alleged to have been received by the creditor in fraudulent preference of the other creditors, but not having given notice of his intention to read the deposition. The registrar allowed the copy to be furnished, notwithstanding the trustee's opposition:—*Held:* although the creditor was not entitled to the deposition as of right, the registrar had properly exercised his discretion.—*Re* HAYMAN, *Ex p.* PRATT (1882), 21 Ch. D. 439; 52 L. J. Ch. 120; 47 L. T. 368; 31 W. R. 189, C. A.

Annotations :—**Consd.** *Re* Standard Gold Mining Co., [1895] 2 Ch. 545. **Apld.** *Re* Merchants' Fire Office, [1899] 1 Ch. 432.

5586. ——— Notice of intention to read deposition.]—Whenever a notice of motion in bkpcy. states that the depositions of witnesses taken at a private examination under 1914 Act, s. 25, will be read in support of the motion, resp. to the motion will be entitled to copies of such depositions on payment of the usual charges therefor. If resp. succeeds on the motion, the taxing master will decide whether resp. shall be allowed the costs of such copies.—*Re* CARILL-WORSLEY, [1915] 2 K. B. 534 ; 84 L. J. K. B. 1414 ; 59 Sol. Jo. 428.

5587. Costs & expenses—Of witness—On what scale.] — Where, upon an adjudication in the first instance, a witness is summoned for examination as to bkpt.'s property, he is entitled to his expenses upon the scale of costs the master shall consider applicable to his grade & condition in life.—*Re* ANON. (1863), 9 L. T. 172.

See, now, 1914 Act, s. 25, 1915 Rules, r. 72.

5588. ——— ——— Solicitor witness.]—A solr. summoned by the official receiver under 1883 Act, s. 27, to attend a county ct. to give evidence respecting debtor, his dealings, or property, is entitled to his costs as a professional witness under 1886 Rules, r. 71, & C. C. R., & may maintain an action to recover them against the official receiver.—CHAMBERLAIN *v.* STONEHAM (1889), 24 Q. B. D. 113 ; 59 L. J. Q. B. 95 ; 61 L. T. 560 ; 38 W. R. 107 ; 6 T. L. R. 21, D. C.

5589. ——— When represented by counsel.]—The managing director of a co., in which debtor had held shares which had been forfeited, was summoned by the trustee for examination with the view of obtaining information for the purpose of impeaching the validity of the forfeiture. He attended at the time appointed, & two counsel were present on his behalf, but, as the trustee's counsel did not attend, the examination was adjourned *sine die*, with costs to be paid by the trustee :—*Held :* the witness was only entitled to the ordinary allowance for his expenses, & not to the costs of his solr. or the fees paid to the counsel.—*Re* LUTSCHER, *Ex p.* WADDELL (1877), 6 Ch. D. 328 ; 37 L. T. 345 ; 26 W. R. 9, C. A.

Annotation :—**Distd.** *Re* Appleton, French & Scrafton, [1905] 1 Ch. 749. Both JAMES & COTTON, L.JJ., in *Ex p. Waddell* grounded themselves for deciding as they did on the fact that the person examined was a mere witness. I have here the case of an examination [under Cos. Act, 1862 (c. 89), s. 115] of persons against whom allegations were made with respect to the co.'s property & against whom proceedings were intended to be taken & should be wrong if I did not make resps. pay the costs (WARRINGTON, J.).

5590. ——— Of creditors taking part in examination—Solicitor employed by them.]—Joint creditors under a separate commission are not entitled to have the expenses of a solr., employed by them to conduct examinations, etc., before the comrs., paid out of the joint fund.

The solr. is quite safe ; he must be paid by those who have employed him ; & the joint creditors ought to contribute & suffer it to be paid out of the dividends (LORD ELDON, C.).—*Re* TABART, *Ex p.* LONGMAN (1812), 1 Rose, 303, L. C.

5591. ——— ——— ——— Charges allowed.]—Only £1 is allowed for the solr. & clerk at meetings, unless special cause shown.—*Re* BARROW & GEDDES, *Ex p.* CHRISTY, *Re* BARROW & GEDDES, *Ex p.* HADFIELD (1837), 3 Mont. & A. 88 ; 6 L. J. Bcy. 68, Ct. of R.

SECT. 5.—INTERROGATORIES AND DISCOVERY AND PRODUCTION OF DOCUMENTS.

5592. Jurisdiction of registrar.]—The registrar has jurisdiction to order a person to produce for the inspection of the trustee all documents & papers relating to the estate of debtor.—*Re* GEIGER (1913), 109 L. T. 224, D. C.

Annotation :—**Refd.** *Re* Ash (1913), 110 L. T. 48, D. C.

See, now, 1915 Rules, r. 70.

5593. Discretion of court.]—In determining whether an order for the production of documents should be made the ct. has to exercise a discretion. —*Re* THORP, *Ex p.* TATTON (1881), 17 Ch. D. 512 ; 50 L. J. Ch. 792 ; 45 L. T. 89, C. A.

5594. In what cases—Sale of property by debtor to bonâ fide purchaser for valuable consideration.]—Where a *bonâ fide* purchaser for valuable consideration, & without notice, has a contest with the assignee, the ct. will not take any advantage from him, & therefore will not compel a discovery. —COLLET *v.* DE GOLS & WARD (1734), Cas. *temp.* Talb. 65 ; 25 E. R. 665.

Annotations :—**Refd.** *Ex p.* Herbert (1806), 13 Ves. 183 ; Sowerby *v.* Brooks (1821), 4 B. & Ald. 523 ; Cannan *v.* S. E. Ry. Co. (1852), 7 Exch. 843. **Mentd.** *Ex p.* Knott (1806), 11 Ves. 609 ; *Re* Slobodinsky, *Ex p.* Moore, [1903] 2 K. B. 517 ; *Re* Hart, *Ex p.* Green, [1912] 3 K. B. 6, C. A.

5595. ——— Primâ facie evidence that debt was part of debtor's property—Production of partnership deed.]—Under the trusts of a deed executed in 1834 a debt was due to Y. & Co. After various changes B. & Co., debtors, became the successors in business of Y. & Co., & in an action for the administration of the trusts of the deed, the trustee of B. & Co. claimed the debt due under that instrument. In order to prove his title the trustee summoned the surviving exor. of Y., who died in 1841, for examination, & it appeared from his examination that a partnership deed of 1838 was under his control, but in the possession of his solr. :—*Held :* he was not bound to produce the deed unless there was *primâ facie* evidence that the debt formed part of the property of debtors.—*Re* BEVAN & Co., *Ex p.* SMITH (1881), 45 L. T. 447.

See 1915 Rules, r. 70.

5596. ——— Primâ facie evidence that documents relate to bankrupt, his dealings or property.]—A witness cannot be compelled to produce documents at a private examination, unless there is *primâ facie* evidence that they relate to bkpt., his dealings or property.—*Re* SAUNDERS, *Ex p.* LEIGH (1896), 13 T. L. R. 108, D. C.

See, also, No. 5559, *ante*, & No. 5624, *post.*

5597. ——— Real object to defeat bankruptcy laws.]—A creditor made application for the discovery of documents, ostensibly to aid a motion to expunge a proof, but with the real intention, in the interest of bkpt., of rescinding the receiving order, after the time limited for appealing had gone by :—*Held :* the application must be refused,

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5587 i. *Costs & expenses—Of witness—In discretion of commissioner.*]—It is discretionary with the comr. of bkpcy. to give any costs or charges to the summoned party suspected of having bkpt.'s property, or supposed to be indebted to him.—*Re* O'CONNOR (1841), 3 I. Eq. R. 364.—IR.

5589 i. ——— ——— *When represented by counsel.*]—In insolvency proceedings a mtgee. was examined under Presidency Towns Insolvency Act, s. 36 (111 of 1909), for the purpose of challenging the mtge. At the time of such examination attorney & counsel appeared on his behalf. Subsequently when the mtge. was not challenged, he applied to ct. for an order for costs against the creditor :—*Held :* a witness examined under s. 36 was not entitled to the costs of employing attorney or counsel.—*Re* ANSHU PROKASH GHOSE (1919), I. L. R. 46 Calc. 795.—IND.

b. ——— ——— *Payable before examination.*]—WORTHINGTON *v.* TAYLOR 1874), 10 C. L. J. N. S. 304.—CAN.

Sect. 5.—Interrogatories & discovery & production of documents. Sects. 6 & 7.]

as being an attempt to aid bkpt. to do indirectly what the law did not allow him to do directly.—*Re* DASHWOOD, *Ex p.* KIRK (1886), 3 Morr. 257, C. A.

Annotation :—**Refd.** *Re* Tallerman, *Ex p.* Rooney (1888), 57 L. J. Q. B. 509.

5598. At what time—Before hearing of bankruptcy petition—Application by petitioning creditor.]—Petitioning creditor in a bkpcy. petition cannot, before the hearing of the petition, obtain an order for interrogatories or discovery to prove the allegations in the petition.—*Re* A DEBTOR (No. 7 OF 1910), [1910] 2 K. B. 59 ; 79 L. J. K. B. 1065 ; 102 L. T. 691 ; 26 T. L. R. 429 ; 17 Mans. 263, C. A.

See 1915 Rules, r. 154.

5599. Who may be compelled to produce documents—Trustee of jointress.]—The Bkpcy. Ct. will not compel the trustee of a jointress to produce the title deeds, but the deed of settlement must be produced. If the assignees seek discovery beyond the deed of settlement, they must confirm her jointure.—*Re* REAY (1847), 8 L. T. O. S. 476.

5600. —— Servant—Not having possession of books.]—On the hearing of a petition for adjudication of bkpcy., a clerk of the persons against whom the adjudication was prayed, who stated that he had no possession of their books :—*Held :* not bound to produce them.—*Re* LEIGHTON & BENETT (1866), 1 Ch. App. 331 ; *sub nom. Re* LEIGHTON, *Ex p.* BYRNE, 35 L. J. Bcy. 43, L. C.

Annotation :—**Mentd.** *Re* Lutscher, *Ex p.* Waddell (1877), 6 Ch. D. 328, C. A.

5601. —— —— Having no authority to produce documents.]—A witness, the manager of a branch business, & in whose possession were certain documents relating to dealings that had taken place between debtor & his master, was ordered to attend & produce on subpœna the documents. The witness had no authority to produce the documents, & refused to do so :—*Held :* as the witness was a mere servant & had no authority to produce, he could not be ordered to do so.—*Re* HIGGS, *Ex p.* LEICESTER (1892), 66 L. T. 296 ; 40 W. R. 432.

See 1914 Act, s. 25 (1).

5602. What documents—Books of dissolved partnership.]—In 1811 A. & B. entered into partnership, which was dissolved in 1818, & wound up except as to some outstanding debts. In 1820 a deed of release was executed, excluding these debts. The books were allowed to remain in A.'s hands, & all the outstanding debts were subsequently settled. In 1830 B. became bkpt., till which time he had never called for the books :—*Held :* A. & B. continued tenants in common of them, & length of time & absence of charge of fraud in settled account notwithstanding, the comr. had jurisdiction to call A. & examine the books relative to former dealings of bkpt.—*Re* MARTINDALE, *Ex p.* TRUEMAN (1832), 1 Deac. & Ch. 464, Ct. of R.

5603. —— Mortgage on bankrupt's property.]—A creditor of debtor, who had executed a registered deed, containing a covenant to pay the debts by instalments, summoned another creditor to be examined, & called upon him to produce a mtge. deed which he held on part of debtor's property :—*Held :* production ought to be ordered. —*Re* MARKS' TRUST DEED (1866), 1 Ch. App. 429 ; 35 L. J. Bcy. 22 ; 15 L. T. 139 ; 12 Jur. N. S. 737 ; 14 W. R. 824, L. JJ.

Annotation :—**Refd.** *Re* Fachiri, *Ex p.* Fachiri (1867), 2 Ch. App. 368, L. JJ.

5604. —— Mortgage, deed of transfer, deed of assignment.]—From the examination of a person summoned for examination under 1869 Act, s. 96, at the instance of the trustee of a bkpt., it appeared that a policy of insurance on the life of bkpt.'s wife which had been effected by her before her marriage with bkpt., & which had been after the marriage assigned by the husband & wife to trustees, on trust for the wife for her separate use, had after the bkpcy. been assigned by way of mtge. by a deed to which bkpt. & his wife were parties, that the mtge. had been afterwards transferred to the witness, & that the wife had subsequently executed a deed assigning the equity of redemption to him : —*Held :* the witness must produce the mtge. deed, the deed of transfer, & the deed of assignment. —*Re* THORP, *Ex p.* TATTON (1881), 17 Ch. D. 512 ; 50 L. J. Ch. 792 ; 45 L. T. 89, C. A.

5605. Refusal to produce documents—Whether justified—Document held by solicitor.]—The solr. of a creditor refused to produce a mtge. deed executed by bkpt. before bkpcy. in favour of his client, on the ground that he held it as solr. A warrant of commitment was issued, but was, by consent, suspended pending the decision of the ct. :—*Held :* the order restraining the execution of the warrant must be discharged.—*Re* WHITE, *Ex p.* CALDECOTT (1830), Mont. 55, L. C.

Annotations :—**Consd.** *Re* Martindale, *Ex p.* Trueman (1832), 1 Deac. & Ch. 464, Ct. of R. **Refd.** *Re* Reay (1847), 8 L. T. O. S. 476 ; *Re* Marks' Trust Deed (1866), 1 Ch. App. 429, L. JJ.

5606. —— —— Solicitor's lien on documents.]—A solr. is not, on the ground of his lien on documents of bkpt. in respect of professional services before the bkpcy., entitled to refuse to produce such documents for examination by the trustee.—*Re* TOLEMAN & ENGLAND, *Ex p.* BRAMBLE (1880), 13 Ch. D. 885 ; 42 L. T. 413 ; 28 W. R. 676.

5607. Petition to restrain production of documents—Dismissed as premature.]—Where a mtgee. of bkpt.'s property, who was summoned to attend before the comrs., petitioned that they might be restrained from requiring the production of the mtge. deed, the petition was dismissed with costs, as being premature.—*Re* WHITE, *Ex p.* BEESTON (1829), 1 Mont. & M. 244.

5608. Discovery of land—Defendant purchaser for value—Without notice of act of bankruptcy.]—A bill was exhibited by bkpt.'s assignee against deft. to discover lands, etc., which were bkpt.'s at the time of his breaking. A plea, that deft. was a purchaser for full & valuable consideration, & at the time of purchase had no notice of the bkpcy. or of any act of bkpcy., was allowed.—ANON. (1682), 2 Cas. in Ch. 136 ; 22 E. R. 883.

Committal on refusal to comply with order.]—*See* Sect. 7, *post.*

PART XIX. SECT. 5.

5598 i. *At what time—After rule for allowance—Filing fresh interrogatories.*]—After a rule for allowance, pltf. cannot file fresh interrogatories & suspend the payment, although he hear of property supposed to have been made away, of which when filing the first interrogatories he had no knowledge.—HYDE *v.* BARNHART (1829), 1 Dra. 54.—CAN.

5599 i. *Who may be compelled to produce documents—Third party.*]—The comrs. cannot make a third party produce his books.—*Re* COPPERTHWAITE (1809), 2 Mol. 443.—IR.

5604 i. *What documents—Deed of assignment.*]—*Held :* the ct. would not, on petition, make a person, who had taken from bkpt. an assignment, which he admitted before the comrs. was in his possession, & that at the time of taking it he knew his situation, produce it to the assignees to take advantage of it.—*Re* USHER (1817), 2 Mol. 444.—IR.

SECT. 6.—POSSESSION OF DOCUMENTS PRODUCED.

5609. Power of court—To retain deed produced to facilitate proceedings.]—The ct. has no power to retain a deed, which has been produced by a witness merely out of courtesy & to facilitate proceedings.

P., a witness, having a lien upon a deed, was asked by the ct. to produce it. The deed was, upon its production, impounded by the ct.:—*Held:* the ct. had no power to retain the deed, even though it might be fraudulent.—*Re* TILL, *Ex p.* PARSONS (1871), 19 W. R. 325.

5610. —— To order documents to be delivered to official receiver.]—Neither a registrar, nor a county ct. judge, has jurisdiction to order a witness, summoned under 1883 Act, s. 27, to hand over documents to the official receiver, acting as trustee, to be retained by him out of the jurisdiction of the ct. The official receiver is not the deputy of the judge, & his custody is not the custody of the ct.—*Re* ASH (1913), 110 L. T. 48; 21 Mans. 15, D. C.

5611. Order to redeliver to party producing—Irrespective of title to same.]—A party, on his examination before the comrs., was compelled by them to produce a book, which was lawfully in his possession, & which, on being produced, the assignees laid their hands on & refused to return. The ct., without entering into the question, as to who had the legal title to the book, ordered it to be delivered up to the party who had the lawful possession of it, when it was produced before the comrs.—*Re* MALACHY, *Ex p.* GILBARD (1838), 3 Deac. 488; 8 L. J. Bcy. 17, Ct. of R.

5612. Order to impound deed discharged—Costs against assignees.]—A party bought land, etc., of a trader, & afterwards the trader was adjudicated bkpt. A person holding the purchase-deed for the purchaser, was summoned, after the adjudication, under 1849 Act, s. 120, before a county ct. judge, to produce the deed. The judge ordered it to be impounded, & the property to be delivered up to the assignees to be sold for the benefit of the creditors:—*Held:* the order must be discharged, the judge having no jurisdiction to make it, & the assignees directed to pay the costs. —*Re* ATTWATER, *Ex p.* COLE (1862), as reported in 32 L. J. Bcy. 11; 7 L. T. 406; 9 Jur. N. S. 33; 11 W. R. 127, L. C.

SECT. 7.—COMMITTAL.

5613. Jurisdiction—Court of Review.]—*Qu.:* whether the Ct. of Review, on an adjournment to them of bkpt.'s examination, had power to commit him for refusing to answer a criminatory question. —*Re* FEAKS (1833), 2 Deac. & Ch. 226; Mont. & B. 215; 2 L. J. Bcy. 46, Ct. of R.

5614. —— County court judge sitting in bankruptcy.]—A county ct. judge sitting in bkpcy. has power to commit a person to prison for contempt for disobedience to an order directing him to attend before the ct. & give information in respect of a bkpt.'s estate.—R. *v.* SURREY COUNTY COURT JUDGE (1884), 13 Q. B. D. 963; *sub nom.* R. *v.* CROYDON COUNTY COURT JUDGE, 53 L. J. Q. B. 545; 51 L. T. 102; 33 W. R. 68, C. A.

Annotation:—**Mentd.** *Re* Bassett's Plaster Co., [1894] 2 Q. B. 96.

5615. —— Subdivision court—Necessity for court to take examination—Sufficiency of the examination.]—It is not competent for the subdivision ct. to commit a person who is brought before them, for not answering to the satisfaction of the comrs., under 1 & 2 Will. 4, c. 56, s. 7, unless they take the examination themselves; & asking the party if he abided by his former answers, will not be sufficient.—*Re* VENABLES, *Ex p.* BARDWELL, (1834), 1 Mont. & A. 193; Coop. *temp.* Brough. 440; 3 L. J. Bcy. 30; 47 E. R. 157.

Annotation:—**Refd.** *Re* Lampon, *Ex p.* Lampon (1834), 3 Deac. & Ch. 751.

5616. Necessity for tender of reasonable expenses.]—A person subpœnaed to attend in ct. & refusing to obey the subpœna cannot be committed for wilful contempt, until a reasonable sum has been tendered to him to cover the cost of coming to the ct. & expenses.—*Re* BATSON, *Ex p.* HASTIE (1894), 70 L. T. 382; 1 Mans. 45; 10 R. 135.

5617. —— What are reasonable expenses.]—The "reasonable sum" which is to be tendered to a witness is conduct money, & is to be measured by the distance the witness has to travel, & it must be sent with the summons in cash or postal orders.—*Re* WEINBERG, *Ex p.* OFFICIAL RECEIVER (1907), 96 L. T. 790; 51 Sol. Jo. 388; 14 Mans. 277.

See, also Nos. 5587 *et seq.*, *ante.*

5618. Necessity for reasonable time between service of summons & date on which appearance required—Question for jury.]—*Held:* in order to justify the comrs. in issuing their warrant for the apprehension of a witness to whom they had directed a summons under 6 Geo. 4, c. 16, s. 33, it was necessary that a reasonable time should intervene between the service of the summons & the time when the witness was thereby required to attend, & the question, whether the service of the summons was in that respect reasonable or not was a question of fact to be submitted to a jury.—GROOCOCK *v.* COOPER (1828), 8 B. & C. 211; 108 E. R. 1022; *sub nom.* GROCOCK *v.* COOPER, 2 Man. & Ry. K. B. 78; 1 Man. & Ry. M. C. 302; 6 L. J. O. S. K. B. 265.

5619. Notice of application for committal—How time computed.]—*Held:* in computing the three days' notice of a motion to commit required by 1870 Rules, r. 176, Sundays must not be reckoned.

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c. *Jurisdiction—Insolvent court.*]—The Insolvent Ct. has power to commit a witness for refusing to be examined, or refusing to answer certain questions, & it is not necessary in an action of trespass against the person executing the warrant, for deft. to show that the testimony required was such as the ct. had power to require.—WALSH *v.* JORDAN (1825), Sm. & Bat. 433.—**IR.**

d. —— —— *Subpœna improperly issued.*]—A witness, who had received a *subpœna*, but who had not been summoned under Act No. 1102, s. 135, to give evidence in an examination in proceedings in an insolvent's estate, refused to produce certain documents directed by the judge to be produced, & was committed for contempt:—*Held:* as the subpœna was improperly issued the Ct. of Insolvency had, in the circumstances, no jurisdiction to make such an order for commitment.—*Re* ELLISON (1893), 19 V. L. R. 548.—**AUS.**

5614 i. —— *County court judge.*]—A county ct. judge made an order committing a person for unsatisfactory answers upon his examination as an insolvent debtor under R. S. O. 1897 (c. 147), s. 34:—*Held:* there was no jurisdiction to make such order.—*Re* ROCHON (1899), 31 O. R. 122.—**CAN.**

e. *Object of committal—To obtain better answers—Not to punish witness.*]—The power of committal given by 1859 Act, s. 385, is not to be exercised for the purpose of punishing a witness, but with a view to obtaining more satisfactory answers to questions, so as to enable the assignees to realise the property of bkpt.—*Re* CONWAY (1912), 46 I. L. T. 243.—**IR.**

5616 i. *Necessity for tender of reasonable expenses—Conduct money.*]—The ct. refused to commit deft. for contempt in disobeying an order & appointment for examination for discovery in aid of execution, where deft. had not been paid the proper amount of conduct money.—DOUGLAS *v.* OMAND (1906), 4 W. L. R. 331.—**CAN.**

f. *Notice of application for committal—Necessary.*]—*Held:* a warrant would not be issued to apprehend a witness, who refused or neglected to attend when summoned by the creditors' trustee under Debtors & Creditors

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—*Re* FERRIGE, *Ex p.* FERRIGE (1875), L. R. 20 Eq. 289; 44 L. J. Bcy. 96; 32 L. T. 507; 23 W. R. 612.

Annotation:—**Mentd.** R. *v.* Surrey County Ct. Judge (1884), 13 Q. B. D. 963, C. A.

5620. —— Abridgment of time.]—*Held:* the ct. had no power under 1870 Rules, r. 179, to abridge the three days' notice, which was to be given of the hearing of an application to commit for contempt of ct.—*Re* BRYANT (1876), 3 Ch. D. 810; 35 L. T. 173; 25 W. R. 127.

5621. Who may be committed—Member of Parliament.]—On a motion to commit a member of Parliament for refusing to submit to examination touching a bkpt.'s affairs:—*Held:* the member was protected by his privilege, as the order for committal sought would be not punitive in its nature, but a civil process to enforce obedience to the order of the ct.—*Re* ARMSTRONG, *Ex p.* LINDSAY, [1892] 1 Q. B. 327; 65 L. T. 464; 40 W. R. 159; 7 T. L. R. 749; 17 Cox, C. C. 349; 8 Morr. 271.

Annotation:—**Consd.** Seldon *v.* Wilde, [1911] 1 K. B. 701, C. A.

5622. Grounds for committal—Failure to produce documents.]—Where the last examination of bkpt. was repeatedly adjourned, in order that he might produce a written account, & bkpt. referred to a written account as the only mode of explaining his trade & dealings, & the last adjournment was made upon his assurance, that he would produce such account, if further time was given:—*Held:* such account not being produced, nor any satisfactory reason given for not producing it on the day to which the adjournment was made, the comrs. were justified in committing.—GODDARD'S CASE (1819), 1 Gl. & J. 45.

Annotation:—**Refd.** Davie *v.* Mitford (1821), 4 B. & Ald. 356.

See 1914 Act, s. 22 (4).

5623. —— ——.]—A person was summoned to appear before comrs. & bring with him a deed. He was not able to produce it, but attended at the appointed time & was then told that it was no use to come without the deed, but that the comrs. would hear what he had to say later. He then went away:—*Held:* a warrant by the comrs. under which he was arrested two days later was regular.—WRIGHT *v.* MAUDE (1842), 10 M. & W. 527; 2 Dowl. N. S. 517; 12 L. J. Ex. 22; 7 J. P. 69; 6 Jur. 953; 152 E. R. 580.

5624. —— —— Oath that they contained nothing concerning bankrupt.]—A witness was examined before the registrar, & produced certain letters torn from a letter-book in his possession, but refused to produce the book itself, as he swore it contained no letters relating to debtor, his dealings or his property, other than those produced. On an application to commit:—*Held:* the witness's answer must be accepted, as the object of 1883 Act, s. 27 (1), was not to enable a trustee by cross-examination to make out a case.—*Re* PURVIS, *Ex p.* ROOKE (1887), 56 L. T. 579.

Annotation:—**Expld.** *Re* Scharrer, *Ex p.* Tilly (1888), 20 Q. B. D. 518, C. A. CAVE, J., tells me that he never intended to say that the judge was bound to accept the witness's first answer, or that he could not be cross-examined & sifted to the end; he merely meant to say that at the end of the witness's examination his answer must be accepted, that is, witnesses cannot be called to contradict him (LORD ESHER, M.R.).

See, also, Nos. 5559, 5596, *ante.*

5625. —— Failure to answer questions satisfactorily.]—Bkpt. can be committed to prison for not answering satisfactorily questions put to him by the comrs. under 1849 Act, s. 260.—*Ex p.* BRADBURY (1853), 14 C. B. 15; 23 L. J. C. P. 25; 18 Jur. 189; 2 C. L. R. 585; 139 E. R. 7.

5626. —— —— Whether commissioners bound to commit.]—If comrs. think that bkpt. has not answered satisfactorily upon his examination, they are bound to commit him. Bkpt. must answer every lawful question, &, although he is not bound to criminate himself, yet, if he refuses to account for any part of his effects, his refusal subjects him to a commitment.—*Re* OLIVER, *Ex p.* OLIVER (1813), 2 Ves. & B. 244; 1 Rose, 407; 35 E. R. 312.

Annotations:—**Consd.** *Re* Kirby & Thomas, *Ex p.* Kirby (1829), Mont. & M. 212, L. C. **Mentd.** *Re* Feaks (1833), Mont. & B. 215, Ct. of R.

5627. —— —— What is a question—Request to read entries in ledger.]—A witness summoned by comrs. of bkpcy. under 6 Geo. 4, c. 16, s. 33, was required by the comrs. to read certain entries in a ledger, & on his refusal to do so, was committed by them for refusing to answer a question:—*Held:* the request to read was neither in form nor substance a question, & the commitment was illegal.—ISAAC *v.* IMPEY (1830), 10 B. & C. 442: 5 Man. & Ry. K. B. 377; 3 Man. & Ry. M. C. 40; 8 L. J. O. S. K. B. 169; 109 E. R. 514.

Annotation:—**Refd.** Ferguson *v.* Kinnoull (1842), 9 Cl. & Fin. 251, H. L.

5628. *S.P. Re* OWEN, *Ex p.* ISAAC (1828), Mont. & M. 23; 3 Y. & J. 38; 148 E. R. 1084; *subsequent proceedings, sub nom.* ISAAC *v.* IMPEY (1830), 10 B. & C. 442.

Annotation:—**Mentd.** *Re* Reay (1847), 8 L. T. O. S. 476.

5629. —— —— Sufficiency of answer.]—It is not necessary in order to give the subdivision ct. power to commit, that the answers should be in themselves contradictory, or actually con-

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Act, 1876, s. 167, unless notice had been given him of the intention to apply for the warrant, as such a warrant ought not to be granted *ex p.*—*Re* CUNNINGHAM, 2 J. R. N. S. 228.—N.Z.

g. *Who may be committed—Witness & surety in arrangement matter.*]—The Ct. of Bkpcy. has no jurisdiction to commit for "unsatisfactory answering," under 1857 Act, s. 385, a person brought before it as a witness & surety merely in an arrangement matter.—*Re* O'MALLEY (1893), 27 I. L. T. Jo. 486.—IR.

h. *Grounds for committal—Failure to account.*]—Insolvent debtor having refused, on his examination under Assignments Act, to account for the proceeds of his assets, which he had disposed of, was committed to gaol for nine months.—*Re* MCLARTY, 12 O. W. R. 1171.—CAN.

5625 i. —— *Failure to answer questions satisfactorily.*]—On an application to commit for unsatisfactory answers on examination as assignor under Assignments Act, R. S. M. 1913 (c. 12), s. 52:—*Held:* the assignor might be punished in case of his refusal to disclose his property or transactions respecting same. — *Re* CHURCHILL (1919), 2 W. W. R. 541.—CAN.

5625 ii. —— ——.]—*Held:* evasive answers to questions put in reference to the preparation of bkpt.'s sched. justified the comr. in issuing a warrant for bkpt.'s commitment.—*Re* DOWNING (1845), 8 I. L. R. 494.—IR.

5629 i. —— —— *Sufficiency of answer.*]—If, upon his examination before the comr. in bkpcy., bkpt. swears to a disposition of his property, which no reasonable man can believe, the comr. is authorised in committing him, under 6 Will. 4, c. 14, s. 52.—*Re* CAULFIELD (1843), 5 I. L. R. 358.—IR.

5629 ii. —— —— ——.]—No matter how improbable the story of bkpt. may be, or how immoral or guilty his conduct, if he is corroborated by witnesses to such an extent as to lead the ct. to believe that his account may be true, he will not be committed for unsatisfactory answering.—*Re* MURPHY (1860), 12 Ir. Jur. 219.—IR.

5629 iii. —— —— ——.]—The true test with regard to unsatisfactory answering is whether the account given is such that a reasonable man ought to believe.—*Re* COURTNEY (1861), 13 Ir. Jur. 159.—IR.

5629 iv. —— —— ——.]—To a number of questions a judgment debtor replied that he did not know, or that he had forgotten:—*Held:* the answers could not be said to be unsatisfactory, although there was a strong suspicion that they were not altogether truthful.—MONKMAN *v.* ROBINSON (1886), 3 Man. L. R. 640.—CAN.

5629 v. —— —— ——.]—From the account books of bkpt. it appeared that the cost price of goods, purported to have been sold within seven months preceding the bkpcy., was £6,712, while the actual amount entered as having been realised by the sales was only

tradicted by independent testimony. It is sufficient if they be of a clearly improbable character.—*Re* MARTIN (1847), 4 Dowl. & L. 768 ; 2 Saund. & C. 33 ; 16 L. J. Q. B. 286 ; 9 L. T. O. S. 107 ; 11 Jur. 369 ; *subsequent proceedings*, 16 L. J. Bcy. 6.

5630. —— —— ——.]—It is not sufficient that bkpt. answers fully, roundly, & positively ; it is necessary that he should answer credibly & satisfactorily.—*Re* OLIVER, *Ex p.* OLIVER (1813), 2 Ves. & B. 244 ; 1 Rose, 407 ; 35 E. R. 312.

Annotations :—**Consd.** *Re* Kirby & Thomas, *Ex p.* Kirby (1829), Mont. & M. 212, L. C. **Mentd.** *Re* Feaks (1833), Mont. & B. 215, Ct. of R.

5631. —— —— —— **Whether evidence of third parties may be resorted to.**]—*Qu. :* whether, for the purpose of determining that the answers of bkpt. on his examination are unsatisfactory, the comrs. can resort to the evidence of third parties.—CROWLEY'S CASE (1818), 2 Swan. 1 ; Buck, 264 ; 36 E. R. 514, L. C.

Annotations :—**Refd.** *Re* Martin (1847), 16 L. J. Bcy. 6. **Mentd.** *Re* Leak (1829), 3 Y. & J. 46 ; *Re* Venables, *Ex p.* Bardwell (1834), Coop. *temp.* Brough. 440 ; Canadian Prisoners' Case, Watson's Case (1839), 9 Ad. & El. 731 ; *Re* Belson (1850), 7 Moo. P. C. C. 114, P. C.

5632. —— —— —— ——.]—The examination of a third person by comrs. is not evidence for the formation of their judgment, but merely a brief to enable them to interrogate the witness, & they have no right to commit the witness upon the evidence of such third person.—*Re* GOODWIN (1832), Mont. 304.

Annotation :—**Distd.** *Re* Feaks (1833), 2 Deac. & Ch. 226, Ct. of R.

5633. —— —— —— ——.]—*Qu. :* as to the influence which the examination of third parties should have on the committal of a bkpt. for not answering satisfactorily.—*Re* FEAKS (1833), Mont. & B. 215 ; 2 Deac. & Ch. 226 ; 2 L. J. Bcy. 46, Ct. of R.

5634. —— —— —— **Examination to be regarded as a whole.**]—Comrs. of bkpcy. committed a witness for giving unsatisfactory answers to questions :—*Held :* the true criterion by which to judge as to the propriety of the commitment was to consider all the questions & answers collectively & then to say whether the whole examination was satisfactory or not.—*Re* EHRENSTROM, *Ex p.* VOGEL (1818), 2 B. & Ald. 219 ; 106 E. R. 347.

Annotations :—**Follď.** *Re* Venables, *Ex p.* Bardwell (1834), Coop. *temp.* Brough. 440. **Mentd.** *Re* Cathcart, *Ex p.* Campbell (1870), 5 Ch. App. 703, L. JJ.

5635. —— —— —— ——.]—On a question of the legality of the commitment of a witness by comrs. of bkpcy., all the questions & answers must be looked at as forming one examination, & a witness cannot be committed for not answering as to his belief of the intention of bkpt., unless other parts of his examination show such belief to be material with reference to the person, trade, dealing, or estate of bkpt.—*Ex p.* BAGSTER (1828), 1 Man. & Ry. K. B. 572 ; 1 Man. & Ry. M. C. 218 ; *subsequent proceedings*, 2 Man. & Ry. K. B. 467.

5636. —— —— —— ——.]—Bkpt. on his examination before a comr., being asked what were his intentions when he went to Southampton, answered that he went to take rest & to make an arrangement for the benefit of his creditors. The comr., from what had previously passed, disbelieving the answer, held it to be unsatisfactory, & committed bkpt. to prison under 1849 Act, s. 260, for not answering to his satisfaction :—*Held :* notwithstanding the answer was a categorical answer to the question put, yet inasmuch as, taken in connection with the preceding portion of the examination, it was not a satisfactory explanation, the comr. was justified in committing bkpt.—*Re* LEGGE, *Ex p.* LEGGE (1853), 22 L. J. Q. B. 345 ; 21 L. T. O. S. 79 ; 17 Jur. 415 ; 1 W. R. 328 ; 1 C. L. R. 42.

Annotations :—**Refd.** *Re* Bradbury (1853), 2 C. L. R. 585.

5637. —— —— —— **Inability to give reasons.**]—Question. "You having stated to the comrs. that if you were out of prison, you could find the persons named by you as debtors to your estate, & being directed by the comrs. to communicate to your assignee how or where such persons could be found, & your assignee having called upon you & seen you in the Fleet Prison for that purpose, have you given him any such information ; & if not, why not ?" Answer. "I have not, & can give no reason why" :—*Held :* a commitment was bad.—*Re* CASSIDY, *Ex p.* CASSIDY (1815), 2 Rose, 217, L. C.

Annotations :—**Mentd.** *Re* Venables, *Ex p.* Bardwell (1834), 1 Mont. & A. 193, L. C.

5638. —— —— —— **Refusal to produce books & refresh memory.**]—A witness, who would have been able to answer questions more correctly if he had referred to his books, refused to produce them to refresh his memory, & was unable to answer satisfactorily :—*Held :* rightly committed for not answering satisfactorily.—*Re* DALE & HARDY (1822), Mont. & M. 271, n., L. C.

5639. —— **Failure to attend for examination—Validity of proceedings questioned.**]—On Apr. 1, 1889, judgment was recovered with costs in an action for libel brought against debtor, & on July 13, a bkpcy. notice was issued under 1883 Act, s. 4 (1) (*g*), upon which a receiving order was made by the county ct. registrar & debtor adjudicated bkpt. The validity of the bkpcy. proceedings was disputed by debtor, on the ground that the debt was not one in respect of

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£3,924, leaving, on the assumption that the goods disposed of only realised cost prices, a deficiency of £2,788. In his evidence bkpt. attributed the deficiency to the cutting of prices & to dishonesty on the part of employees, & a statement was presented purporting to account otherwise for £1,000 of the deficiency. The ct. considered the explanation of bkpt. insufficient, & ordered him to be committed to prison for unsatisfactory answering : —*Held :* there was evidence to justify the order of the ct.—*Re* CONWAY (1912), 46 I. L. T. 243.—IR.

5629 vi. —— —— ——.]—An order committing bkpt. & his wife to prison for unsatisfactory answering was made, on the grounds that their evidence as a whole was characterised by fencing & shuffling & a desire to avoid giving any definite answers if possible, & that it was plainly not candid :—*Held :* the ct. was entitled to form the opinion that it was false & unsatisfactory & justified in coming to the conclusion that a committal might induce the witnesses to make a full, true, & candid statement.—HOLLINSHEAD *v.* M'LOUGHLIN, [1917] 2 I. R. 28 ; 51 I. L. T. 1 ; [1916] W. N. 384, H. L.—IR.

i. —— —— *Validity of proceedings questioned.*]—Although it is bkpt.'s *bonâ fide* intention to show cause against his adjudication, on the ground that he has not committed any act of bkpcy., & he has taken the necessary proceedings to do so, he may, nevertheless, be committed for unsatisfactory answering, & for not giving up money in his possession, before the validity of the adjudication is decided.—*Re* DISPUTED ADJUDICATION (1866), 18 Ir. Jur. 324.—IR.

k. —— —— *Time for application.*]—An application for the committal of bkpt., on the ground of unsatisfactory answering, was founded on the general rambling & confused nature of bkpt.'s evidence, given at a previous sitting :—*Held :* a committal order under 1857 Act, s. 385, could only be made with regard to specific questions, & should be applied for at the time such questions were put.—*Re* BOLAND (1896), 30 I. L. T. Jo. 80.—IR.

5639 i. —— *Failure to attend for examination.*]—On an application to commit for unsatisfactory answers on examination as assignor under Assignments Act, R. S. M. 1913 (c. 12), s. 52 : —*Held :* the assignor might be punished in case of his non-attendance.—*Re* CHURCHILL (1919), 2 W. W. R. 541. —CAN.

5639 ii. —— ——.]—*Held :* Bkpcy. Act, 1867, s. 323, which gave power to

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which a bkpcy. notice could be issued, & he refused to submit himself to the jurisdiction of the ct. On Dec. 2, an order was made by the county ct. judge requiring debtor to attend the ct. for public examination which he failed to do, & a warrant for his arrest was subsequently issued by the county ct. judge who declined to allow the question of the validity of the bkpcy. proceedings to be gone into :—*Held :* the county ct. judge was right in refusing to review the decision of the registrar in making the receiving order ; & debtor having neglected to comply with the terms of an order of the ct. requiring him to attend for examination on a specified day a warrant for his committal was rightly made.—*Re* CLIFTON (LORD), *Ex p.* CLIFTON (LORD) (1890), 7 Morr. 59, D. C.

5640. —— Alleged insufficiency of statement of affairs—Prosecution under Debtors Act, 1869 (c. 62), necessary.]—On comparing certain of bkpt.'s property with the inventory, under which such property had been originally purchased by bkpt., it was discovered by the trustee in bkpcy. that articles & plant of the alleged value of between £200 & £300 were wanting, & an order was in consequence obtained requiring bkpt. to file a proper goods, cash & deficiency account for the six months immediately preceding his bkpcy. An account was filed by bkpt., who denied that he had disposed of any of the goods, but the account was alleged by the trustee to be insufficient ; & application was made to commit bkpt. for contempt by reason of his non-compliance with the order of the ct. :—*Held :* the ct. could not allow its powers to be used in such a case to obtain the committal of bkpt. to prison under colour of his not having filed a proper account, & if the trustee was of opinion that the statement of bkpt. that he had not disposed of the goods was untrue, the proper course was to institute a prosecution under Debtors Act, 1869.—*Re* DAVIS, *Ex p.* TURNPENNY (1892), 9 Morr. 278.

See, also, Nos. 5467, 5469, *ante*, & Part XXII., *post.*

5641. —— Refusal to disclose secret process.]—Bkpt., at his public examination, when questioned by the official receiver as to a secret process or invention which he had sold to a co., refused to disclose it or to write down the formula of it for the official receiver or for the trustee in bkpcy., on the ground that it was not " property " within 1914 Act, s. 15. The registrar, being of opinion that bkpt. ought to disclose the secret process, reported bkpt.'s refusal to the judge :—*Held :* bkpt. undertaking to give all information at a private examination under s. 25, the hearing on the report should be adjourned until after the private examination.—*Re* STEVENSON, [1918–19] B. & C. R. 106.

5642. Defences to application for committal—That examination not sufficiently minute.]—A commitment is defective if the comrs. do not examine with sufficient minuteness.—HOOTON'S CASE (1827), 2 Gl. & J. 215, L. C.

Annotation :—**Refd.** *Re* Venables, *Ex p.* Bardwell (1834), Coop. *temp.* Brough. 440, L. C.

5643. —— That service of summons not proved on oath.]—The comrs. are not bound to have information on oath of the service of a summons on a witness before they issue their warrant, but it is sufficient if the summons is actually served.—GROCOCK *v.* COOPER (1828), 8 B. & C. 211 ; 108 E. R. 1022 ; *sub nom.* GROCOCK *v.* COOPER, 2 Man. & Ry. K. B. 78 ; 1 Man. & Ry. M. C. 302 ; 6 L. J. O. S. K. B. 265.

5644. —— That business in regard to which account refused did not belong to bankrupt.]—At the public examination of an undischarged bkpt. he was questioned about a business which it was alleged he had, since the date of the receiving order, been carrying on under a name not his own. He asserted that the business was not his but his wife's, & that he only acted as her clerk. The registrar did not believe bkpt.'s statements, & on the application of the official receiver ordered bkpt. to file an account of his dealings in the business in question :—*Held :* if an application were made to the ct. to commit bkpt. for disobedience to the order, it would still be open to him to prove that the business belonged to his wife.—*Re* CRONMIRE, *Ex p.* CRONMIRE, [1894] 2 Q. B. 246 ; 63 L. J. Q. B. 616 ; 70 L. T. 610 ; 42 W. R. 417 ; 10 T. L. R. 389 ; 38 Sol. Jo. 386 ; 1 Mans. 79 ; 9 R. 376, C. A.

5645. —— That no notice to produce documents served on him had been given—Evidence of service.]—Debtor was adjudicated bkpt., & affidavits of service on him of the receiving order & order to attend the first meeting of creditors & of various letters from the official receiver were read at the hearing in support of a motion to commit, but bkpt., who did not appear and was not represented on the hearing of the motion, had not been served with notice to produce. On a motion to commit bkpt. for failure to attend the first meeting of creditors or to wait on the official receiver as required by 1914 Act, s. 22 :—*Held :* notice must be given to bkpt. to produce the documents served on him in connection with the application.

Evidence of service cannot be given, unless it is proved that the application came to debtor's notice (HORRIDGE, J.).—*Re* VAUGHAN, [1916] H. B. R. 55.

5646. Adjournment of application for committal.]—A motion to commit debtor for contempt will not, as a rule, be adjourned, even with the consent of all parties.—*Re* GRAIN, *Ex p.* LEE (1892), 9 Morr. 232.

5647. Form of warrant—Defective evidence must be stated in hæc verba.]—Comrs. having, on the evidence of third persons committed bkpt. for not answering satisfactorily, must state that evidence *in hæc verba* on the warrant of commitment, & a warrant stating only the effect of the evidence is defective in substance.—CROWLEY'S CASE (1818), 2 Swan. 1 ; Buck, 264 ; 36 E. R. 514, L. C.

Annotations :—**Consd.** *Re* Leak (1829), 3 Y. & J. 46. **Refd.** *Re* Venables, *Ex p.* Bardwell (1834), Coop. *temp.* Brough. 440 ; *Re* Martin (1847), 16 L. J. Bcy. 6. **Mentd.** Canadian Prisoners' Case, Watson's Case, *Re* Parker, R. *v.* Batcheldor (1839), 3 State Tr. N. S. 963 ; *Re* Belson (1850), 7 Moo. P. C. C. 114, P. C.

5648. —— Whether specific questions must be set out.]—A warrant of commitment by comrs., after setting out the issuing of the commission, the

summon bkpt.'s wife, or any person known to have part of his property, or supposed to be indebted to him, or believed to be capable of giving information, etc., & in case of disobedience empowered the ct. to grant a warrant of arrest, did not apply to the case of bkpt. himself failing to obey such a summons.—*Re* CUFF (1872), 2 C. A. 139.—N.Z.

5642 i. *Defences to application for committal—That examination not sufficiently minute.*]—*Held :* to justify a committal under 11 & 12 Geo. 3. c. 8, s. 26, it was not sufficient that the first answer or statement of bkpt. should be unsatisfactory, but the comrs. should have gone further with the examination & sifted the bkpcy. more thoroughly.—*Ex p.* FITZHENRY (1827), 1 Mol. 35.—IR.

1. —— *That plaintiff outside jurisdiction—Residence within jurisdiction presumed.*]—It was alleged that when the summons to examine issued, pltf. resided in the county, but not that he continued so resident at the issue of the summons to commit :—*Held :* sufficient, for that would be presumed.—PECK *v.* MCDOUGALL (1868), 27 U. C. R. 353.—CAN.

5647 i. *Form of warrant.*]—*Re* DOWNING (1845), 8 I. L. R. 494.—IR.

adjudication of bkpcy., etc., stated as the ground of commitment, that bkpt. being brought before them, & they having proposed to administer an oath to him, he refused to be sworn, or to give an account of his property:—*Held:* (1) such warrant was legal, & it was not necessary in it to set out any specific question in such case, for it was a refusal to answer all possible questions which could be suggested; (2) after the issuing of the writ of *habeas corpus*, & before the return to it, the comrs. might, if necessary, make a fresh warrant, stating more fully the cause for detaining bkpt. in custody, & such warrant might by words of reference incorporate the formal parts of the first warrant.—*Ex p.* PAGE (1818), 1 B. & Ald. 568; 106 E. R. 209.

Annotation:—**Consd.** *Re* Leak (1829), 3 Y. & J. 46.

5649. —— "Till he should full answer make," etc.—Answers to several questions sufficient if taken alone.]—Comrs. of bkpcy. committed a witness for giving unsatisfactory answers to questions:—*Held:* the fact that the comrs. in their warrant set out several questions, to some of which, taken alone, the answers were satisfactory, was no objection to a warrant committing the party "till he should full answer make to the questions so put to him as aforesaid."—*Re* EHRENSTROM, *Ex p.* VOGEL (1818), 2 B. & Ald. 219; 106 E. R. 347.

Annotations:—**Consd.** *Re* Venables, *Ex p.* Bardwell (1834), Coop. *temp.* Brough. 440. **Apld.** *Re* Cathcart, *Ex p.* Campbell (1870), 5 Ch. App. 703, L. JJ. **Mentd.** *Re* Reay (1847), 8 L. T. O. S. 476.

5650. —— Statement that bankrupt refused to be sworn.]—Bkpt. refused to be sworn before the comrs. until his attorney arrived:—*Held:* (1) a warrant for his commitment, stating generally the refusal of bkpt. to be sworn, was sufficient without assigning the reason for such refusal; (2) the warrant committing him until such time as he should submit himself to the comrs., & full answer make, to the questions which might be put to him by virtue of the commission, sufficiently pursued the terms of the oath to be taken by bkpt., as it must be intended that the questions which might be put by the comrs., would be legal questions.—NOBES *v.* MOUNTAIN (1822), 3 Brod. & Bing. 233; 7 Moore, C. P. 39; 129 E. R. 1273.

Annotation:—**Apprvd. but Distd.** *Ex p.* Leake (1829), 9 B. & C. 234.

5651. —— Whether all questions & answers must be set out.]—The whole of the questions & answers should be set out in the warrant of commitment.—TOMLIN'S CASE (1824), 1 Gl. & J. 373; *sub nom. Re* TOMLINE, 2 L. J. O. S. Ch. 120, L. C.

Annotations:—**Distd.** Atkinson's Case (1827), 2 Gl. & J. 218, L. C. **Extd.** *Re* Leak (1829), 3 Y. & J. 46. **Expld.** *Re* Venables, *Ex p.* Bardwell (1834), Coop. *temp.* Brough. 440.

5652. —— ——.]—In a commitment of bkpt., for not satisfactorily answering questions put to him in the course of an examination, the questions & answers, in respect of which the commitment proceeds, should be set forth & particularised, & a general allegation of the answers having been unsatisfactory is not sufficient.—*Re* HADLAND (1842), 1 Dowl. N. S. 835; 11 L. J. Q. B. 207.

Annotations:—**Consd. & Distd.** *Ex p.* Dauncey (1843), 4 Q. B. 668. **Distd.** *Ex p.* Dauncey (1843), 8 Jur. 829. **Dbtd.** *Re* Bull (1846), 15 L. J. Q. B. 235. *Hadland's Case* has been considered to be overruled (WIGHTMAN, J.). **Dbtd. & Distd.** *Ex p.* Ward (1846), 15 L. J. Q. B. 233. **Distd.** *Re* Lord (1847), 11 J. P. 696.

5653. —— ——.]—Bkpt. being committed by the comrs. applied for a *habeas corpus* on affidavit, which set out the conclusion only of the warrant as follows: "which answers so given on the same several examinations as aforesaid by," etc., "& the schedule by him referred to & hereunto annexed as part of this our warrant, not being satisfactory to us the comrs., these are to will," etc. It appeared from the affidavit that bkpt. had been several times examined, but no part of any examination was there set out:—*Held:* no defect appeared, it not being necessary that the warrant should further particularise the objections, & the examinations themselves not being brought before the ct.—*Ex p.* DAUNCEY (1843), 4 Q. B. 668; 3 Gal. & Dav. 640; 12 L. J. Q. B. 239; 7 Jur. 555; 114 E. R. 1050.

Annotations:—**Refd.** Anon. (1846), 7 L. T. O. S. 117. **Mentd.** *Re* Bull (1846), 15 L. J. Q. B. 235; *Ex p.* Ward (1846), 15 L. J. Q. B. 233.

5654. —— ——.]—A warrant of commitment set out at length the questions put to bkpt. in examination, & the answers given, & stated that the answers were unsatisfactory:—*Held:* it was not necessary to specify which particular answers were unsatisfactory.—*Re* BULL, *Ex p.* BULL (1846), 15 L. J. Q. B. 235; 10 Jur. 827.

Annotation:—**Mentd.** *Re* Terraz (1878), 39 L. T. 502.

5655. —— —— Warrant of recommitment.]—In a warrant for the committal of bkpt. for not answering satisfactorily, it is sufficient to state, that the answers of bkpt., set out in the examination, are not satisfactory; it is not necessary to state which of them are not so.

Where bkpt., who has been committed for not answering satisfactorily, is subsequently re-examined & remanded, it is not necessary that the warrant of re-commitment should set out the first examination, if the answers on the second are in themselves clearly unsatisfactory.—*Ex p.* DAUNCEY (1843), 12 M. & W. 271; 1 Dow. & L. 608; 13 L. J. Ex. 165; 2 L. T. O. S. 171; 8 Jur. 829; 152 E. R. 1200.

Annotations:—**Refd.** *Re* Lord (1847), 11 J. P. 696. **Mentd.** *Re* Terraz & Extradition Acts, 1870 & 1873 (1878), 39 L. T. 502.

5656. —— —— Whether "& amongst others, the following" sufficient.]—A warrant stating that various questions had been proposed "& amongst others, the following," is defective.—LAWRENCE'S CASE (1827), 2 Gl. & J. 209.

Annotation:—**Refd.** *Re* Venables, *Ex p.* Bardwell (1834), 1 Mont. & A. 193, L. C.

5657. —— Referring to but not setting out previous examinations.]—A warrant is defective, if it refers to, without setting out, previous examinations, & without which the ct. cannot judge of the sufficiency of what appears.—HOOTON'S CASE (1827), 2 Gl. & J. 215, L. C.

Annotation:—**Refd.** *Re* Venables, *Ex p.* Bardwell (1834), Coop. *temp.* Brough. 440, L. C.

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m. —— "*Until further order.*"]—Commitment by the Insolvent Ct. for a contempt, to remain in custody until further order, is legal.—WALSH *v.* JORDAN (1825), Sm. & Bat. 433.—IR.

5651 i. —— *Whether all questions & answers must be set out*—12 & 13 *Vict. c.* 107, *s.* 49.]—Bkpt. was examined & committed, his answers not being satisfactory. On a motion to discharge him from custody:—*Held:* the above sect., which directed that in a warrant of committal for refusing to answer questions, instead of setting out in the warrant the questions put to bkpt. & his answers, a reference should be made to the examinations or depositions on the files of the ct., extended to cases where bkpt. had been examined before the passing of that Act.—*Ex p.* CLARKE (1850), 3 Ir. Jur. 83.—IR.

5657 i. —— *Referring to but not setting out previous examinations.*]—Where the comrs. asked bkpt. "could he give any other account of his affairs," & he answered "none but that contained in the account given in this & in his former examination," & they then committed him:—*Held:* he should be discharged, & the comrs. should by particularising call bkpt.'s attention to the parts of the account with which they were dissatisfied, & enable the ct. without wading through the whole accounts to judge of the sufficiency of the answer.—*Re* MORRIS (1819), 2 Mol. 448.—IR.

Sect. 7.—Committal.]

5658. —— ——.]—A warrant is defective, if it refers to documents in a former examination, without setting them forth, so as to enable the ct. to decide upon the same information as the comrs. possessed.—PRICE'S CASE (1827), 2 Gl. & J. 211.

Annotations :—**Distd.** Atkinson's Case (1827), 2 Gl. & J. 218. **Consd.** *Re* Venables, *Ex p.* Bardwell (1834), Coop. *temp.* Brough. 440.

5659. —— **Concluding words must have direct reference to offence.**]—The concluding words of a warrant of commitment must be so limited as to have direct reference to the offence imputed in the preceding part.

A commitment, after reciting that bkpt. had surrendered, & that the comrs. examined him touching his trade, etc., & caused such examination to be reduced into writing, & read over to him, to which examination bkpt. did refuse to sign his name (not having a reasonable objection to the wording thereof or otherwise), required the gaoler to detain bkpt. in custody until such time as he should submit himself, & full answer make to the satisfaction of the comrs. to all such questions as should be put to him, & sign & subscribe such examination as aforesaid :—*Held :* the commitment was void.—*Ex p.* LEAKE (1829), 9 B. & C. 234 ; 109 E. R. 87.

Annotation :—**Refd.** Howard *v.* Gossett, Gossett *v.* Howard (1847), 6 State Tr. N. S. 319.

5660. —— ——.]—A warrant of commitment, after reciting an examination of bkpt., & that he refused to sign or subscribe such examination, proceeded as follows : "These are to require & authorise you, etc. to receive" etc. "into your custody, etc. until such time as he shall submit himself to us, etc., & shall sign or subscribe the examination, etc." :—*Held :* the submission was properly confined to the refusal to sign, & the warrant was not informal.—*Re* DAVIDSON (1830), 1 Mont. & M. 443, L. C.

5661. —— **Averment that questions lawful.**]—In a warrant of commitment by comrs. for not answering questions concerning bkpt.'s person, trade, dealings, etc., it is not necessary to aver that the questions were touching & concerning those matters, or were lawful questions. The ct., on *habeas corpus*, will look into the examination themselves, to see whether the questions were upon a subject within the jurisdiction of the comrs. —*Ex p.* HARRISON (1830), 1 B. & Ad. 410 ; 9 L. J. O. S. K. B. 53 ; 109 E. R. 840.

Annotations :—**Consd.** *Re* Venables, *Ex p.* Bardwell (1834), Coop. *temp.* Brough. 440. **Apld.** *Ex p.* Dauncey (1843), 4 Q. B. 668.

5662. —— **Unsatisfactory answers not precisely stated.**]—It is no objection to a warrant committing a witness, suspected to have obtained part of bkpt.'s estate by means of certain colourable fictitious sales, that it does not state precisely which were the unsatisfactory answers, nor that some of the questions put related not to sales by bkpt. to the witness but to other individuals.—*Re* VENABLES, *Ex p.* BARDWELL (1834), 1 Mont. & A. 193 ; Coop. *temp.* Brough. 440 ; 3 L. J. Bcy. 30 ; 47 E. R. 157.

Annotation :—**Refd.** *Re* Lampon, *Ex p.* Lampon (1834), 3 Deac. & Ch. 751.

5663. —— **Showing that bankrupt was sworn on examination.**]—A warrant of commitment of bkpt. for not giving satisfactory answers stated that the comr. proceeded to examine bkpt., & that bkpt. was "then duly sworn & required before me to make true answers," etc. The warrant then set out several questions & answers, & other adjournments & examinations, where bkpt. was stated to be "duly sworn" :—*Held :* the warrant was bad, as showing that bkpt. was sworn on his examination, contrary to 8 & 9 Vict. c. 48, s. 1.—*Re* RAMSDEN (1846), 3 Dow. & L. 748 ; 2 New Sess. Cas. 427 ; 15 L. J. M. C. 113 ; 11 J. P. 21 ; 10 Jur. 879.

5664. —— **Questions before single commissioner on previous examination—Description of court.**]—A warrant of commitment of bkpt. to prison, for not answering satisfactorily the questions put to him by a subdivision ct., need not set out the answers given before a single comr. on his previous examination, & if it state on the face of it that it is made by three comrs. of the Ct. of Bkpcy., "constituting a subdivision ct.," it is sufficient, & it need not show that the ct. was duly summoned, or in what manner it was constituted.—*Re* MARTIN (1847), 4 Dow. & L. 768 ; 2 Saund. & C. 33 ; 16 L. J. Q. B. 286 ; 9 L. T. O. S. 107 ; 11 Jur. 369 ; *subsequent proceedings*, 16 L. J. Bcy. 6.

5665. —— **Reference to unsworn affidavit.**]—A warrant issued by the Ct. of Bkpcy. under 1869 Act, s. 86, for the arrest of debtor, against whom a petition in bkpcy. had been presented on the ground that it had been made to appear to the satisfaction of the ct. that he had concealed or was about to conceal his books, stated a number of affidavits upon which the opinion of the ct. was founded. One of the affidavits did not appear to have been sworn :—*Held :* the warrant was bad, & must be set aside.—*Re* HEYMANN, *Ex p.* HEYMANN (1872), 7 Ch. App. 488 ; 26 L. T. 339 ; 20 W. R. 457, L. JJ.

5666. **Amendment of warrant—Error in date.**]—A warrant of committal of bkpt. was by mistake dated Mar. 2 instead of Feb. 2 :—*Held :* this was not such an error as could be amended.—*Re* M'GEE, *Ex p.* M'GEE (1821), 6 Madd. 206 ; 56 E. R. 1070.

5667. **Alteration of warrant—To enable officer to detain witness.**]—*Held :* the form of warrant ought to be altered, so as to enable an officer, who arrests a witness in order to bring him up for examination,

5662 i. —— *Unsatisfactory answers not precisely stated.*]—A committal for unsatisfactory answers is sufficient, which states that bkpt. was "duly" sworn, though it is to answer "all" questions, & not limited in the words of the Act to questions respecting his trade, etc., & does not state that the examination was taken in writing, or specify what particular answers are unsatisfactory, the warrant setting out an examination, on the face of it, proper, & answers which on the whole are "unsatisfactory," & which for this purpose need not be necessarily false.—*Re* HICKEY (1847), 10 I. Eq. R. 432.—IR.

5662. ii. —— ——.]—K. was committed under a warrant from the Ct. of Bkpcy., entitled in the matter of O., a bkpt., which recited that K., being present in the ct. on a day mentioned in the warrant, was required to submit to be duly sworn & examined, pursuant to the statute, & that K., having been sworn, then & there refused to answer a lawful question put to him by the ct., to wit, the question—"Do you remember being in the Mall House, Youghal, on Nov. 16 last,' but not further setting out or incorporating K.'s examination or deposition. A document was filed in the bkpcy. matter, purporting to be a shorthand-writer's note of K.'s examination on the date mentioned in the warrant, comprising the question set out in the warrant, & certain other questions which K. appeared to have answered, but that was not signed by K. :—*Held :* even assuming that the question set out in the warrant was in fact material & relevant, the warrant was bad.—*Re* KELLER (1887), 22 L. R. Ir. 158.—IR.

n. —— *Need not state that questions were put by judge.*]—It is not necessary that the warrant committing bkpt. for unsatisfactory answering should state that the questions were put by the judge, or that such should have been the fact. The words, "by & before me," at the commencement of the deposition are sufficient.—*Re* COURTNEY (1861), 11 I. Ch. R. 410.—IR.

o. —— *Binding on application for relief.*]—Where bkpt. has been committed for giving unsatisfactory answers to a disposition of his property, an affidavit containing additional statements of bkpt. is not admissible on an application to the Ct. of Queen's Bench to discharge bkpt. from custody, as the party is bound by the warrant.—*Re* CAULFIELD (1843), 5 I. L. R. 358.—IR.

to detain him in prison for such a reasonable period as may be necessary to ensure his attendance at the examination.—*Re* WEINBERG, *Ex p.* OFFICIAL RECEIVER (1907), 96 L. T. 790; 51 Sol. Jo. 388; 14 Mans. 277.

5668. Stay of proceedings on warrant—Pending appeal.]—Where application was made, pending appeal, for a stay of proceedings on a warrant granted by a county ct., to a Divisional Ct., of which the judge to whom bkpcy. business was assigned was not a member:—*Held:* (1) such judge not being a member of such Divisional Ct. it had no jurisdiction to hear & decide upon the application; (2) on application subsequently made to a Divisional Ct. sitting in bkpcy., a stay of proceedings should be granted.—*Re* MOON (1886), 3 Morr. 74, D. C.

5669. Execution of warrant—What amounts to.]—Comrs. make a warrant for the commitment of bkpt. for refusing to be examined, bkpt. being already confined to the King's Bench under previous process:—*Semble:* the issuing of the warrant by the comrs. did not amount to an imprisonment by them, till the warrant was in some way operative to the detention of the party independently of the other process, but if the warrant operated to the confinement of the party within narrower bounds, it was an imprisonment by the comrs.—CROWLEY *v.* IMPEY (1817), 2 Stark. 261.

Annotation:—**Refd.** Ferguson *v.* Kinnoull (1842), 9 Cl. & Fin. 251, H. L.

5670. —— Authority to break open door.]—An officer charged with a warrant for the arrest of debtor has authority to break open a locked door.—*Re* VON WEISSENFELD, *Ex p.* HENDRY (1892), 36 Sol. Jo. 276; 9 Morr, 30.

Annotation:—**Mentd.** *Re* Hirth, *Ex p.* Official Receiver (1899), 68 L. J. Q. B. 287, C. A.

See, further, Part XXII., Sect. 2, *post.*

5671. —— When complete.]—*Held:* a warrant for the arrest of a person issued under 1883 & 1890 Acts was not completely executed until the person was lodged in the prison named in the warrant.—*Re* CROPLEY, *Ex p.* FOX, [1911] 2 K. B. 309; 80 L. J. K. B. 822; 104 L. T. 720; 27 T. L. R. 391; 18 Mans. 119.

5672. In what prison debtor detained.]—An insolvent prisoner in the Queen's Prison was ordered to file his sched. under Judgments Act, 1838 (c. 110), s. 36, by an order made before the passing of 11 & 12 Vict. c. 7. After the passing of that Act the insolvent was removed to a ward in the first class of the prison, pursuant to the directions of s. 2, as a debtor neglecting or refusing to file a sched. of his property when ordered to do so by the Insolvent Ct., under Judgments Act, 1838, s. 36. A petition by the prisoner, under 32 Geo. 2, c. 28, s. 11, to be removed from the first class into the general prison, on the ground that 11 & 12 Vict. c. 7, applied only to cases where the order to file the sched. had been made previous to the passing of the Act, was dismissed, with costs.—STEAD *v.* ANDERSON (1850), 9 C. B. 262; 1 L. M. & P. 109; 19 L. J. C. P. 264; 137 E. R. 894.

5673. Application for relief—When granted.]—Where bkpt. had been committed by the comrs., for not answering satisfactorily, & was desirous of being examined before them again:—*Held:* in the special circumstances of the case, *viz.*, that bkpt. had been lying in prison twelve months, & was in a state of perfect destitution, he should be brought up, at the expense of the estate.—*Re* CROSSLEY, *Ex p.* CROSSLEY (1838), 3 Deac. 492; 8 L. J. Bcy. 26.

5674. When relief granted—Hearing of application.]—If comrs. think that bkpt. has not answered satisfactorily upon his examination, they are bound to commit him; but he may be discharged, either upon his answering satisfactorily to them at a subsequent time, or upon his answer already given, being deemed satisfactory by such other jurisdiction as he shall be brought before by writ of *habeas corpus*.

Upon a question of discharge from commitment by comrs., the Lord Chancellor will not go out of the return to the writ of *habeas corpus* into the conduct of bkpt. under the bkpcy. or into any examination other than that stated in the return to the writ.—*Re* OLIVER, *Ex p.* OLIVER (1813), 2 Ves. & B. 244; 1 Rose, 407; 35 E. R. 312.

Annotations:—**Consd.** *Re* Kirby & Thomas, *Ex p.* Kirby (1829), Mont. & M. 212, L. C. **Mentd.** *Re* Feaks (1833), Mont. & B. 215, Ct. of R.

5675. Effect of proceeding on invalid warrant—Liability in trespass of solicitor.]—If attorneys conducting the business of a fiat in bkpcy. take out a summons to attend before a comr. under 6 Geo. 4, c. 16, s. 33, which is disobeyed, & they afterwards obtain a warrant of the comr. to arrest & bring before him for examination the party so summoned, which warrant proves invalid, the attorneys are not liable in trespass, if they have taken no steps in the execution of the warrant except ordering it to be prepared by an agent, who, when it was ready, gave the messenger notice to take it, although the attorneys, in applying for the warrant, used urgency, & being told by the comr. that they must take it at their peril said they would do so.—COOPER *v.* HARDING (1845), 7 Q. B. 928; 5 L. T. O. S. 306; 9 Jur. 777; 115 E. R. 737.

Annotations:—**Consd.** *Re* Thin's Trust Deed, *Ex p.* Alexander (1863), 1 De G. J. & Sm. 311, L. C. **Apld.** Johnson *v.* Emerson (1871), L. R. 6 Exch. 329. **Mentd.** Williams *v.* Smith (1863), 14 C. B. N. S. 596.

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p. *Application for relief—What applicant must show.*]—When a prisoner, who has been committed to prison for unsatisfactory answering regarding the description of bkpt.'s property, applies to be brought up for examination, the affidavit must state fully the nature of the evidence he could & would give in relation to it.—*Re* CUMMINS (1870), 4 I. L. T. Jo. 769.—IR.

5673 i. —— *When granted—Copies of depositions not furnished within twenty-four hours after committal.*]—Bkpt. committed for unsatisfactory answering will be discharged from custody, if not furnished with copies of his depositions within twenty-four hours after committal.—*Re* MURPHY (1860), 12 Ir. Jur. 219.—IR.

5673 ii. —— *Prisoner's ill-health.*]—The bkpcy. judge has jurisdiction, on an *ex p.* application, to release from prison bkpt. committed to gaol for unsatisfactory answering, if it appears that the state of bkpt.'s health is such that further detention might prove fatal.—*Re* O'CONNOR (1916), 50 I. L. T. 49.—IR.

q. *Appeal—From order refusing relief.*]—Insolvent was committed for disobedience of an order by a county judge to produce certain books & papers. Afterwards he applied for his discharge, on the ground that he had complied with the order, but the county judge made an order refusing the application, & insolvent appealed to a judge in chambers at Toronto:—*Held:* (1) the judge at Toronto had no right to inquire into the legality or propriety of the warrant for arrest, or as to the nature or object of the imprisonment, or whether the warrant was an order, & so an appealable matter; (2) the last order of the county judge was not improperly made.—MCINNES *v.* DAVIDSON (1867), 4 P. R. 183.—CAN.

r. —— *From refusal of Queen's Bench Division to grant habeas corpus.*]—K. having been committed for giving unsatisfactory answers:—*Held:* an order of the Q. B. Div., refusing to grant a writ of *habeas corpus ad subjiciendum* on K.'s application was not a judgment in a criminal cause or matter, & an appeal from the order was competent.—*Re* KELLER (1887), 22 L. R. Ir. 158.—IR.

s. —— *From reversal of committal order by Court of Appeal—To House of Lords.*]—An appeal lies to the House of Lords from an order of the Ct. of Appeal, reversing a committal order made by the bkpcy. judge under Irish 1857 Act, s. 385.—HOLLINSHEAD *v.* M'LOUGHLIN, [1917] 2 I. R. 28; 51 I. L. T. 1; [1916] W. N. 384, H. L.—IR.

t. —— *When granted.*]—In order to discharge bkpt., the ct., before which he is brought on *habeas corpus*, must be fully satisfied that the judge below was wrong in committing him.—*Re* COURTNEY (1861), 11 I. Ch. R. 410.—IR.

Part XX.—Property Available for Distribution amongst Creditors.

SECT. 1.—DISCOVERY OF PROPERTY.

See Part XIX., *ante*.

SECT. 2.—GENERAL NATURE OF PROPERTY PASSING TO TRUSTEE AND OF HIS TITLE THERETO.

5676. General policy of bankruptcy law.]—The policy of the law is that every right belonging in any shape to bkpt. should pass to his assignees (EYRE, C.J.).—SMITH *v.* COFFIN (1795), 2 Hy. Bl. 444; 126 E. R. 641.

Annotations:—**Apld.** Michell *v.* Hughes (1830), 6 Bing. 689. **Distd.** Kearsey *v.* Carstairs (1831), 2 B. & Ad. 716. **Apprvd.** Beckham *v.* Drake (1849), 2 H. L. Cas. 579, H. L. **Refd.** Clark *v.* Calvert (1819), 8 Taunt. 742; Drake *v.* Beckham (1843), 11 M. & W. 315. **Mentd.** Goodright d. Fowler *v.* Forrester (1807), 8 East, 552; Doe d. Penwarden *v.* Gilbert (1821), 3 Brod. & Bing. 85; Monk *v.* Mawdsley (1827), 1 Sim. 286; Wilce *v.* Wilce (1831), 7 Bing. 664; Ackers *v.* Phipps (1835), 9 Bli. N. S. 430, H. L.

5677. ——.]—The general principle is that all rights of bkpt. which can be exercised beneficially for the creditors pass to the assignees (ERLE, J.).—BECKHAM *v.* DRAKE (1849), 2 H. L. Cas. 579; 13 Jur. 921; 9 E. R. 1213, H. L.; *affg.* S. C. *sub nom.* DRAKE *v.* BECKHAM (1843), 11 M. & W. 315, Ex. Ch.

Annotations:—**Apld.** Wetherell *v.* Julius (1850), 10 C. B. 267. **Consd.** Boddington *v.* Castelli (1853), 1 E. & B. 879, Ex. Ch.; Stanton *v.* Collier (1854), 3 E. & B. 274; Wadling *v.* Oliphant (1875), 1 Q. B. D. 145. **Folld.** Emden *v.* Carte (1881), 17 Ch. D. 169. **Consd.** Rose *v.* Buckett, [1901] 2 K. B. 449, C. A.; Bailey *v.* Thurston, [1903] 1 K. B. 137, C. A. **Refd.** Elliot *v.* Clayton (1851), 16 Q. B. 581; Kellaway *v.* Bury (1892), 66 L. T. 599, C. A.; *Re* Beyts & Craig, *Ex p.* Trustee (1894), 70 L. T. 561; Wilson *v.* United Counties Bank (1919), 88 L. J. K. B. 1033, H. L. **Mentd.** Hill *v.* Smith (1844), 13 L. J. Ex. 243; Williams *v.* Chambers (1847), 10 Q. B. 337; Bell *v.* Carey (1849), 8 C. B. 887; Emmens *v.* Elderton (1853), 13 C. B. 495, H. L.; Betts *v.* Burch (1859), 4 H. & N. 506; Richbell *v.* Alexander (1861), 30 L. J. C. P. 268; Spurr *v.* Cass, Cass *v.* Spurr (1870), 23 L. T. 409; Formby *v.* Barker, [1903] 2 Ch. 539, C. A.

See, further, Sect. 4, *post*.

5678. Whether trustee stands in place of bankrupt—Account stated by trustee.]—A man made a mtge., & after forfeiture for non-payment of the mtge. money he married, & conveyed the equity of redemption to trustees, to the use of himself for life, remainder to his wife for her jointure. Afterwards he became a bkpt., & the comrs. assigned the equity of redemption in trust for the creditors, & the assignees stated an account with the mtgee. The jointress having brought her bill to be relieved against the account, alleging it was not fairly stated, but that the assignees by combination with the mtgee., had allowed more money than was really due on the mtge.:—*Held:* (1) the assignees stood in the place of the husband, & the account by them stated ought to be as conclusive as if it had been stated with the husband; (2) as pltf. ought to have assigned particular errors in the account, pltf. should have leave to amend her bill.—KNIGHT *v.* BAMPFEILD (1683), 1 Vern. 179; 1 Eq. Cas. Abr. 12, pl. 6; 23 E. R. 399.

Annotation:—**Mentd.** Bourke *v.* Bridgeman (1729), 1 Barn. K. B. 272.

5679. —— Assignment of mortgage term prior to title of dower.]—The question being whether assignees of comrs. of bkpt. took an assignment of a mtge. term prior to the title of dower, it was insisted that creditors & assignees of comrs. of bkpt. stood only in the place of bkpt., & since such an assignment to bkpt. himself or his heir would not protect the estate from title of dower in the hands of the heir, neither would it protect the estate in the hands of the creditors of bkpt. or the assignee of the comrs.:—*Held:* pltf. should be let into her dower, keeping down the interest of a third part of the mtge.—SQUIRE *v.* COMPTON (1724), 2 Eq. Cas. Abr. 387, pl. 7; 9 Vin. Abr. 227, pl. 60; 22 E. R. 330.

5680. —— Dower established against trustee under joint commission.]—Dower established against assignees under a joint commission of bkpcy. upon estates purchased with the partnership fund, but conveyed to one partner under a specific agreement that the estates should be his, & he should be debtor for the money.—SMITH *v.* SMITH (1800), 5 Ves. 189; 31 E. R. 539, L. C.

Annotations:—**Apld.** Burridge *v.* Rowe (1844), 3 L. T. O. S. 1, L. C. **Mentd.** *Re* Chambers (1845), 5 L. T. O. S. 456; Kekewich *v.* Manning (1851), 18 L. T. O. S. 263, C. A.

PART XX. SECT. 2.

5676 i. *General policy of bankruptcy law.*]—Under the insolvent law a trustee duly appointed becomes *ipso facto* the owner of the property which at the time of the insolvency belonged to insolvents.—DICKINSON (TRUSTEE OF MCLEA'S INSOLVENT ESTATE) *v.* COMMERCIAL BANK (DIRECTORS) (1869), 5 Nfld. L. R. 289.—NFLD.

5676 ii. ——.]—The effect of [Scottish 1856] Act is to divest bkpt., & to invest the trustee in the entire estate, & it is not surprising that questions should have arisen as to the extent to which this transference of the legal title might or might not involve a corresponding transference of all equitable qualifications, which might have affected the estate in the hands of bkpt. (LORD KINNEAR).—BANK OF SCOTLAND (GOVERNOR) *v.* MACLEOD, [1914] A. C. 311; 83 L. J. P. C. 250; 110 L. T. 946, H. L.—SCOT.

5676 iii. ——.]—Where an order has been made vesting the property of a judgment debtor in the official assignee, the judgment debtor has no salable interest in the property.—RAM SOONDUR DEY *v.* SHOSHI MOHUN PAL CHOWDHRY (1882), 11 C. L. R. 389.—IND.

u. —— *Goods in possession of mortgagee.*]—Goods in the possession of a mtgee. cannot be seized & sold, & the proceeds paid over to a sheriff acting under a writ of attachment in insolvency against the mtgor.—WATSON *v.* HENDERSON (1876), 25 C. P. 562.—CAN.

w. —— *Ship.*]—*Held:* the provisions of Imperial Merchant Shipping Act did not prevent the property in the ship passing to the assignee under Insolvent Act, 1876.—JONES *v.* KINNEY (1885), 11 S. C. R. 708; 5 R. & G. 244.—CAN.

y. —— *Right of set-off.*]—At the date of mtgor.'s insolvency there existed a right of set-off in favour of the mtgor. for the balance due from mtgee. on their general dealings:—*Held:* such right of set-off passed to the official assignee of the mtgor., & a transferee of the security took it subject to the equity.—COURT *v.* HOLLAND (1881), 29 Gr. 19.—CAN.

a. —— *Interest under agreement of purchase.*]—Insolvent, before making an assignment for creditors, paid a fourth share of deposit to Govt. for the purchase of an island, & an agreement between him & deft. & others provided for an adjustment of accounts in case any of the partners paid more than his one-fourth share:—*Held:* his interest in the island enured to the benefit of his estate.—COLE *v.* DESCHAMBAULT (1914), 26 O. W. R. 348, 630; 6 O. W. N. 359, 673.—CAN.

b. —— *Right to ratable contributions to servants' wages.*]—The trustees of an insolvent estate can compel the receivers of the produce of the voyage to contribute ratably, *i.e.*, in a proportion compounded of the amount of the supplies they have issued & the value of the produce which has fallen into their hands, to the payment of the servants' wages.—BENNING & HOLOHAN (TRUSTEES) *v.* BROWN, HOYLES & CO. (1820), 1 Nfld. L. R. 199.—NFLD.

5678 i. *Whether trustee stands in place of bankrupt.*]—A lease was made for three lives (one of them was in being), to B., who subsequently disposed of his interest to M. by an agreement not under seal. M. paid the rent to the landlord & died intestate, leaving a widow who afterwards married Z. Z. became insolvent:—*Held:* his assignees were entitled to recover against Z. & the persons claiming under him.—MURPHY *v.* BURNS (1867), 1 I. L. T. Jo. 282.—IR.

5681. —— Bound by all acts fairly done by bankrupt.]—The assignees under the commission stand only in the place of bkpt., & are bound by all acts fairly done by him, notwithstanding they gain the legal estate, & this proves that assignees of bkpts. are not considered as purchasers of the legal estate for a valuable consideration for every purpose (LORD HARDWICKE, C.).—WALKER *v.* BURROWS (1745), 1 Atk. 93; 26 E. R. 61, L. C.

Annotations :—**Mentd.** Glaister *v.* Hewer (1802), 8 Ves. 195; Holloway *v.* Millard (1816), 1 Madd. 414; Smith *v.* Keating (1848), 6 C. B. 136, Ex. Ch.; Skarf *v.* Soulby (1849), 1 Mac. & G. 364; *Re* Tetley, *Ex p.* Jeffrey *v.* Tetley (1896), 3 Mans. 321, C. A.

5682. —— Bound by bankrupt's violation of statute.]—A., the proprietor of a newspaper, prevailed on B. to make & deliver to the Stamp Office an affidavit that B. was the proprietor of the paper. B. afterwards agreed to sell the paper to D. A. having become insolvent, his assignees filed a bill to set aside the sale for fraud :—*Held :* as B. had at A.'s instance violated 38 Geo. 3, c. 78, which required the true names of the proprietors of newspapers to be inserted in the affidavit, A.'s assignees were not entitled to the relief asked.—HARMER *v.* WESTMACOTT (1833), 6 Sim. 284; 58 E. R. 600.

Annotation :—**Mentd.** Prowett *v.* Mortimer (1856), 27 L. T. O. S. 132.

5683. —— Bankruptcy of bailee.]—A., by deed, dated Sept. 28, 1845, conveyed goods to B., subject to a proviso that if he should pay B. the sum thereby secured on Mar. 22, 1850, or at such earlier day or time as B. should appoint, by giving A. fourteen days' notice, & should pay interest in the meantime half-yearly, the conveyance should be void, & it was thereby agreed between the parties, that, until default should be made in the payment of the principal sum secured at the time therein specified, or the interest, after fourteen days' notice, it should be lawful for A., his exors. or administrators, to hold & enjoy the chattels. A. continued in possession of the chattels according to the agreement until Dec. 13, 1849, when he became bkpt., & his assignees, defts., on Feb. 19, 1850, sold the whole of the chattels absolutely & not merely bkpt.'s interest in them. No demand had been made on A. by B., or by pltfs., the assignees of B., for the principal money or interest in the meantime :—*Held :* the sale by the assignees was equivalent to a sale by the bailee himself, & trover would lie by the assignees of the mtgee. against the assignees of the mtgor., for the conversion by the sale of the goods during the term.—FENN *v.* BITTLESTON (1851), 7 Exch. 152; 21 L. J. Ex. 41; 18 L. T. O. S. 197; 155 E. R. 895.

Annotations :—**Apld.** Letts *v.* Whitmore (1852), 18 L. T. O. S. 254. **Distd.** *Re* Collins, *Ex p.* Harvey (1854), 1 Bankr. & Ins. R. 194. **Consd.** Spackman *v.* Miller (1862), 12 C. B. N. S. 659. **Reid.** Nyberg *v.* Handelaar, [1892] 2 Q. B. 202, C. A. **Mentd.** Brierly *v.* Kendall (1852), 17 Q. B. 937; Donald *v.* Suckling (1866), L. R. 1 Q. B. 585; Mulliner *v.* Florence (1878), 3 Q. B. D. 484, C. A.; Whiteley *v.* Hilt, [1918] 2 K. B. 808, C. A.

5684. —— Bound by bankrupt's acknowledgments—Except when considering proofs.]—A trustee is bound by the acknowledgments of bkpt., except in the exercise of his powers to admit or reject proofs.—LONDON & WESTMINSTER BANK *v.* BUTTON (1907), 51 Sol. Jo. 466.

Admission or rejection of proofs.]—*See, generally,* Part VIII., *ante.*

5685. —— Second bankruptcy.]—The trustee in a second bkpcy. only takes the right which bkpt. himself would have had.—*Re* PHILLIPS, [1914] 2 K. B. 689; 83 L. J. K. B. 1364; 21 Mans. 144; *sub nom. Re* PHILLIPS, *Ex p.* OFFICIAL RECEIVER, 110 L. T. 939; 58 Sol. Jo. 304.

Annotations :—**Mentd.** *Re* Stokes, *Ex p.* Mellish, [1919] 2 K. B. 256; *Re* Thellusson, *Ex p.* Abdy, [1919] 2 K. B. 735, C. A.

General position of trustee.]—*See* Part VII., Sect. 1, *ante.*

5686. Trustee has no higher right than bankrupt.]—From the moment a person becomes bkpt., the property of all his goods, debts, credits, etc. are vested in the assignees duly chosen under the commission, but they cannot declare in trover or *assumpsit* as of their own goods or debts, but must declare as assignees of bkpt., & deft. may wage his law, or plead the Stat. Limitations, as the case

c. —— *Prior assignment for creditors.*]—The effect of a legal assignment to trustees for creditors is, that it divests the beneficial interest of the property assigned from the assignor, & subsequent assignees of his estate under the bkpt. laws do not take it as his assignees, for they acquire a legal interest in such property only as can be applied to the payment of his creditors generally under the bkpt. laws.—ANDERSON *v.* GAMBLE (1852), 8 U. C. R. 437.—**CAN.**

d. —— ——.]—The capital of surviving partners having been lost, they, while the estate was supposed to be solvent, conveyed same to a trustee for creditors upon the request of the extrix. of a deceased partner, in consideration of a release by her from all liabilities. The extrix. afterwards, upon obtaining probate, conveyed her interest to the trustee. Subsequently the estate became insufficient to meet the liabilities :—*Held :* by the assignment to the trustee for valuable consideration, they had parted with all interest in the estate, & nothing passed to pltf., as assignee, under proceedings in insolvency.—DAVIDSON *v.* PAPPS (1880), 28 Gr. 91.—**CAN.**

e. —— *Not bound by unregistered agreement to give chattel mortgage.*]—An unregistered agreement by debtor, to give to his creditor upon default in payment, or upon demand, a chattel mtge. upon his "present & future goods & chattels," confers no title upon the creditor as against debtor's assignee for the benefit of creditors, who takes possession before a chattel mtge. is given.—HOPE *v.* MAY (1897), 24 A. R. 16.—**CAN.**

f. —— *Not bound by bankrupt's fraudulent acts.*]—A sequestration is not a bar to a claim for rescission of a contract, which has been induced by fraud on the part of bkpt. The trustee takes the estate *tantum et tale* as it stood in the person of bkpt., & the other creditors cannot complain that property is taken out of the sequestration, which would not have fallen into it but for the fraud of bkpt.—GAMAGE LTD. *v.* CHARLESWORTH (1909), 47 Sc. L. R. 191; [1910] 1 S. L. T. 11.—**SCOT.**

h. —— ——.]—Where a *cognovit* has been given by bkpt. in fraud of the bkpcy. law, & it is, with all steps taken under it, void, the assignee, in bringing an action against the sheriff, must be looked upon as contending for the interest of the creditors, & not merely as representing the person or estates of bkpt., & will not be estopped, as bkpt. might, from disputing the validity of the *cognovit* & subsequent proceedings on the ground of fraud.—PONTON *v.* MOODIE (1850), 7 U. C. R. 301.—**CAN.**

k. —— *Not bound by bankrupt's illegal acts.*]—To secure a gambling debt & a further advance the mtgor. mortgaged his motor car to deft., who seized the car. Shortly afterwards the mtgor. was adjudicated bkpt., & the official assignee claimed the car, which was still in deft.'s possession :—*Held :* as the bill of sale was bad because partly based upon an illegal consideration, the official assignee was entitled to succeed.—OFFICIAL ASSIGNEE OF MATENE MITA *v.* JOHNSTON, [1918] N. Z. L. R. 373.—**N.Z.**

5686 i. *Trustee has no higher right than bankrupt.*]—S., a trader, in Aug., 1899, procured the consent in writing of his creditors to payment of his debts, by notes at different dates extending to the following Mar. V., one of the creditors, insisted on more prompt payment of part of his claim & took from S. notes, all payable in Sept., which S. agreed in writing to pay at maturity, & did pay. In Nov., 1899, S. assigned for the benefit of his creditors, when the assignee & other creditors brought an action to recover $708 from V. as part of the estate :—*Held :* S. having paid the notes voluntarily without oppression or coercion, could not himself have recovered back the amount, & his assignee was in no better position.—LANGLEY *v.* VAN ALLEN (1902), 22 C. L. T. Occ. N. 222; 32 S. C. R. 174.—**CAN.**

5686 ii. ——.]—The proprietors of an estate appointed as their factor a party, a law-agent, in partnership with another individual. The factory transactions & accounts were entered in the books of the copartnery, but it did not appear that the proprietors had recognised the firm as their factors :—*Held :* the trustee upon the sequestrated estate of the firm was not entitled to claim a debt alleged to be due to the firm, in the capacity of factors on the above estate.—MABON (BELL'S TRUSTEES) *v.* CHRISTIE (1844), 6 Dunl. (Ct. of Sess.) 619.—**SCOT.**

Sect. 2.—General nature of property passing to trustee and of his title thereto.]

may happen to be or require.—KITCHEN *v.* CAMPBELL (1772), 3 Wils. 304 ; 95 E. R. 1069 ; *sub nom.* HITCHIN *v.* CAMPBELL, 2 Wm. Bl. 827.

Annotations :—**Consd.** Feltham *v.* Terry (1773), Lofft, 207, where a note of the judgment given in *Kitchen* v. *Campbell* will be found cited ; Hutton *v.* Balme (1833), 2 Tyr. 620, Ex. Ch. **Refd.** Ward *v.* Fry (1900), 17 T. L. R. 37. **Mentd.** Seddon *v.* Tutop (1796), 6 Term Rep. 607 ; Martin *v.* Kennedy (1800), 2 Bos. & P. 69 ; Balme *v.* Hutton (1831), 2 Cr. & J. 19 ; Garland *v.* Carlisle (1833), 2 Cr. & M. 31, Ex. Ch. ; Buckland *v.* Johnson (1854), 15 C. B. 145 ; Brunsden *v.* Humphrey (1884), 14 Q. B. D. 141, C. A. ; Furness, Withy *v.* Hall (1909), 25 T. L. R. 233.

5687. ——.]—The want of registration of a conveyance invalidates the deed as to subsequent purchasers only, not as to assignees of the party conveying the property.—*Re* RUCKER, *Ex p.* COLES (1832), 1 Deac. & Ch. 100 ; 1 L. J. Bcy. 18, Ct. of R.

Annotation :—**Refd.** *Re* Rucker, *Ex p.* Rucker (1834), 3 L. J. Bcy. 104, Ct. of R.

See, generally, REAL PROPERTY & CHATTELS REAL.

5688. —— **Attempt to evade set-off.**]—A. & Co. & B. & Co. respectively carried on the business of bankers at M. B. & Co. became bkpts., & at the time of their act of bkpcy. the two banks held notes & other securities of each other to nearly the same amount. The provisional assignee of B. & Co., knowing that fact, presented & obtained payment of the notes of A. & Co., partly at their bank, & partly at the house of their agents in London, who were ignorant of the situation in which the parties stood :—*Held :* A. & Co. might recover the amount so received, in an action for money had & received against the provisional assignee.

Deft. was provisional assignee of B. & Co., & in that capacity had their rights only (BAYLEY, J.).—EDMEADS *v.* NEWMAN (1823), 1 B. & C. 418 ; 2 Dow. & Ry. K. B. 568 ; 107 E. R. 155.

5689. —— **To property subject to lien—Solicitor.**]—Assignees have no higher rights with regard to deeds belonging to bkpt.'s estate, on which a solr. claims a lien for costs, than bkpt. himself had.—*Re* HEMSWORTH, *Ex p.* UNDERWOOD (1845), 5 L. T. O. S. 288 ; 9 Jur. 632.

See, further, SOLICITORS.

5690. —— **Tenant for life concurring in breach of trust.**]—A trustee, with the consent of the tenant for life, gave trust funds to his wife. The trust funds were lost, & in an action by infant remaindermen an order was made in the nature of a compromise, by which the trustee was to pay into ct. the sum paid away to the wife of the tenant for life, with interest. The order directed that the money should be applied in the first instance in satisfaction of the capital of the trust funds, & then of interest thereon on application for the purpose. The tenant for life at the date of the order was bkpt., & his trustee in bkpcy. declined to consent to the order, which was made without prejudice to his rights. The trustee of the settlement was dead, & the money in ct. exceeded the capital of the trust funds. The surplus of such money, after replacing the capital, was claimed by the personal representatives of the deceased trustee on the one hand, & by the trustee in bkpcy. of the tenant for life on the other hand :—*Held :* the trustee in bkpcy. stood in no better position than the tenant for life, who could not have called on the deceased trustee to make good his life interest, & the trustee in bkpcy. had no right to any of the surplus money as against the personal representative of the deceased trustee.—FLETCHER *v.* COLLIS, [1905] 2 Ch. 24 ; 74 L. J. Ch. 502 ; 92 L. T. 749 ; 53 W. R. 516, C. A.

5691. Property really & beneficially belonging to bankrupt—Indorsement of bill or note.]—If a trader deliver over a bill for a valuable consideration to another & forget to indorse it, he may indorse it after he has become a bkpt.

This is a good indorsement by bkpts. Nothing passes to the assignees of bkpt., but property that really & beneficially belongs to bkpt. Though bkpts. had the legal estate in this bill, yet it was unattended by any interest, & they were bound to indorse it (LORD KENYON, C.J.).—SMITH *v.* PICKERING (1791), Peake, 69, N. P.

Annotations :—**Consd.** Whistler *v.* Forster (1863), 32 L. J. C. P. 161. **Refd.** Watkins *v.* Maule (1820), 2 Jac. & W. 237 ; Burn *v.* Carvalho (1834), 1 Ad. & El. 883, Ex. Ch. **Mentd.** Nichols *v.* Client (1817), 3 Price, 547.

5692. —— ——.]—Bkpt., before failure, gave A. a promissory note, payable to bkpt.'s order, as security for a debt. After the bkpcy., on petition by A. to the Ch. Ct. :—*Held :* bkpt. or his assignee should indorse the note.—*Ex p.* GREENING (1806), 13 Ves. 206 ; 33 E. R. 272, L. C.

5693. —— ——.]—If a note or bill is transferred without indorsement for valuable consideration before the bkpcy., the holder may afterwards call on bkpt. or his assignees to indorse it, which will make it as valid as if it had been indorsed at first, for the equitable right attaches at the time of the transfer, & the assignees succeed to all equitable rights & liabilities of bkpt.—WATKINS *v.* MAULE (1820), 2 Jac. & W. 237 ; 37 E. R. 618 ; *subsequent proceedings* (1821), Jac. 105.

Annotations :—**Consd.** Whistler *v.* Forster (1863), 32 L. J. C. P. 161. **Refd.** Walters *v.* Neary (1904), 21 T. L. R. 146, C. A. **Mentd.** Bromage *v.* Lloyd (1847), 1 Exch. 32 ; Edge *v.* Bumford (1862), 9 Jur. N. S. 8.

5694. —— —— **Accommodation bill.**]—As an accommodation bill does not pass under a commission of bkpcy. against the payee, he may indorse it after an act of bkpcy., & his indorsee for a valuable consideration may recover it for the

5686 iii. ——.]—Action by the trustee of a ship's husband's sequestrated estate against the owners for payment of disbursements on account of the ship. Circumstances in which :—*Held :* pursuer as trustee had no higher or other right than bkpt., & plea of compensation sustained.—LINDSAY *v.* COX & CO. (1883), 10 R. (Ct. of Sess.) 1028 ; 20 Sc. L. R. 701. —**SCOT.**

5686 iv. ——.]—Goods, for which a bill was passed, were sold, & a memorandum given to the purchaser that they were to be kept to his order subject to the amount of the bill. They were in the vendor's possession when the vendee became bkpt. The vendee's assignee applied to get them for the general creditors, leaving the vendor to prove for his debt :—*Held :* the vendor was entitled to retain them.—*Re* GILBERT (1862), 14 Ir. Jur. 121.—**IR.**

5689 i. —— *To property subject to lien—Banker.*]—An indorsement on a title deed "lodged to cover overdraft," & signed by bkpt., gives a right of lien to the banker as against the assignees in bkpcy., as well as for overdue bills charged to bkpt.'s account as for money drawn out by cheques.—*Re* WILLIAMS (1869), 3 I. R. Eq. 346.—**IR.**

5689 ii. —— —— *Under company's articles of association.*]—Where under their articles of assocn. a co. had a lien over the shares of a shareholder, whose estate had been sequestrated :—*Held :* the trustee was subject thereto as bkpt. would have been.—SHARP (BELL'S TRUSTEE) *v.* COATBRIDGE TINPLATE CO., LTD. (1886), 24 Sc. L. R. 209.—**SCOT.**

5689 iii. —— —— *Under bye-laws of building society.*]—A bye-law of a building society required that a shareholder should have satisfied all his obligations to the society before he should be at liberty to transfer his shares. P., a director, in contravention of the bye-law, transferred his shares to a bank :—*Held :* the shares had always been charged under the bye-law with the amount of P.'s indebtedness to the society, & his creditors had only the same rights in respect of the shares as P. himself had when he made the abandonment of his property, *viz.*, to get the shares upon payment of P.'s indebtedness to the society.—SOCIÉTÉ CANADIENNE FRANCAISE DE CONSTRUCTION DE MONTREAL *v.* DAVELUY (1892) 20 S. C. R. 449.—**CAN.**

acceptor.—WALLACE *v.* HARDACRE (1807), 1 Camp. 45, N. P.

Annotations :—**Mentd.** Williams *v.* Bayley (1866), L. R. 1 H. L. 200 ; *Re* Mapleback, *Ex p.* Butt (1876), 46 L. J. Bcy. 14, C. A. ; Jones *v.* Merionethshire Permanent Benefit Bldg. Soc., [1892] 1 Ch. 173, C. A.

5695. —— —— Form of indorsement.]—Assignees were ordered to indorse a bill, which bkpt., before his bkpcy., had transferred to petitioner for a valuable consideration, but without indorsement, the indorsement to be special, so as to secure the assignees from personal liability.—*Re* EVEREST, *Ex p.* MOWBRAY (1820), 1 Jac. & W. 428 ; 37 E. R. 438.

Annotations :—**Distd.** *Re* Salisbury, *Ex p.* Brown (1824), 1 Gl. & J. 407. **Refd.** *Re* Gibbs, *Ex p.* Price (1844), 2 L. T. O. S. 426.

5696. —— —— ——.]—Where an unindorsed bill of exchange has been deposited by debtor with one of his creditors as a collateral security for his debt, & debtor becomes bkpt., the ct. will, in case of necessity, direct the assignees to indorse the bill *sans recours* for the benefit of the creditor.—*Re* GIBBS, *Ex p.* PRICE (1844), 3 Mont. D. & De G. 586 ; 13 L. J. Bcy. 15 ; 2 L. T. O. S. 477 ; 8 Jur. 545, Ct. of R.

Annotations :—**Mentd.** Thompson *v.* Speirs (1845), 9 Jur. 933 ; *Re* Goetz, Jonas, *Ex p.* Trustee (1898), 78 L. T. 399, C. A.

5697. —— —— Whole beneficial interest not divested.]—Bkpts. had given a promissory note as security for less than the amount of the note, without indorsement. A petition that bkpt. might be ordered to indorse it, was dismissed, on the ground that the whole beneficial interest was not out of bkpt.—*Re* SALISBURY, *Ex p.* BROWN (1824), 1 Gl. & J. 407.

Annotation :—**Refd.** *Re* Dean, *Ex p.* Rhodes (1837), 2 Deac. 364, Ct. of R.

See, further, BILLS OF EXCHANGE, PROMISSORY NOTES, & NEGOTIABLE INSTRUMENTS.

5698. Only property to which debtor entitled in law or in equity passes—Proceeds of bill procured by fraud.]—If A. fraudulently procure a bill of exchange from B. & afterwards become bkpt., & his assignees receive the money for the bill, B. may recover it from them in an action for money had & received.

The assignment under the commission passes only such property as bkpt. is conscientiously entitled to (LORD KENYON, C.J.).—HARRISON *v.* WALKER (1792), Peake, 150, N. P.

5699. —— Title deeds deposited with creditor.]—The property which passes to an assignee comprises only what insolvent was entitled to at law or in equity, & if he has deposited title deeds with a creditor, as security for a debt, the assignee has no right to the rents, nor any title to receive them.—GARRY *v.* SHARRATT (1830), 10 B. & C. 716 ; 5 Man. & Ry. K. B. 609 ; 8 L. J. O. S. K. B. 306 ; 109 E. R. 616.

Annotations :—**Consd.** *Re* Postle, *Ex p.* Bignold (1835), 4 Deac. & Ch. 259, Ct. of R. **Distd.** *Re* Burris (1851), 18 L. T. O. S. 292. **Consd.** *Re* Freeman, *Ex p.* Williams (1865), 12 L. T. 180. **Mentd.** *Re* Norman, *Ex p.* Burrell (1838), 3 Deac. 76 ; Finck *v.* Tranter (1905), 92 L. T. 297.

5700. Legal as well as equitable estate passes.]—In bkpcy., the legal as well as the equitable estate passes out of bkpt. (COLLINS, J.).—MINNA CRAIG S.S. Co. *v.* CHARTERED MERCANTILE BANK OF INDIA LONDON & CHINA, [1897] 1 Q. B. 55 ; 66 L. J. Q. B. 162 ; 75 L. T. 354 ; 13 T. L. R. 35 ; 8 Asp. M. L. C. 184 ; *affd.*, [1897] 1 Q. B. 460, C. A.

5701. —— Bill pledged for debt of smaller amount.]—Bkpts. had given a promissory note as security for less than the amount of the note, without indorsement :—*Held :* the legal interest in the note passed to the assignees by reason of its amount being beyond the debt for which it was pledged.—*Re* SALISBURY, *Ex p.* BROWN (1824), 1 Gl. & J. 407.

Annotation :—**Refd.** *Re* Dean, *Ex p.* Rhodes (1837), 2 Deac. 364, Ct. of R.

5702. Legal estate.]—On Sept. 29, 1893, land & premises were demised to A. for ninety-nine years. On Sept. 30, 1893, A. mortgaged the property by sub-demise, with a declaration of trust of the last day. In 1896 A. became bkpt., & his trustee assigned the premises to B. for the whole term, subject to the mtge. of Sept. 30, 1893. In 1918 the mtgee. under his power of sale sold the premises for the term created by the mtge. together with the benefit of the declaration of trust of the last day :—*Held :* the legal estate in the term vested in A.'s trustee & passed under the assignment to B.—*Re* CAINE'S MORTGAGE TRUSTS (1918), 63 Sol. Jo. 136 ; [1918-19] B. & C. R. 297.

5703. Equitable estate—Legal estate conveyed by error.]—A. agreed to sell to C. a copyhold, the legal title to which had, by mistake, been conveyed to B. A. subsequently was discharged under Insolvent Debtors Act. After his discharge, B. surrendered the copyhold to A., who surrendered it to C., & C. paid the purchase money to D. on A.'s behalf :—*Held :* A.'s assignee, under Insolvent Debtors Act, might recover the money from D.

The property in dispute was vested in insolvent at the time of the assignment of his effects to pltf. 1 Geo. 4, c. 119 transfers to insolvent's assignee all his equitable as well as legal estate, & he had an equitable interest in the property, the title to which had, by mistake, been conveyed to [B.] (BEST, C.J.).—TWISS *v.* WHITE (1826), 3 Bing. 486 ; 11 Moore, C. P. 413 ; 4 L. J. O. S. C. P. 165 ; 130 E. R. 601.

5704. Necessity for intimation of trustee's title—Transfer of public nature.]—The title of the assignees by assignment under a commission of bkpcy. does not, like an assignation by an individual, or upon particular contract, require intimation, being recognised as a transfer of a public nature, taking effect by operation of law as a transfer by

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5698 i. *Only property to which debtor entitled in law or equity passes.*]—*Held :* under Insolvent Act, 1869, s. 10, the assignee could take only what was the property of insolvent.—*Re* COLEMAN (1875), 36 U. C. R. 559.—**CAN.**

5698 ii. ——.]—Trustees in insolvency take no greater estate than that vested in insolvent.—O'DEADY'S TRUSTEES *v.* MCLOUGHLAN (1890), 7 Nfld. L. R. 457.—**NFLD.**

5704 i. *Necessity for intimation of trustee's title—Transfer of public nature.*]—Defts., insurance brokers in London, effected for G., a shipowner in Dublin, insurances upon the hull & chartered freight of one of his ships. The ship was subsequently lost. After the loss of the ship G. was adjudicated bkpt., & pltfs., the official assignees of the Irish Bkpcy. Ct., became the assignees of his estate. After the adjudication G. instructed defts. to collect from the insurance office, & to forward to him, the insurance money due upon the policies, which was done by defts. in due course. Defts. had no notice that G. had been adjudicated bkpt. In an action by pltfs., as assignees of G.'s estate, to recover the money so paid over by defts. to G. :—*Held :* under Irish 1857 Act, s. 267, the title of pltfs. was complete upon the adjudication, & they were entitled to recover.—MCENTIRE *v.* POTTER & CO. (1889), 22 Q. B. D. 438 ; 60 L. T. 600 ; 37 W. R. 607.—**IR.**

5704 ii. —— ——.]—The real estate of an absconding debtor is divested by the publication in the *Gazette* of the warrant of attachment, & vests in the trustees when appointed, & is not affected by a subsequent conveyance by debtor.—ROBICHEAU *v.* BLACK (1871), N. B. Dig. 2 (11).—**CAN.**

5704 iii. —— ——.]—It is not necessary that there must have been a declaration of insolvency before the appointment of the trustee could prevail against an unregistered deed, as the expression "trustee under subsequent insolvency" does not mean under a declared insolvency.—*Re* SAINT (1883), 6 Nfld. L. R. 477.—**NFLD.**

Sect. 2.—General nature of property passing to trustee and of his title thereto.]

marriage.—SELKRIG *v.* DAVIES (1814), 2 Dow, 230 ; 2 Rose, 97, 291 ; 3 E. R. 848, H. L.

Annotations :—**Mentd.** *Re* Cridland, *Ex p.* Cridland (1814), 2 Rose, 164, L. C. ; *Re* Mowat, *Ex p.* Geddes (1824), 1 Gl. & J. 414, H. L. ; Randall *v.* Randall (1835), 7 Sim. 271 ; Cockerell *v.* Dickens (1840), 3 Moo. P. C. C. 98, P. C. ; Fergusson *v.* Spencer (1840), 2 Scott, N. R. 229 ; Scott *v.* Bentley (1855), 1 K. & J. 281 ; Darby *v.* Darby (1856), 3 Drew. 495 ; *Re* Douglas, *Ex p.* Wilson (1872), 7 Ch. App. 490, L.JJ. ; *Re* Oriental Steam Co. (1874), 22 W. R. 622 ; Banco de Portugal *v.* Waddell (1880), 5 App. Cas. 161, H. L. ; Ewing *v.* Orr Ewing (1885), 10 App. Cas. 460, n. ; *Re* Artola Hermanos, *Ex p.* Châle (1890), 59 L. J. Q. B. 254.

See, also, No. 1956, *ante.*

5705. —— **Whether defeated by earlier intimation of adverse claim.**]—D., who had become bkpt. in 1852, was entitled to a contingent reversionary interest under a will. In 1853 he assigned the interest for value to a co., who gave notice to the trustees of the will, who at that time had had no notice of the bkpcy. The fund fell into possession in 1858 :—*Held :* the assignees in bkpcy. were entitled to the fund.—*Re* COOMBE'S WILL TRUSTS (1859), 1 Giff. 91 ; 5 Jur. N. S. 784 ; 7 W. R. 609 ; 65 E. R. 838.

Annotations :—**Consd.** Webb's Policy (1867), 36 L. J. Ch. 341. **Apld.** *Re* Bright's Settlmt. (1880), 13 Ch. D. 413, C. A. **Refd.** Semphill *v.* Queensland Sheep Investment Co. (1873), 29 L. T. 737.

5706. —— ——.]—H., a domiciled Australian, agreed to sell an estate to a co., but previously to the execution of the agreement he assigned half of his interest under it to W. H. became insolvent in Australia, & an official assignee was appointed there. Subsequently W. gave notice to the co. of his assignment, & afterwards the official assignee gave the co. notice of the insolvency :—*Held :* the notice given by W. was inoperative as against the official assignee.—SEMPHILL *v.* QUEENSLAND SHEEP INVESTMENT CO., LTD. (1873), 29 L. T. 737.

5707. —— ——.]—A person entitled to a reversionary share of a trust fund became bkpt. in 1866. The trustees of the fund had no notice of the bkpcy. till 1878. In 1871 bkpt. assigned his reversionary share for value to a purchaser, who had no notice of the bkpcy., & who gave immediate notice of the assignment to the trustees of the fund. The reversion fell into possession in 1878 :—*Held :* the title of the assignee in bkpcy. must prevail against that of the particular assignee.—*Re* BRIGHT'S SETTLEMENT (1880), 13 Ch. D. 413 ; 42 L. T. 308 ; 28 W. R. 551, C. A.

Annotations :—**Consd.** Palmer *v.* Locke (1881), 18 Ch. D. 381, C. A. **Distd.** *Re* Jakeman's Trusts (1883), 23 Ch. D. 344. **Consd.** McEntire *v.* Potter (1889), 22 Q. B. D. 438 ; *Re* Stone's Will (1893), 37 Sol. Jo. 354.

See, also, Nos. 5733, 5734, *post.*

5708. —— —— **Pleading.**]—Under Insolvent Debtors Act, 1826 (c. 57), s. 30, a debt due to insolvent will pass to the provisional assignee, although it has been assigned to a third party before insolvent's imprisonment, if notice of such assignment was not given to debtor before such imprisonment.

A plea in *assumpsit* alleged that the debt sued upon had vested in the provisional assignee, pltf. having become insolvent, & having executed an assignment under the Act. The replication alleged an assignment to a third party before the imprisonment, for good consideration :—*Held :* the replication was bad, for not alleging that debtor had notice of such assignment.—BUCK *v.* LEE (1834), 1 Ad. & El. 804 ; 3 Nev. & M. K. B. 580 ; 3 L. J. K. B. 260 ; 110 E. R. 1414.

Annotations :—**Refd.** Gibson *v.* Overbury (1841), 10 L. J. Ex. 219 ; West *v.* Reid (1843), 2 Hare, 249.

5709. —— —— **Effect of Companies Act, 1862 (c. 89).**]—At the time of his bkpcy. A. had shares in a limited co. standing in his name. The certificates were taken in possession by B., the assignee, but no steps were taken by him in respect of the shares, nor was any notice of the bkpcy., which was advertised in the *Gazette*, given to the co. for five years. In the meantime the shares were transferred by the co. into the name of C., bkpt.'s widow & extrix., & upon a statutory declaration that the original certificates had been lost or mislaid duplicate certificates were delivered to C. in Apr., 1860, pursuant to the articles of association :—*Held :* the title of D., a registered purchaser of the shares for value from C., prevailed against the assignee in bkpcy., who had taken no step for five years to assert his right.—*Re* LONDON & PROVINCIAL TELEGRAPH CO. (1870), L. R. 9 Eq. 653 ; 39 L. J. Ch. 419 ; 23 L. T. 237 ; 18 W. R. 597.

Annotation :—**Expld. & Distd.** *Re* Bright's Settlmt. (1880), 13 Ch. D. 413, C. A. The case seems to go on the ground that there had been a transfer of a legal title for value without notice (COTTON, L.J.).

5710. —— —— **Assignment of equitable interest in chose in action.**]—The doctrine in *Dearle* v. *Hall* (1828), 3 Russ. 1, as to the importance of notice of an assignment of an equitable interest in a chose in action, applies to assignees under a commission in bkpcy., equally with particular assignees, & assignees under a commission in bkpcy., who had omitted to give such notice, were postponed to a subsequent assignee for value, who gave due notice of his assignment.—*Re* BARR'S TRUST (1858), 4 K. & J. 219 ; 27 L. J. Ch. 548 ; 32 L. T. O. S. 9 ; 4 Jur. N. S. 1013 ; 6 W. R. 424 ; 70 E. R. 92.

Annotations :—**Consd.** *Re* Coombe's Will Trusts (1859), 1 Giff. 91 ; *Re* Vickress's Trusts (1859), 7 W. R. 542 ; *Re* Webb's Policy (1867), 36 L. J. Ch. 341 ; Palmer *v.* Locke (1881), 18 Ch. D. 381, C. A. **Refd.** *Re* Currie (1871), 41 L. J. Bcy. 55 ; Semphill *v.* Queensland Sheep Investment Co. (1873), 29 L. T. 737 ; Mercer *v.* Vans Colina (1897), [1900] 1 Q. B. 130, n.

5711. —— —— ——.]—A legatee of a reversionary interest under a will, which had been paid into ct. in an administration suit, presented a petition for liquidation in Mar., 1873, & a trustee was appointed. In July he assigned his interest in the legacy to J., who obtained a stop order on the fund in ct. In Nov., 1876, he assigned his interest to E., without notice of the liquidation, who also obtained a stop order on the fund. Afterwards the trustee in liquidation obtained a stop order. Pltfs. having purchased the interest of the trustee in liquidation & of J., & contracted to sell the legacy to deft. :—*Held :* having obtained a stop order before the trustee in liquidation, his interest was prior to that of the trustee's, & was an incumbrance on the estate.—PALMER *v.* LOCKE (1881), 18 Ch. D. 381 ; 51 L. J. Ch. 124 ; 45 L. T. 229 ; 30 W. R. 419, C. A.

Annotations :—**Consd.** *Re* Stone's Estate (1893), 9 T. L. R. 346. **Refd.** *Re* Jakeman's Trusts (1883), 23 Ch. D. 344 ; Mercer *v.* Vans Colina (1897), [1900] 1 Q. B. 130, n. **Mentd.** Burnaby *v.* Equitable Reversionary Interest Soc. (1885), 54 L. J. Ch. 466 ; *Re* Allsop & Joy's Contract (1889), 61 L. T. 213.

5712. —— —— ——.]—Bkpt. at the date of his bkpcy. was entitled to a reversionary interest

5704 iv. —— ——.]—The payee of a promissory note made & payable in Ontario, who had absconded to Michigan, while there, & after a writ of attachment in insolvency had issued against him in Ontario, indorsed the note for good consideration to pltfs., who took it *bonâ fide*. By the law of Michigan the indorsement was sufficient to pass the note to pltfs. :—*Held :* the title to the note had vested in the assignee before the indorsement, & pltfs. could not recover.—JENKS *v.* DORAN (1880), 5 A. R. 558.—CAN.

in a fund held by trustees. He was unaware of his interest & did not include it in his statement of affairs. It fell into possession after his discharge, & believing it to be unaffected by his bkpcy., he mortgaged it. The mtgee., who had no notice of the bkpcy., gave notice to the trustee:—*Held:* 1883 Act when vesting bkpt.'s equitable choses in action in his trustee, did not relieve him from the rules of equity as to perfecting his title by notice to the holders of the fund, & the mtgee. had priority for the amount of his debt.—*Re* STONE'S ESTATE (1893), 9 T. L. R. 346; 37 Sol. Jo. 354.

5713. **Trustee takes subject to all equities affecting bankrupt.**]—Assignees take the property subject to all equities affecting bkpt.—HINTON *v.* HINTON (1755), 2 Ves. Sen. 631, 638; 28 E. R. 402, 406, L. C.

Annotations:—**Mentd.** Brown *v.* Raindle (1796), 3 Ves. 256; Meeking *v.* Meeking, [1917] 1 Ch. 77.

5714. ——.]—T. having taken shares in a mining co., it became necessary, in order to complete his title, that he should sign a deed of association in London by a certain day. Finding that inconvenient, he desired his son H. to sign in his stead, & to let the shares stand in his, the son's, name. H. executed the deed & received a voucher, certifying him to be proprietor of seventy shares, not transferable without consent of the directors. H. afterwards sold the shares, & paid the proceeds to T., who had become bkpt. The assignees of T., having brought trover against T. & H. for the voucher & shares:—*Held:* there was no legal title, on which the assignees could maintain an action.

The assignees can only have an equitable right against H. to compel an assignment of the shares (*per* CUR.).—DAWSON *v.* RISHWORTH (1830), 1 B. & Ad. 574; 9 L. J. O. S. K. B. 96; 109 E. R. 901.

5715. —— **Bound to make good defective surrender of copyholds.**]—A. mortgaged copyhold land to B., but the surrender not being presented within the time limited by the custom, became void. Afterwards A. became bkpt. On a bill by B. against the assignees, the defective surrender was made good.—TAYLOR *v.* WHEELER (1706), 2 Vern. 564; 2 Salk. 449; 1 Eq. Cas. Abr. 122, pl. 3, 312, pl. 8; 23 E. R. 968.

Annotations:—**Consd.** Morrice *v.* Bank of England (1736), Cas. *temp.* Talb. 217, L. C.; Unwin *v.* Grosvenor (1739), West *temp.* Hard. 647, L. C.; Ineson *v.* Moulston, Vobe's Case (1742), 9 Mod. Rep. 373, L. C.; Tyrrell *v.* Hope (1743), 2 Atk. 558; Oxwith *v.* Plummer (1788), Gilb. Ch. 13, L. C. **Refd.** Jennings *v.* Moore (1708), 2 Vern. 609, L. C.; Brown *v.* Jones (1744), 1 Atk. 188, L. C.; Brown *v.* Heathcote (1746), 1 Atk. 160, L. C.; Hinton *v.* Hinton (1755), Amb. 277; Ross *v.* Army & Navy Hotel Co. (1886), 34 Ch. D. 43, C. A. **Mentd.** Whitworth *v.* Gaugain (1846), 1 Ph. 728, L. C.

5716. —— **Informal bill of exchange binding in equity.**]—B., a creditor under a commission for £79, drew on the assignees for that sum, payable to K. or order, out of B.'s share of the dividend to be made. The assignee accepted it by parol, but before any dividend became a bkpt. himself:—*Held:* K. was entitled to the whole £79, & not obliged to come in *pro ratâ* only, under the commission against the assignee.

Though this is not a legal bill of exchange at law, yet it is good in equity, petitioner having paid a valuable consideration for it, & it was a lien upon the effects of bkpt. as soon as they came to the assignee's hands (LORD HARDWICKE, C.)—*Ex p.* KIRK (1745), 1 Atk. 108; 26 E. R. 71, L. C.

5717. —— **Covenant for further assurance.**]—A tenant in tail made a mtge., with covenant for further assurance, & became bkpt.:—*Held:* his assignees were bound by the covenant.—PYE *v.* DAUBUZ (1792), 3 Bro. C. C. 595; Dick. 759; 29 E. R. 719, L. C.

Annotation:—**Mentd.** *Re* Brown, *Ex p.* Turpin (1832), Mont. 443, Ct. of R.

5718. —— ——.]—S. & A., debtors, of the first part, pltfs., the trustees, of the second part & the joint & separate creditors of the third part, entered into a deed whereby S. & A. assigned to pltfs. all their joint & separate goods, & A. covenanted to convey to them a reversion in fee expectant on the death of his mother. The deed also contained a covenant for further assurance. A. became bkpt., & his estate of A. vested in his assignees, against whom the trustees under the deed brought a bill to have the estate delivered to them:—*Held:* as the estate was bound by a specific covenant by bkpt. for further assurance, the trustees were entitled to his interest in the estate.—EDWARDS *v.* APPLEBEE (1765), 2 Bro. C. C. 652, n.; 29 E. R. 362.

5719. —— **7 Geo. 4, c. 57.**]—*Held:* the effect of the above Act was to vest in the assignee in insolvency all the property of insolvent, but subject to all equities to which it would be liable in the hands of insolvent.—*Re* ATKINSON (1852), 2 De G. M. & G. 140; 19 L. T. O. S. 237; 16 Jur. 1003; 1 W. R. 47; 42 E. R. 824, L. C.

Annotations:—**Refd.** *Re* Barr's Trust (1858), 4 K. & J. 219; Palmer *v.* Locke (1881), 18 Ch. D. 381, C. A.; Mercer *v.* Vans Colina (1897), 67 L. J. Q. B. 424. **Mentd.** Bartlett *v.* Bartlett (1857), 1 De G. & J. 127, L. JJ.; *Re* Webb's Policy (1867), 36 L. J. Ch. 341.

5720. —— **Rights increased by express provision of bankruptcy law.**]—The trustee takes all bkpt.'s property, subject to all the liabilities which affected it in bkpt.'s hands, unless the property which he takes as the legal personal representative of the bkpt. is added to by some express provision of the bkpcy. law.—*Re* GARRUD, *Ex p.* NEWITT (1881), 16 Ch. D. 522; 51 L. J. Ch. 381; 44 L. T. 5; 29 W. R. 344, C. A.

Annotations:—**Mentd.** Reeves *v.* Barlow (1883), 11 Q. B. D. 610; Climpson *v.* Coles (1889), 23 Q. B. D. 465; Church *v.* Sage (1892), 67 L. T. 800; Marshall *v.* Mackintosh (1898), 14 T. L. R. 458.

5721. —— —— **Reputed ownership.**]—The trustee takes bkpt.'s property & nothing more. Bkpt. cannot give him anything that is not either his own or made by 1883 Act, *e.g.* under the order & disposition clause, his own for the purposes of the Act. The trustee claims through bkpt., & takes bkpt.'s property & not somebody else's property.—BIRD *v.* PHILPOTT, [1900] 1 Ch. 822; 69 L. J. Ch. 487; 82 L. T. 110; 16 T. L. R. 173; 44 Sol. Jo. 246; 7 Mans. 251.

Annotations:—**Mentd.** London & County Contracts *v.* Tallack (1903), 51 W. R. 408; Preston's Trustee *v.* Cooke (1906), 75 L. J. Ch. 757; *Re* Connolly, Wood *v.* The Co. (1912), 106 L. T. 738, C. A.

See, further, Sect. 9, *post.*

5713 i. *Trustee takes subject to all equities affecting bankrupt.*]—Assignees cannot be in a better situation than bkpt. himself; they are in respect to his estate liable to all equities that would attach upon the estate in his possession.—SAUNDERS *v.* LESLIE (1814), 2 Ball & B. 509.—IR.

5713 ii. ——.]—Where the right to an estate is personal in bkpt., it passes to the trustee *tantum et tale.*

Circumstances in which:—*Held:* the trustee was not entitled to demand a charter from the superior, except subject to a prior right in favour of a third party constituted by bond & disposition in security from bkpt., though not followed by infeftment.—EDMOND *v.* GORDON (1858), 3 Macq. 116.—SCOT.

5713 iii. ——.]—B., a customer of bkpt., in the ordinary course of business gave him a bill for £200, which was sent to his bankers, but by mistake was not docketted with other bills then sent in, & was supposed to be lost. In lieu of it B. gave another bill, which the bank placed to bkpt.'s credit. B. had to pay both bills. The proceeds of the bills became part of bkpt.'s estate:—*Held:* the proceeds of the two bills did not pass to the assignees, & B. was entitled to be paid their amount out of the estate.—*Re* HALL (1863), 15 Ir. Jur. 256.—IR.

5713 iv. ——.]—FEDERAL LIFE ASSURANCE CO. *v.* STINSON (1906), 8 O. W. R. 929.—CAN.

Sect. 2.—General nature of property passing to trustee and of his title thereto.]

5722. —— —— **Relation back.**]—Debtor obtained the adjournment of a bkpcy. petition pending against him by paying petitioning creditors £125, which they accepted, on his representation made at the time that the money was not his but that of a third party. The representation was untrue. Within three months debtor was adjudicated bkpt., & the trustee, on the doctrine of relation back, claimed repayment of the £125 from petitioning creditors, on the ground that it was part of the property of bkpt. :—*Held :* the trustee had a higher & better title than debtor & was not estopped by debtor's misrepresentation from enforcing repayment of the money.—*Re* ASHWELL, *Ex p.* SALAMAN, [1912] 1 K. B. 390 ; 81 L. J. K. B. 360 ; 106 L. T. 190 ; 28 T. L. R. 166 ; 56 Sol. Jo. 189 ; 19 Mans. 49.

Annotations :—**Consd.** *Re* Hooley, *Ex p.* Trustee (1915), 84 L. J. K. B. 1415. **Follo.** *Re* Evans, *Ex p.* Salaman, [1916] H. B. R. 111.

See, further, Sects. 3 & 13, *post.*

5723. —— **Not purchaser for value.**]—An assignment from the comrs. in bkpcy., like any other assignment by operation of law, passes bkpt.'s rights in the same plight & condition as he possessed them. Even when a complete legal title vests in them, & there is no notice of any equity affecting it, they take subject to whatever equity bkpt. was liable to. This shows they are not purchasers for valuable consideration in the proper sense of the words (GRANT, M.R.).—MITFORD *v.* MITFORD (1803), 9 Ves. 87 ; 32 E. R. 534.

Annotations :—**Expld.** Wright *v.* Morley (1805), 11 Ves. 12. **Consd.** Hornsby *v.* Lee (1816), 2 Madd. 16 ; Purdew *v.* Jackson (1823), 1 Russ. 1 ; Honner *v.* Morton (1828), 3 Russ. 65, L. C. ; Pierce *v.* Thornely (1828), 2 Sim. 167 ; *Re* Courtney, *Ex p.* Pollard (1837), 2 Deac. 367, Ct. of R. ; *Re* Barr's Trusts (1858), 4 K. & J. 219. **Distd.** *Re* Jackson, *Ex p.* Union Bank of Manchester (1871), L. R. 12 Eq. 354. **Refd.** *Re* Brown, *Ex p.* Turpin (1832), 1 Deac. & Ch. 120, Ct. of R. ; *Re* Severn, *Ex p.* King (1835), 1 Deac. 143 ; Houlditch *v.* Wallace (1838), 5 Cl. & Fin. 629, H. L. ; Sturgis *v.* Champneys (1839), 5 My. & Cr. 97, L. C. ; Sherrington *v.* Yates (1844), 1 Dow. & L. 1032, Ex. Ch. ; *Re* Good, *Ex p.* Good (1850), 15 L. T. O. S. 50. **Mentd.** Stanton *v.* Hall (1831), 2 Russ. & M. 175, L. C. ; Corsbie *v.* Free (1840), Cr. & Ph. 64 ; Greedy *v.* Lavender (1850), 13 Beav. 62 ; Drewe *v.* Long (1853), 1 Eq. Rep. 58 ; Richbell *v.* Alexander (1861), 10 C. B. N. S. 324.

5724. —— **Bound as bankrupt would have been —Altered marriage settlement.**]—A trader, before marriage, agreed by parol to settle all his stock on his intended wife, which stock, it appeared afterwards, amounted then to £450 3 per cents., but in the marriage articles it was stated to be £340 stock, & the deed executed after marriage settled the same sum. The mistake, proved & accounted for by the witness who prepared the deed, & by bkpt., to have originated from the latter giving the sum of £340 as the value of the stock in money at that time, & the other setting it down as the amount of the stock itself, was admitted & agreed by bkpt., after his bkpcy. & absconding, to be rectified by the alteration of the sum as it stood in the articles & the deed from £340 stock to £450 stock, which was done, & the instrument re-executed, with the consent of bkpt. & his wife, & the trustees, & the whole stock having been sold out by the bkpt. before his bkpcy., & the amount paid into the hands of the trustees before such alteration, who after the bkpcy. purchased other stock with the money :—*Held :* however such an alteration might avoid the instruments if done with the consent of the parties interested, yet, inasmuch as one of the parties, the *feme covert*, to whom no fraud was imputed, was incapable, by such consent, of exonerating the trustees from the performance of the trust, but equity would probably set up again the destroyed instruments in her favour, the trustees, who had received such money under the instruments when they existed, in a valid form, held same subject to the purpose of the trust, & not for the benefit of the bkpt.'s estate, & the assignees could not recover in *assumpsit* from the trustees the value of the stock originally included in the marriage articles & deed, but only the surplus, which they were entitled to recover at law, the agreement for the settlement of the whole stock not being evidenced by writing before marriage within Stat. Frauds, but being the subject of equitable jurisdiction only, in the circumstances. —SHAW *v.* JAKEMAN (1803), 4 East, 201 ; 102 E. R. 807.

Annotation :—**Mentd.** *Re* Holland, Gregg *v.* Holland, [1901] 2 Ch. 145.

5725. —— **Marshalling.**]—Bkpt. to whom two estates were devised charged with the payment of legacies, had mortgaged each of them separately, & the assignees sold the estates subject to the unpaid legacies & the mtges. One of the estates sold for more than the amount of the mtge. money with which it was charged, the surplus being sufficient to pay the legacies. The proceeds of the other estate were scarcely sufficient to satisfy the mtge. on it :—*Held :* the outstanding legacies should be charged exclusively on the surplus proceeds of the first estate.

The bkpcy. of the mtgor. makes no difference, for the assignee take subject to all equities which were good against the estate before the bkpcy. (ERSKINE, C.J.).—*Re* TRISTRAM, *Ex p.* HARTLEY (1835), 1 Deac. 288 ; 2 Mont. & A. 496 ; 5 L. J. Bcy. 13, Ct. of R.

5724 i. —— *Bound as bankrupt would have been.*]—D., a solr., was employed to obtain a mtge., which he neglected to register, & subsequently he took a mtge. over the same property to himself & registered it. D. became bkpt., & his official assignee admitted that the mtge. to bkpt. did not take priority by registration & agreed to execute an acknowledgment on payment of a sum for his costs :—*Held :* he was bound to execute such acknowledgment apart from any agreement.—*Re* DAVIDSON, *Ex p.* LANIGAN (OFFICIAL ASSIGNEE) (1897), 18 N. S. W. B. 11.—AUS.

q. —— *Covenant for quiet enjoyment & against incumbrances.*]—A., seised of lands charged with an annuity, & of other lands not so charged, sold a portion of the former to B., & covenanted with him that the annuity should be exclusively borne by the latter. By a subsequent marriage settlement A. conveyed the indemnity lands to the use of himself for life, remainder to the use of such sons of the marriage as he should appoint to, remainder to the first & other sons in tail, & covenanted with the trustees for quiet enjoyment & against incumbrances. The annuity having fallen into arrear, a bill was filed to raise the arrears & secure the future gales. B. also filed a bill for a sale of the indemnity lands. Part was sold, the annuity & arrears were paid, & the balance of the purchase-money lodged in ct., on which devidends accumulated for many years. A. having afterwards become insolvent :—*Held :* the first son of the marriage was entitled as against insolvent's assignee to be recouped the sum paid in discharge of the annuity out of the dividends in ct.—COOTE *v.* O'REILLY (1844), 7 I. Eq. R. 356 ; 1 Jo. & Lat. 455.—IR.

s. —— *Mortgage.*]—T. & J. were entitled to receive grants of certain Crown lands, upon which the price had been paid to the govt. Before taking out their grants they mortgaged their rights to pltf. Subsequently they made a general assignment to defts. for the benefit of their creditors, & on pltf. seeking repayment of the amount loaned by him to T. & J., defts. refused to satisfy his claim :—*Held :* as assignees, they had only succeeded to such rights as T. & J. possessed at the time of the assignment, & those rights having been mortgaged to pltf., his claim should first be satisfied before they could deal with the land granted to them.—STEPHENS *v.* TWINING (1874), 9 N. S. R. 445.—CAN.

t. —— ——.]—A mtge. executed by insolvent, who has not obtained a certificate & discharge, is subject to the lien of the mtgee. in priority to the claim of the official assignee. —KERAKOOSE *v.* BROOKS (1860), 3 L. T. 712 ; 8 Moo. Ind. App. 339. —IND.

5726. —— ——.]—Bkpt. mortgaged personal chattels to a creditor, & was allowed to retain possession. He was also the owner of other chattels. His landlord distrained upon both sets of goods. The bailiff, at the request of the mtgee., held possession of the mortgaged goods for him, as well as the landlord, without prejudice to the landlord's rights. All that was before the bkpcy. After the bkpcy. a sale was made under the distress, by which the landlord's demand was satisfied. The goods sold were not all the goods subject to the distress, but included some subject to the mtge., & some of the goods not included in the mtge. remained unsold:—*Held:* the principle of marshalling must be applied between the mtgee. & the assignees, & fraud & reputed ownership being out of the question, the assignees & bkpt. were one, & the ordinary course where the first creditor had two funds of debtor, & the second creditor but one must be followed, & the landlord's debt thrown exclusively on the property not subject to the mtge.—*Re* STEPHENSON, *Ex p.* STEPHENSON (1847), De G. 586; 17 L. J. Bcy. 5; 10 L. T. O. S. 310; 12 Jur. 6.

5727. —— ——.]—A. employed brokers to purchase securities for him, the arrangement being that on each occasion they advanced him part of the purchase price & he paid the margin in cash or in account. It was also part of the arrangement that the money so advanced should be obtained by the brokers from their bankers on deposit of A.'s securities so purchased. The brokers pledged A.'s securities & their own with their bankers as cover for their current overdraft. On the bkpcy. of the brokers the bank paid themselves by selling A.'s securities, & handed over the surplus securities in their hands to the trustee in bkpcy.:—*Held:* by analogy to the doctrine of marshalling, A. was entitled to have the surplus securities in the hands of the trustee applied towards satisfaction of the balance due to him from the brokers on the account between them.—*Re* BURGE, WOODALL & CO., *Ex p.* SKYRME, [1912] 1 K. B. 393; 81 L. J. K. B. 721; 106 L. T. 47; 20 Mans. 11.

5728. —— **Sums advanced by factor—Payable out of compensation for seizure of goods by enemy.**]—A., in England, consigned goods to B., a factor, in Denmark. War having been declared by England the goods were confiscated on arrival by the Danish govt., but after B. had paid freight, duties, & other charges, A. having become bkpt., his assignees subsequently recovered compensation from the British govt.:—*Held:* out of the compensation money the assignees must pay B. the sums he had expended.—*Re* ATKINSON, *Ex p.* GOOD (1837), 2 Deac. 389; 3 Mont. & A. 246; 7 L. J. Bcy. 7; 1 Jur. 456, Ct. of R.

5729. —— **Agreement in equity charging goods.**]—H. & Co., being under a contract to deliver a quantity of sleepers to defts., applied to them for an advance of £600, on a cargo of timber, which had arrived, & was being discharged, but was not sawn up into sleepers, & which they stated would be sawn up in a day or two, & would then be worth £900. Defts. gave a cheque for £600, after which, & before any of the cargo was delivered, one of the firm of H. & Co. committed an act of bkpcy. Defts. thereupon seized the timber, a part of which only had been sawn into sleepers. In an action of trover, by the assignees of H. & Co. against defts., for the conversion of the timber:—*Held:* what passed between the parties, at the time the advance was made constituted an agreement in equity that the cargo should stand charged as security for the £600, & the property did not pass to the assignees, so as to enable them to bring an action.—LANGTON *v.* WARING (1865), 18 C. B. N. S. 315; 11 L. T. 633; 13 W. R. 347; 144 E. R. 465.

Annotations:—**Refd.** Young *v.* Matthews (1866), L. R. 2 C. P 127. **Mentd.** Brown *v.* Bateman (1867), L. R. 2 C. P. 272; Thompson *v.* Simpson (1870), 39 L. J. Ch. 857, L. C. & L. J.

5730. —— **Contract for valuable consideration.**]—An assignee takes the property of bkpt. subject to the equities that effect it in his hands, &, as a general rule, he will take it subject to the effect of any contract for valuable consideration entered into before the bkpcy.—*Re* SHELLEY, *Ex p.* STEWART (1864), 4 De G. J. & Sm. 543; 5 New Rep. 200; 34 L. J. Bcy. 6; 11 L. T. 554; 11 Jur. N. S. 25; 13 W. R. 356; 46 E. R. 1029, L. C.

Annotations:—**Mentd.** *Re* Worcester, *Ex p.* Agra Bank (1868), 3 Ch. App. 555, L. JJ.; *Re* Jackson, *Ex p.* Union Bank of Manchester (1871), L. R. 12 Eq. 354; Société Générale de Paris *v.* Tram. Union Co. (1884), 14 Q. B. D. 424, C. A.; Colonial Bank *v.* Whinney (1886), 11 App. Cas. 426, H. L.; *Re* Crouch, *Ex p.* Smith (1902), 83 L. T. 746.

5731. —— **Estoppel.**]—Where bkpt. who has obtained goods by fraud, would have been estopped from setting up his own fraud, his trustee is similarly estopped.—HARRIS *v.* TRUMAN (1882), 9 Q. B. D. 264; 51 L. J. Q. B. 338; 46 L. T. 844; 30 W. R. 533, C. A.

Annotations:—**Mentd.** Mercer *v.* Vans Colina (1897), 4 Mans. 363; *Re* Van Laun, *Ex p.* Chatterton (1907), 76 L. J. K. B. 644, C. A.; Chelsham & Woldingham Assocn. *v.* Hayward (1911), 76 J. P. 52.

5732. —— ——.]—A trader, being in financial difficulties, sold his business to a co. The subscribers to the memorandum of association of the co. were either his relatives or employees. No cash was paid by the co. for the business, & no shares were issued to the public, & all the shares

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v. —— —— *Right to redeem.*]—The master having appointed a day for payment by a mtgor. of the amount due to S. on an assigned judgment as well as on the mtge., the mtgor. made an assignment for the benefit of creditors before the day fixed for redemption:—*Held:* the assignee of the mtgor. could only redeem on payment of the total sum due to S. under the mtge. & the judgment assigned to him.—SCOTT *v.* SWANSON (1907), 27 C. L. T. 651; 39 S. C. R. 229.—**CAN.**

z. —— *Agreement to demise—Beneficial to estate.*]—An estate was limited to L. for life, with power to lease at the best rent. L. demised for years to a trustee to secure an annuity to G., & covenanted to exercise his leasing power. L. was afterwards discharged as an insolvent. L. & G. agreed to demise, & executed a lease:—*Held:* the provisional assignee was bound to execute it, since he took the estate subject to all the equities & liabilities to which it was subject in L.'s hands, & because the exercise of the power was beneficial to the creditors.—DYAS *v.* CRUISE (1845), 8 I. Eq. R. 407; 2 Jo. & Lat. 460.—**IR.**

5731 i. —— *Estoppel.*]—Where an official assignee claims property through bkpt., he is bound by estoppel, but not where he claims adversely to bkpt.

A person allowed another to give a bill of sale over his goods, & subsequently became bkpt.:—*Held:* the official assignee was estopped from saying the goods were the property of bkpt.—*Re* HAMILTON, *Ex p.* OFFICIAL ASSIGNEE & YORK & HAMILTON (1893), 14 N. S. W. B. 40.—**AUS.**

5731 ii. —— ——.]—K. having become security for repayment by H. of $600, an agreement in writing was entered into whereby H. assigned to K. "all his right & claim to the goods & stock-in-trade in the store of H. to an amount sufficient to reimburse K. whatever he may pay in consequence of becoming such security." The agreement was not registered & H. subsequently made an assignment for the benefit of creditors:—*Held:* the assignee had no more right to object to the non-registration than the assignor himself would have had, the assignee being merely the legal personal representative of debtor with such right as he would have had if not bkpt., & no other.—KITCHING *v.* HICKS (1884), 6 O. R. 739.—**CAN.**

a. —— *Verbal order to pay rent.*]—A verbal order by bkpt. before his bkpcy., accompanied by a receipt, directing his tenant to pay an equitable mtgee. a gale of rent then due, will be such an assignment of a chose in action as will entitle the mtgee. to recover it back from the assignee, who received it after the bkpcy.—*Re* BURRIS (1851), 18 L. T. O. S. 292.—**IR.**

Sect. 2.—General nature of property passing to trustee and of his title thereto. Sect. 3: Sub-sect. 1.]

that were issued were issued as fully paid up. The trader was appointed managing director of the co. Some months afterwards a receiving order was made against the trader, & the same day the co. passed resolutions for a voluntary winding up :—*Held :* the business & assets of the co. formed part of the property of bkpt. divisible amongst his creditors, subject to a first charge thereon in favour of the *bonâ fide* creditors of the co.

As far as bkpt. is concerned, the sale by him to the co. is a nullity, but so far as the *bonâ fide* creditors of the co. are concerned, it must be treated as a reality. Bkpt. would have been estopped from saying the sale was a nullity as regards them, & his trustee stands in the same position. The co. being merely the agents of bkpt., he is bound as principal to indemnify his agents against the obligations they have incurred on his behalf, & his trustee can only take the assets of the co. subject to the same duty (VAUGHAN WILLIAMS, J.).—*Re* CAREY, *Ex p.* JEFFREYS, [1895] 2 Q. B. 624 ; 73 L. T. 221 ; 43 W. R. 605 ; 11 T. L. R. 426 ; 39 Sol. Jo. 541 ; 2 Mans. 198 ; *affd.*, 44 W. R. 59, C. A.

Annotation :—**Consd.** *Re* Hirth, *Ex p.* Trustee, [1899] 1 Q. B. 612, C. A.

5733. —— Cannot obtain priority by giving notice.]—A trustee, being under the bkpcy. laws only statutory assignee of bkpt.'s choses in action subject to all equities existing therein at the date of the commencement of the bkpcy., cannot obtain priority over a good equitable mtge. thereof for value merely by giving notice before the mtgee.—*Re* WALLIS, *Ex p.* JENKS, [1902] 1 K. B. 719 ; 71 L. J. K. B. 465 ; 18 T. L. R. 414 ; 9 Mans. 136.

Annotation :—**Consd.** *Re* Anderson, [1911] 1 K. B. 896.

5734. —— ——.]—A statutory assignee, who first gives notice of his title to the trustees of a fund, obtains no priority by so doing over assignees for value, nor even over a prior statutory assignee, who may not have given notice.—*Re* ANDERSON, *Ex p.* NEW ZEALAND OFFICIAL ASSIGNEE, [1911] 1 K. B. 896 ; 80 L. J. K. B. 919 ; 104 L. T. 221 ; 18 Mans. 216.

See, also, Nos. 5705 *et seq., ante.*

5735. —— Third party's right to disaffirm contract.]—The title of the trustee to the goods he finds in bkpt.'s possession is subject to the rights of third parties, including that of the vendors of the goods to disaffirm the contract.—*Re* EASTGATE, *Ex p.* WARD, [1905] 1 K. B. 465 ; 74 L. J. K. B. 324 ; 92 L. T. 207 ; 21 T. L. R. 198 ; 12 Mans. 11 ; *sub nom. Re* EASTGATE, *Ex p.* TRUSTEE, 53 W. R. 432 ; 49 Sol. Jo. 205.

Annotation :—**Consd.** Tilley *v.* Bowman, [1910] 1 K. B. 745.

5736. —— ——.]—A sale of goods upon credit was induced by the fraud of the purchaser, who upon obtaining them pledged them with a pawnbroker. After the purchaser had paid part of the price a receiving order in bkpcy. was made against him. The vendor then discovered the fraud & disaffirmed the contract, retaking possession of the goods upon payment to the pawnbroker of the sum advanced upon them. The purchaser having been adjudicated bkpt., his trustee brought an action against the vendor, claiming (1) to recover the goods or their value after giving credit for the sum paid to the pawnbroker to redeem them, or (2) in the alternative to recover the amount paid to the vendor on account of the purchase price :—*Held :* the trustee acquired the property in the goods subject to the right of the vendor to disaffirm the contract of sale & to retake possession of the goods, & as the vendor had a right to disaffirm the contract after the date of the receiving order, the trustee was not entitled to recover the goods or their value.—TILLEY *v.* BOWMAN, LTD., [1910] 1 K. B. 745 ; 79 L. J. K. B. 547 ; 102 L. T. 318 ; 54 Sol. Jo. 342 ; 17 Mans. 97.

5737. Liability for permissive waste.]—BACON *v.* SMITH, No. 6079, *post.*

See, also, Nos. 5678 *et seq., ante,* & cases in Sect. 4, sub-sect. 5, *post.*

5738. Trustee takes subject to order of criminal court—Funds on prisoner when arrested.]—After the conviction of a prisoner for felony the ct. made an order, under Forfeiture Act, 1870 (c. 23), s. 3, for payment of the costs of the prosecution out of the money found on prisoner at the time of his apprehension. Between his arrest & conviction prisoner was adjudged bkpt. :—*Held :* the order was rightly made, the trustee taking the property of bkpt., subject to the possibility of the criminal ct. making the order in question. *Qu. :* whether such an order would be valid, if prisoner were adjudicated bkpt. in respect of an act of bkpcy. committed before his apprehension.—R. *v.* ROBERTS (1873), L. R. 9 Q. B. 77 ; 43 L. J. M. C. 17 ; 29 L. T. 674 ; 37 J. P. 756 ; 22 W. R. 60 ; 12 Cox, C. C. 574.

Right of auctioneer to set up title of trustee after notice.]—*See* AUCTION & AUCTIONEERS, Vol. III., pp. 29, 30.

SECT. 3.—RELATION BACK OF TITLE OF TRUSTEE.

SUB-SECT. 1.—IN GENERAL.

See 1914 Act, ss. 37, 45, & 46.

5739. Doctrine not to be extended further than necessary.]—The doctrine of the relation of the act of bkpcy. is in all cases extremely hard, & in many shocking, & it is not to be carried further than we are compelled to carry it (MANSFIELD, C.J.).—COLES *v.* WRIGHT (1811), 4 Taunt. 198 ; 128 E. R. 305.

c. —— *Secret trust.*]—A widow by writing duly signed, sealed, & attested, released to her son W. $14,477.95, "standing to my account in my son W.'s books at this date, & which I intended to give him ; I hereby give it to him & release him from all claim in respect thereof." W. afterwards made an assignment under Insolvent Acts. In a suit by the official assignee claiming the money for W.'s creditors, the ct. allowed parol evidence to be given, showing that such release, though absolute in form, was, as to one-half of the amount transferred, intended to create a trust in favour of another son, A., his wife & children, & the ct. being satisfied of the truthfulness of such evidence, dismissed the bill.—KERR *v.* READ (1876), 23 Gr. 525.—**CAN.**

f. —— *Calgary business tax.*]—Goods subject to the charge imposed by the Calgary City Charter, in respect to business tax, remain subject thereto in the hands of an assignee for the benefit of the creditors of the person assessed, but since goods are not liable for a tax on land, unless when seized they are the property of the person assessed, they are not liable when seized after they have been assigned for the benefit of such person's creditors.—*Re* TARDY (1918), 3 W. W. R. 137.—**CAN.**

5733 i. —— *Cannot obtain priority by giving notice.*]—An assignee cannot acquire priority over a prior vendee of insolvent by prior registration of the instrument appointing such assignee.—COLLVER *v.* SHAW (1873), 19 Gr. 599.—**CAN.**

5733 ii. —— ——.]—A mtge. was made on Oct. 15, 1896, to defts. followed on Oct. 21, by an assignment by the mtgor. to pltf. for the benefit of creditors :—*Held :* pltf. occupied no higher position than his assignor, & could not be regarded as a subsequent purchaser for valuable consideration so as to avail himself of the provisions of Registry Act with regard to the registration of the assignment before the mtge.—CRAIG *v.* MCKAY (1906), 12 O. L. R. 121 ; 7 O. W. R. 507.—**CAN.**

Annotations :—**Consd.** Tope *v.* Hockin (1827), 7 B. & C. 101. **Mentd.** Pearson *v.* Graham (1837), 6 Ad. & El. 899; Kynaston *v.* Crouch (1845), 14 M. & W. 266.

5740. —— Statutory limitations.]—The doctrine of relation in bkpcy. has operated with severity, & that consideration has probably occasioned the alteration of the law [by 6 Geo. 4, c. 16, s. 50] (ABBOTT, C.J.).—KINDER *v.* BUTTERWORTH (1826), 6 B. & C. 42; 9 Dow. & Ry. K. B. 47; 5 L. J. O. S. K. B. 23; 108 E. R. 369.

Annotation :—**Mentd.** Bittleston *v.* Timmis (1845), 1 C. B. 389.

5741. Application to orders vesting property in order & disposition of bankrupt in trustee.]—*Held :* under 1849 Act, s. 125, which made an order necessary for the vesting of property in goods in the order & disposition of bkpt., as reputed owner, in the assignees or vendee of the goods, the title of the assignees related back to the act of bkpcy. in the same manner as the title of the assignees by the general assignment had relation back.—HESLOP *v.* BAKER (1853), 8 Exch. 411; 22 L. J. Ex. 333; 20 L. T. O. S. 191; 17 J. P. 136; 155 E. R. 1408.

Annotations :—**Folld.** Webb's Policy (1867), 36 L. J. Ch. 341. **Mentd.** Fielding *v.* Lee (1865), 18 C. B. N. S. 499; Cooke *v.* Hemming (1868), L. R. 3 C. P. 334.

5742. Whether ground for debtor to bankrupt refusing payment.]—Where two partners have stopped payment, & a commission is taken out against one of them, a debtor to the firm, who knows of the stoppage, cannot refuse to pay money due to them, on the ground that the other may have committed an act of bkpcy., in which case his assignees might call upon debtor to pay a moiety of the money a second time.—PRICKETT *v.* DOWN (1811), 3 Camp. 131, N. P.

Annotation :—**Consd.** Garland *v.* Carlisle (1837), 4 Cl. & Fin. 693, H. L.

5743. —— Payment into court—Costs.]—A creditor, who had committed an available act of bkpcy., demanded payment from his debtors, but they refused to pay, upon the ground that they had notice of the act of bkpcy. The creditor sued them, & they paid the money into ct. under an order made upon their application. Pltf. issued a summons for judgment under R. S. C. Ord. 14, which was adjourned until the expiration of three months from the date of the act of bkpcy. After the three months expired pltf. obtained leave to sign final judgment, & an order that each party should pay their own costs, except that defts. should pay pltf.'s costs of the application to pay into ct. :—*Held :* defts. were entitled to their costs of the action, including the costs of the application to pay into ct.—MCCARTHY *v.* CAPITAL & COUNTIES BANK, [1911] 2 K. B. 1088; 81 L. J. K. B. 14; 105 L. T. 327, C. A.

Annotation :—**Consd.** *Re* Debtor, No. 211 of 1912, [1912] 2 K. B. 533, C. A.

5744. Validity of receiving order made on bankruptcy notice served by bankrupt judgment creditor.]—A judgment debtor was served by his judgment creditor with a bkpcy. notice to pay the amount of the debt or secure or compound for the same. Previously to the service of the notice the judgment creditor had himself committed an act of bkpcy., in respect of which he was subsequently adjudicated bkpt. & a trustee was appointed in his bkpcy. :—*Held :* having regard to the relation back of his trustee's title, the judgment creditor was not in a position to issue & serve the bkpcy. notice, & a receiving order which had been made upon debtor in respect thereof must be discharged.—*Re* A DEBTOR, No. 211 OF 1912, [1912] 2 K. B. 533; 81 L. J. K. B. 1169; 107 L. T. 3; 56 Sol. Jo. 689; 19 Mans. 309, C. A.

5745. To whom doctrine applies—Mortgagee.]—A mtgee. was not permitted to tack as against assignees a mtge. subsequent to an act of bkpcy., though without notice, & previous to the commission, & though he had the legal estate.—*Ex p.* HERBERT (1806), 13 Ves. 183; 33 E. R. 263.

5746. —— Mere bearer.]—A trader in prison employed an auctioneer to sell goods, who sent him the proceeds by the hands of deft. The trader became bkpt. by lying two months in prison :—*Held :* his assignees could not recover from deft., who was a mere bearer, the money he had so received & paid over.

We find no case, in which this doctrine of relation of an act of bkpcy., committed by suffering imprisonment, has been carried so far as to charge a man with money received for a trader lying in prison, at a time before he became bkpt. (MANSFIELD, C.J.).—COLES *v.* WRIGHT (1811), 4 Taunt. 198; 128 E. R. 305.

Annotations :—**Folld.** Tope *v.* Hockin (1827), 7 B. & C. 101. **Consd.** Kynaston *v.* Crouch (1845), 14 M. & W. 266. **Refd.** Pearson *v.* Graham (1837), 6 Ad. & El. 899.

5747. —— Crown.]—Though named in some sects. of 1869 Act, the Crown is not bound by the other provisions, & the relation back of the title of a trustee in a liquidation to the filing of the petition does not affect the rights of the Crown under an extent, issued against the property of debtor between the filing of the petition & the appointment of a trustee.—*Re* BONHAM, *Ex p.* POSTMASTER-GENERAL (1879), 10 Ch. D. 595; 48 L. J. Bcy. 84; 40 L. T. 16; 27 W. R. 325, C. A.

Annotations :—**Refd.** *Re* De Keysers Royal Hotel, De Keysers Royal Hotel *v.* R., [1919] 2 Ch. 197, C A. **Mentd.** Mersey Docks & Harbour Board *v.* Lucas (1881), 51 L. J. Q. B. 114, C. A.; *Re* Utley (1901), 17 T. L. R. 349.

5748. —— Agent.]—With regard to dealing with debtor's property after an act of bkpcy. has been committed, an agent is on the same footing as other persons, & if there is an adjudication within three months after the agent has dealt with the property he must risk it.—*Re* LAMB, *Ex p.* GIBSON & BOLLAND (1886), 55 L. T. 817; *affd.* on other points (1887), 3 T. L. R. 303, C. A.

Annotations :—**Mentd.** Barr *v.* Kingsford, Oakley Claimant (1887), 56 L. T. 861, D. C.; *Re* Crook, *Ex p.* Crook (1890), 24 Q. B. D. 320, C. A.; Crook *v.* Morley, [1891] A. C. 316, H. L.; *Re* Entwistle, *Ex p.* Turner (1891), 65 L. T. 349, D. C.; *Re* Selwood, *Ex p.* Dash (1894), 1 Mans. 66, D. C.; *Re* Waite, *Ex p.* Bentley's Yorkshire Breweries (1894), 71 L. T. 778, D. C.; *Re* Phillips, *Ex p.* Thomas (1897), 76 L. T. 531, D. C.; Clough *v.* Samuel, [1905] A. C. 442, H. L.; *Re* Midgley (1913), 108 L. T. 45, D. C.

5749. To what doctrine applies—Generally—Goods & money.]—1883 Act, s. 43 relates generally to the property of bkpt., without distinguishing whether it is goods or money (FLETCHER MOULTON, L.J.).—PONSFORD, BAKER & CO. *v.* UNION OF LONDON & SMITH'S BANK, LTD., [1906] 2 Ch. 444; 75 L. J. Ch. 724; 95 L. T. 333; 22 T. L. R. 812; 13 Mans. 321, C. A.

Annotations :—**Mentd.** McCarthy *v.* Capital & Counties Bank, [1911] 2 K. B. 1088, C. A.; *Re* Debtor, No. 211 of 1912, [1912] 2 K. B. 533, C. A.

5750. —— Money in hands of arbitrator.]—Money was deposited by bkpt. in the hands of an arbitrator, who was to decide to whom it belonged. The arbitrator, before the commission issued, & without knowledge of any act of bkpcy. having been committed, paid the money over to the person whom he thought entitled to receive it :—*Held :* the assignees could not recover it from the arbitrator.—TOPE *v.* HOCKIN (1827), 7 B. & C. 101; 9 Dow. & Ry. K. B. 881; 5 L. J. O. S. K. B. 342; 108 E. R. 663.

Annotations :—**Distd.** Kynaston *v.* Crouch (1845), 14 M. & W. 266. **Refd.** Pearson *v.* Graham (1838), 7 L. J. Q. B. 247. **Mentd.** *Re* Robinson, *Ex p.* Fernande (1840), 1 Mont. D. & De G. 114, Ct. of R.; *Re* Chapman, *Ex p.* Edwards (1884), 13 Q. B. D. 747, C. A.

Sect. 3.—*Relation back of title of trustee: Sub-sect.* 1.]

5751. —— **Property passing to creditor on failure of debtor to comply with notice—Act of bankruptcy during currency of notice.**]—A contract by a trader to do certain works contained a clause that, if he should become bkpt. or delay proceeding with the works, his employer should have power, after a seven days' notice to him to proceed, to employ others to do the works, that the advances made to the trader before his default should be taken as full payment, & that all tools & materials being upon the works should become the property of the employer. The trader having delayed to proceed with the works, was served on Apr. 11 by his employer with notice to proceed. On Apr. 17 the trader committed an act of bkpcy. On Apr. 19, the notice to proceed not having been complied with, his employers took possession of the tools & materials. In June a fiat of bkpcy. issued against the trader:—*Held:* the tools & materials did not become the property of his employer at the expiration of the seven days' notice, because they had vested in his assignees by relation on Apr. 17, before the notice had expired.—ROUCH *v.* GREAT WESTERN RY. CO. (1841), 1 Q. B. 51; 4 Per. & Dav. 686; 2 Ry. & Can. Cas. 505; 113 E. R. 1049.

See, also, Nos. 5862, 5863, *post.*

5752. —— **Money in hands of garnishee.**]—A. sold goods to B., to be paid for by bills of exchange at future periods. Before the bills were due C. recovered a judgment against A., & obtained a judge's order under C. L. P. Act, 1854, s. 61, for attachment of the debt due from B. to A., & to show cause why B. should not pay C. the debt due from B. to A. Upon the order being served on B., he gave C. a promissory note payable by instalments for the amount of the debt due to A. No further proceedings were taken under the attachment. A. afterwards became bkpt.:—*Held:* the debt due from B. to A. was not discharged by the promissory note given by B. to C., & A.'s assignees were entitled to recover it from B. *Semble:* payment by the garnishee to the judgment creditor upon notice of the attachment, was no discharge of the debt due from the garnishee to the judgment debtor, but there must be a judge's order for payment.—TURNER *v.* JONES (1857), 1 H. & N. 878; 26 L. J. Ex. 262; 28 L. T. O. S. 341; 5 W. R. 318; 156 E. R. 1457.

Annotations:—**Consd.** Wood *v.* Dunn (1866), L. R. 2 Q. B. 73, Ex. Ch. **Mentd.** Lowe *v.* Blakemore (1875), L. R. 10 Q. B. 485.

5753. —— ——.]—Where debtor commits an act of bkpcy. & judgment is subsequently obtained against him by a creditor, who obtains a garnishee order *nisi* attaching a debt due to the judgment debtor, the garnishee order *nisi* does not justify the garnishee in forthwith paying the debt to the judgment creditor, & if he does so the debt will still form part of the judgment debtor's estate by virtue of the relation back of the title of the trustee to the act of bkpcy. The garnishee must pay the debt again to the trustee.—*Re* WEBSTER, *Ex p.* OFFICIAL RECEIVER, [1907] 1 K. B. 623; 76 L. J. K. B. 380; 96 L. T. 332; 51 Sol. Jo. 230; 14 Mans. 20, D. C.

5754. —— **Receipts from business—In hands of agent.**]—When a man becomes bkpt. the bkpcy. relates back to the act of bkpcy. on which it is founded, & the receipts from his business after the date of the act of bkpcy., though in the hands of an agent who has received them, pass to the trustee.—*Re* JONES, *Ex p.* NICHOLS (1883), 22 Ch. D. 782; 52 L. J. Ch. 635; 48 L. T. 492; 31 W. R. 661, C. A.

Annotations:—**Distd.** *Re* Toward, *Ex p.* Moss (1884), 14 Q. B. D. 310, D. C.; *Re* Davis, *Ex p.* Rawlings (1888), 22 Q. B. D. 193, C. A. **Apld.** Wilmot *v.* Alton, [1897] 1 Q. B. 17, C. A. **Mentd.** Mercer *v.* Vans Colina (1897), [1900] 1 Q. B. 130, n.; Durham *v.* Robertson, [1898] 1 Q. B. 765, C. A.

—— **Money impressed with trust.**]—*See* Sect. 5, *post.*

5755. —— —— **Money in hands of broker.**]—A trader indebted to defts., after a secret act of bkpcy. gave them a new bill in lieu of their former claim, & deposited with them policies of insurance made on his account, as collateral security. After notice of a loss upon these policies, the policy broker, at bkpt.'s request, gave his own acceptance to defts., which was afterwards paid, in order to induce them to give up their lien on the policies, after which a commission issued against the trader on the prior act of bkpcy.:—*Held:* the assignees could not recover from defts. the amount of the broker's acceptance paid to them, which was the money of the broker, & not of bkpt., though the broker, in settling his account with the assignees, retained the amount of the money so paid by him to defts., in order to get the policies out of their hands.—HOVIL *v.* PACK (1806), 7 East, 164; 3 Smith, K. B. 164; 103 E. R. 63.

5756. —— —— ——.]—A. being a trader, before any act of bkpcy. directed his broker, who had authority to distrain for rents due to him, to pay a sum to B. in satisfaction of a debt, & the broker, *bonâ fide*, agreed with B. to pay him as soon as he received the rents. After that A. became bkpt.:—*Held:* the assignees of A. could not recover such sum from the broker, though he did not in fact pay it over to B. till after the commission issued.—BEDFORD *v.* PERKINS (1828), 3 C. & P. 90, N. P.

Annotation:—**Refd.** Green *v.* White (1836), 3 Scott, 387.

5757. —— —— **Money in hands of executor.**]—A trader having given to a creditor an order on the exor. of her debtor to pay the debt to the creditor, & the exor. having received the order, & retained it until the assets of testator should enable him to pay simple contract debts, & the trader having become bkpt. before payment:—*Held:* the creditor was entitled to receive the amount of the order from the exor., notwithstanding a subsequent arrest of the trader.—*Re* ROW, *Ex p.* SOUTH (1818), 3 Swan. 392; 36 E. R. 907, L. C.

Annotations:—**Folld.** Burn *v.* Carvalho (1839), 4 My. & Cr. 690, L. C. **Consd.** Rodick *v.* Gandell (1852), 1 De G. M. & G. 763, L. C.; Addison *v.* Cox (1872), 8 Ch. App. 76, L. C. **Refd.** Best *v.* Argles (1834), 2 Cr. & M. 394; Tibbits *v.* George (1836), 5 Ad. & El. 107; Bell *v.* L. & N. W. Ry. Co. (1852), 15 Beav. 548; Morrell *v.* Wootten (1852), 16 Beav. 197; Diplock *v.* Hammond (1854), 2 Eq. Rep. 738, L. JJ.; Brandt's Sons *v.* Dunlop Rubber Co., [1905] A. C. 454, H. L.

5758. —— **Right of redemption.**]—Bkpt., whose estate is in mtge., conveys the equity of redemption to a third person after an act of bkpcy., but before the commission & assignment; this shall not defeat the assignees.—COLLET *v.* DE GOLS (1734), Cas. *temp.* Talb. 65; 25 E. R. 665, L. C.

Annotations:—**Refd.** *Ex p.* Herbert (1806), 13 Ves. 183; *Ex p.* Knott (1806), 11 Ves. 609, L. C.; Cannan *v.* S. E. Ry. Co. (1852), 7 Exch. 843; *Re* Slobodinsky, *Ex p.* Moore, [1903] 2 K. B. 517; *Re* Gunsbourg, [1920] 2 K. B. 426, C. A. **Mentd.** Sowerby *v.* Brooks (1821), 4 B. & Ald. 523; *Re* Hart, *Ex p.* Green, [1912] 3 K. B. 6, C. A.

5759. —— —— **Duty of secured creditor to accept repayment & return security.**]—On Sept. 14 & 27, L. pledged chattels to W., & received loans against them. On Oct. 9 he committed an act of bkpcy. On Oct. 26 W., with notice of the act of bkpcy., being repaid the loan of Sept. 14, redelivered the chattels pledged against it. On Jan. 9, 1901, a receiving order was made on the act of bkpcy., & L. was subsequently adjudicated bkpt. On Jan. 11 W., being repaid the loan of Sept. 27, redelivered the rest of the chattels:—

Held : though the title of the trustee related back to Oct. 6, he took subject to the pledge, & could not recover from W. the value of the chattels less the amount of the loans.—*Re* LAWFORD & LAWRENCE, *Ex p.* TRUSTEE, [1902] 2 K. B. 445 ; 71 L. J. K. B. 786 ; 86 L. T. 693 ; 50 W. R. 592 ; 46 Sol. Jo. 588 ; 9 Mans. 254.

Annotation :—**Overd.** Ponsford Baker *v.* Union of London & Smith's Bank, [1906] 2 Ch. 444, C. A.

5760. —— —— ——.]—Stockbrokers were declared defaulters on the Stock Exchange, & an official assignee was appointed according to the rules of the Stock Exchange. They had deposited with defts. certain securities to secure a loan. The official assignee tendered the amount due in respect of the loan & called on defts. to hand over the securities. They refused on the ground that, having notice of an act of bkpcy. by the stockbrokers, *viz.* the assignment to the official assignee, within three months, they would not be safe in handing over the securities till the expiration of three months, for if bkpcy. proceedings were taken within that period the title of the trustee would relate back. The stockbrokers & official assignee then sued for delivery up of the securities on payment of the amount due :—*Held :* pltfs. could not require the defts. to give up the securities, while the act of bkpcy. was available.—PONSFORD, BAKER & Co. *v.* UNION OF LONDON & SMITH'S BANK, LTD., [1906] 2 Ch. 444 ; 75 L. J. Ch. 724 ; 95 L. T. 333 ; 22 T. L. R. 812 ; 13 Mans. 321, C. A.

Annotations :—**Consd.** McCarthy *v.* Capital & Counties Bank, [1911] 2 K. B. 1088, C. A. ; *Re* Debtor, No. 211 of 1912, [1912] 2 K. B. 533, C. A.

5761. —— **Money paid to petitioning creditor's solicitor—Paid over to petitioning creditor after notice of act of bankruptcy.**]—Pending the hearing of a bkpcy. petition, & with notice of the act of bkpcy. on which it was founded, the solr. of petitioning creditor, as his agent, received from debtor sums of money as consideration for adjournments of the hearing of the petition, & those sums he paid over, or accounted for, to petitioning creditor. Afterwards an adjudication was made on the petition :—*Held :* the solr. having received the money with notice of the act of bkpcy. to which the title of the trustee related back, the payment by him was a wrongful act, & he was liable to repay the money to the trustee, & was not discharged by the payment to his own principal.—*Re* CHAPMAN, *Ex p.* EDWARDS (1884), 13 Q. B. D. 747 ; 51 L. T. 881 ; 33 W. R. 268 ; 1 Morr. 238, C. A.

Annotation :—**Distd.** *Re* Sinclair, *Ex p.* Payne (1885), 2 Morr. 255.

5762. —— —— **Borrowed by bankrupt.**]—After the presentation of a bkpcy. petition against debtor, negotiations were entered into with petitioning creditor for an adjournment of the hearing of the petition, & with that object £1,050 was paid by the solr. acting for debtor to the solrs. for petitioning creditor by cheque, the amount having been borrowed by debtor from a third party for the purpose. Debtor was subsequently adjudicated bkpt. on the petition, & the sum so paid over was claimed by his trustee :—*Held :* the money was the property of bkpt., & the trustee was entitled to an order directing petitioning creditor to repay it to him.—*Re* SNYDER, *Ex p.* PIXLEY (1891), 7 T. L. R. 423 ; 8 Morr. 127.

Annotations :—**Distd.** *Re* Rogers, *Ex p.* Holland & Hannen (1891), 8 Morr. 243, C. A. ; *Re* Drucker, *Ex p.* Trustee *v.* Birmingham & District Banking Co. (1902), 46 Sol. Jo. 502.

See, further, Sect. 5, sub-sect. 2, B., *post.*

5763. —— —— **Under false statement that money furnished by third party.**]—Debtor obtained the adjournment of a bkpcy. petition pending against him, by paying petitioning creditors' solr. £125, which was accepted on his representation, made at the time, that the money was not his but that of a third party. That representation was untrue. Within three months debtor was adjudicated bkpt., & the trustee, on the doctrine of relation back, claimed repayment of the £125 from petitioning creditors, on the ground that it was part of the property of bkpt. :—*Held :* the trustee had a higher & better title than debtor, & was not estopped by debtor's misrepresentation from enforcing repayment of the money.—*Re* ASHWELL, *Ex p.* SALAMAN, [1912] 1 K. B. 390 ; 81 L. J. K. B. 360 ; 106 L. T. 190 ; 28 T. L. R. 166 ; 56 Sol. Jo. 189 ; 19 Mans. 49.

Annotations :—**Apld.** *Re* Hooley, *Ex p.* Trustee (1915), 84 L. J. K. B. 1415. **Folld.** *Re* Evans, *Ex p.* Salaman, [1916] H. B. R. 111.

5764. —— **Money paid to debtor's solicitor—To defray costs of opposing bankruptcy proceedings.**]—Money *bonâ fide* paid by debtor to his solr. to defray counsel's fees & other legal expenses in opposing proceedings in bkpcy. that have been commenced against him, cannot, should adjudication follow, be recovered from the solr. by the trustee, even although the solr. knew of the acts of bkpcy. on which the proceedings were based.—*Re* SINCLAIR, *Ex p.* PAYNE (1885), 15 Q. B. D. 616 ; 53 L. T. 767 ; 2 Morr. 255.

Annotations :—**Distd.** *Re* Spackman, *Ex p.* Foley (1890), 24 Q. B. D. 728, C. A. **Consd.** *Re* Pollitt, *Ex p.* Minor (1892), 67 L. T. 715. **Expld.** *Re* Whitlock & Jackson, *Ex p.* Official Receiver (1893), 63 L. J. Q. B. 245. **Distd.** *Re* Charlwood, *Ex p.* Trustee (1894), 63 L. J. Q. B. 344, D. C. : *Re* Simonson, *Ex p.* Ball, [1894] 1 Q. B. 433. **Folld.** *Re* Johnson, *Ex p.* Ellis (1914), 111 L. T. 165. **Refd.** *Re* Beyts & Craig, *Ex p.* Cooper & Irvine (1894), 1 Mans. 56.

5765. —— —— ——.]—On Feb. 14, 1912, J., against whom a bkpcy. petition had been presented by W. & various judgments had been obtained, requested T., his solr., who had acted for him since Sept., 1911, to oppose the petition & to act for him in the other proceedings then pending. T., who was owed a considerable sum for professional services, declined to act unless debtor provided funds for the purpose, & thereupon J. gave T. a letter authorising the Comrs. of Inland Revenue to pay T. £42 15*s.* 5*d.* then due from them to J. T. immediately took the letter to Somerset House, but the money was not paid over to him till Mar. 20. T. acted for J. from Feb. 14 till May 29, when the retainer was withdrawn, &, by making payments amounting to £38 17*s.* 2*d.* succeeded in getting two adjournments of W.'s petition & of a subsequent petition by K. After May 29 J. employed another solr., &, although W.'s petition was dismissed, a receiving order was made against J. on K.'s petition, & he was subsequently adjudicated bkpt. The trustee applied for an order that T. should pay over to him the £42 15*s.* 5*d.* as being money received by him with notice of an available act of bkpcy. It was admitted that T. had notice of an available act of bkpcy. when he received the letter of authority from J. on Feb. 14 :—*Held :* the money was paid by debtor to his solr. for the purpose of opposing bkpcy. proceedings & protecting debtor's estate,

PART XX. SECT. 3, SUB-SECT. 1.

5759 i. *To what doctrine applies—Right of redemption—Duty of secured creditor to accept repayment & return security.*]—A secured creditor, even though acting *bonâ fide*, is not entitled to receive payment of his debt from his debtor & to hand over his security after notice of an act of bkpcy. on the part of debtor.—*Re* RENDELL, OFFICIAL ASSIGNEE OF RENDELL *v.* HUTCHISON (1910), 29 N. Z. L. R. 456.—N.Z.

Sect. 3.—*Relation back of title of trustee: Subsects.* 1, 2 & 3.]

& what the solr. did was for the benefit of debtor's estate, & he was entitled to retain out of the £42 15*s.* 5*d.* the sum of £38 17*s.* 2*d.* actually expended, & the trustee was only entitled to the balance.—*Re* JOHNSON, *Ex p.* ELLIS (1914), 111 L. T. 165.

5766. —— —— —— **Not costs of endeavouring to arrange with creditors.**]—The rule laid down in *Re Sinclair, Ex p. Payne*, No. 5764, *ante*, is not to be extended so as to allow solrs., who have money in their hands on which debtor has given them a charge for general costs, to retain that money to meet costs incurred for debtor after knowledge of an act of bkpcy.

The rule only applies to costs which are expended on what is strictly a necessity, & does not cover costs incurred in endeavouring to make arrangements with creditors with a view of preventing bkpcy. proceedings being taken.—*Re* SPACKMAN, *Ex p.* FOLEY (1890), 24 Q. B. D. 728; 62 L. T. 266; 38 W. R. 368; 6 T. L. R. 210; 7 MORR. 100, D. C.; *revsd.* on other grounds, 24 Q. B. D. 735, C. A.

Annotations:—**Distd.** *Re* Hughes, *Ex p.* Hughes (1893), 68 L. T. 629, C. A. **Refd.** *Re* Pollitt, *Ex p.* Minor (1893), 68 L. T. 366, C. A.; *Re* Simonson, *Ex p.* Ball (1894), 1 Q. B. 433. **Mentd.** *Re* David & Adlard, *Ex p.* Whinney, [1914] 2 K. B. 694; Radcliffe *v* Abbey Road & St John's Wood Permanent Bldg. Soc. (1918), 87 L. J. Ch. 557.

5767. —— —— **Under verbal contract to act in bankruptcy proceedings.**]—A solr. received from a client a lump sum, under a verbal contract to act for him in his bkpcy. proceedings:—*Held:* the amount so paid must be repaid to the trustee, less costs incurred to the date of the receiving order.—*Re* MANDER, *Ex p.* OFFICIAL RECEIVER *v.* DAVIS (1902), 86 L. T. 234.

5768. —— **Money deposited with solicitor for general costs—Costs settled for lump sum.**]—A client employed a solr. to transact for him certain business, partly contentious & partly non-contentious, & deposited with him a sum of money to be applied in payment of the costs to be incurred in such business. After the costs had been incurred, & before delivery of any bill, the solr. & the client settled by oral agreement the amount of the costs at a lump sum, which sum the solr. retained out of the money deposited with him. The client having subsequently become bkpt., his trustee applied for the delivery of a bill of his costs by the solr.:—*Held:* the retainer of the money by the solr. did not amount to payment under Solrs. Remuneration Act, 1881 (c. 44), & a bill must be delivered.—*Re* WEST, KING & ADAMS, *Ex p.* CLOUGH, [1892] 2 Q. B. 102; 61 L. J. Q. B. 639; 67 L. T. 57; 40 W. R. 644, D. C.

Annotations:—**Folld.** *Re* Frape, *Ex p.* Perrett, [1893] 2 Ch. 284. **Consd.** *Re* Chapman (1903), 20 T. L. R. 3, C. A. **Refd.** *Re* Thompson, *Ex p.* Baylis, [1894] 1 Q. B. 462.

5769. —— —— **Costs after execution of deed of assignment.**]—Debtor consulted a solr., to whom he was then indebted for costs. The solr. declined to act further, unless he were furnished with money to meet future costs, & debtor placed money in his hands for that purpose. The solr. then called debtor's creditors together, & prepared a deed of assignment, which debtor executed. Debtor was afterwards adjudged bkpt., the act of bkpcy. being the execution of the deed of assignment. On an application for payment to the trustee of the money in the hands of the solr.:—*Held:* the solr. was not entitled to retain the money as payment for services rendered by him to debtor after the execution of the deed of assignment.—*Re* POLLITT, *Ex p.* MINOR, [1893] 1 Q. B. 455; 62 L. J. Q. B. 236; 68 L. T. 366; 41 W. R. 276; 9 T. L. R. 195; 37 Sol. Jo. 217; 10 Morr. 35; 4 R. 253, C. A.

Annotations:—**Distd.** *Re* Charlwood, *Ex p.* Masters, [1894] 1 Q. B. 643, D. C. **Folld.** *Re* Simonson, *Ex p.* Ball, [1894] 1 Q. B. 433. **Apld.** *Re* A Debtor, *Ex p.* Peak Hill Goldfield, [1909] 1 K. B. 430, C. A. **Consd.** *Re* Thorne, [1914] 2 Ch. 438. **Refd.** *Re* Daintrey, *Ex p.* Mant, [1900] 1 Q. B. 546, D. C.; Davis *v.* Petrie (1905), 93 L. T. 511; Lister *v.* Hooson, [1908] 1 K. B. 174, C. A.

5770. —— —— **Solicitor becoming personally liable for accountant's fees—Costs of opposing bankruptcy petition.**]—A client handed a sum of money to his solr. to be disbursed for legal services or otherwise. The solr. then made himself personally liable to an accountant for his charges for examining the books of the client's firm. After receiving notice that the client had committed an act of bkpcy. the solr. paid the accountant's charges, & also rendered professional services to the client in opposing a bkpcy. petition presented against him. A receiving order having been made, the trustee claimed the amount remaining in the hands of the solr. after deducting his charges up to the date of the receipt of notice of the act of bkpcy.:—*Held:* the solr. was entitled to retain the amount paid to the accountant subsequently to notice of the act of bkpcy., as he had previously become personally liable for the payment thereof, but he was not entitled to retain the amount of his charges for opposing the bkpcy. petition, & the money, less the accountant's charges, must be paid to the trustee.—*Re* WHITLOCK & JACKSON, *Ex p.* OFFICIAL RECEIVER (1893), 63 L. J. Q. B. 245; 70 L. T. 34; 1 Mans. 33; 10 R. 110.

5771. —— —— **Of criminal defence—Under agreement within Attorneys & Solicitors Act, 1870 (c. 28), s. 4.**]—Ten days prior to the act of bkpcy. debtor handed a lump sum of money to his solr. to defend him on a criminal charge, & by a written agreement within the above sect., the solr. undertook to present the defence to the ct. & pay all disbursements including ct. fees, counsel's fees, witnesses' charges, & all expenses. The greater part of the charges & expenses were incurred & paid by the solr. after the date of the act of bkpcy. The trustee claimed repayment of the bulk of the money from the solr. as money belonging to bkpt. at that date:—*Held:* the money was not bkpt.'s but the solr.'s property, having been paid in a lump sum upon terms set out in a written agreement, under which the solr. undertook to render certain services.—*Re* CHARLWOOD, *Ex p.* MASTERS, [1894] 1 Q. B. 643; 63 L. J. Q. B. 344; 70 L. T. 383; 10 T. L. R. 317; 1 Mans. 42; 10 R. 132, D. C.

5772. —— —— —— **Authority terminated by presentation of petition.**]—Debtors entered into a verbal agreement with solrs. to defend them on a criminal charge, & also to look after their business affairs, & paid to the solrs. a sum of £250. The solrs. had at the time no knowledge of any act of bkpcy. having been committed by debtors. Subsequently debtors presented their petition, & on bkpcy. ensuing the trustee claimed from the solrs. the return of the money:—*Held:* the solrs.' authority was determined by the presentation of the bkpcy. petition, &, subject to any claim for costs incurred prior to that date, the solrs. must repay the money to the estate.—*Re* BEYTS & CRAIG, *Ex p.* TRUSTEE (1894), 70 L. T. 561; 42 W. R. 432; 38 Sol. Jo. 327; 1 Mans. 56; 10 R. 143.

5773. —— **Money received by solicitor or accountant.**]—Solrs. or accountants, who have received money from debtor with notice that he has suspended payment, must refund it to the trustee.—*Re* SIMONSON, *Ex p.* BALL, [1894] 1

Q. B. 433; 63 L. J. Q. B. 242; 70 L. T. 32; 1 Mans. 30; 10 R. 107.

Annotations:—**Distd.** *Re* Charlwood, *Ex p.* Trustee (1894), 63 L. J. Q. B. 344, D. C. **Refd.** Davis *v.* Petrie (1905), 93 L. T. 511. **Mentd.** *Re* Midgley (1913), 108 L. T. 45, D. C.; *Re* Geen, *Ex p.* Parker, [1917] 1 K. B. 183.

5774. —— Money paid to accountant—For preparing circular amounting to act of bankruptcy.]—Where an accountant, who had prepared a statement of accounts & sent to the creditors a notice which amounted to an act of bkpcy., had received payment for his services:—*Held:* the money so paid was recoverable by the trustee.—*Re* WHITE, *Ex p.* WARD & AFFORD (1898), 78 L. T. 25; 5 Mans. 17.

What transactions are protected.]—*See* Sect. 13, *post.*

SUB-SECT. 2.—TO WHAT TIME.

See, now, 1914 Act, s. 37.

5775. Act of bankruptcy—Not date of adjudication.]—The commission has relation to the act of bkpcy., & all the property vests by relation from that time (LORD ELDON, C.).—BARKER *v.* GOODAIR (1805), 11 Ves. 78; 32 E. R. 1017, L. C.

Annotations:—**Mentd.** Dutton *v.* Morrison (1810), 17 Ves. 193; Brickwood *v.* Miller (1817), 3 Mer. 279; Pennell *v.* Roy (1853), 3 De G. M. & G. 126, L. JJ.; Dibb *v.* Brooke, [1894] 2 Q. B. 338.

5776. Commencement of act of bankruptcy—If voluntary.]—If the act of bkpcy. is the act of bkpt. himself, then the title of the trustee relates back to the moment of the commencement of the act done by him.—*Re* ROGERS, *Ex p.* VILLARS (1874), 9 Ch. App. 432; 43 L. J. Bcy. 76; 30 L. T. 348; 38 J. P. 533; 22 W. R. 603, L. C. & L. JJ.

Annotations:—**Consd.** *Re* Condon, *Ex p.* James (1874), 9 Ch. App. 609, L. JJ.; *Re* Husband, *Ex p.* Dawes (1875), L. R. 19 Eq. 438. **Expld. & Distd.** Burns-Burns Trustee *v.* Brown, [1895] 1 Q. B. 324. **Consd.** *Re* Thellusson, *Ex p.* Abdy (1919), 88 L. J. K. B. 1210, C. A. **Refd.** Crew *v.* Terry (1877), 2 C. P. D. 403; Figg *v.* Moore, [1894] 2 Q. B. 690. **Mentd.** *Re* McHenry, *Ex p.* McHenry (1883), 24 Ch. D. 35, C. A.

5777. Completion of act of bankruptcy—If proceeding in invitum.]—If the act of bkpcy. is not a voluntary act of bkpt., but a proceeding *in invitum*, it relates back only to the moment after the completion of the transaction which constitutes the act of bkpcy. (JAMES, L.J.).—*Re* ROGERS, *Ex p.* VILLARS (1874), 9 Ch. App. 432; 43 L. J. Bcy. 76; 30 L. T. 348; 38 J. P. 533; 22 W. R. 603, L. C. & L. JJ.

Annotations:—**Distd.** Figg *v.* Moore, [1894] 2 Q. B. 690. **Consd.** *Re* Thellusson, *Ex p.* Abdy (1919), 88 L. J. K. B. 1210, C. A. **Refd.** *Re* Condon, *Ex p.* James (1874), 9 Ch. App. 609, L. JJ.; *Re* Husband, *Ex p.* Dawes (1875), L. R. 19 Eq. 438; Crew *v.* Terry (1877), 2 C. P. D. 403; Burns-Burns Trustee *v.* Brown, [1895] 1 Q. B. 324. **Mentd.** *Re* McHenry, *Ex p.* McHenry (1883), 24 Ch. D. 35, C. A.

5778. —— Act of bankruptcy committed by agent.]—An agent, who, in obedience to the previous direction of his principal, pays away money of the principal which is in his hands, knowing before he makes the payment, though he did not know when he received the money, that the payment will when completed constitute an act of bkpcy. on the part of the principal, is not liable to the trustee in the subsequent bkpcy. of the principal for the money so paid away.

The trustee could recover the money from the agent only on the ground that he had paid away the money of the trustee, & in such a case the money would become the trustee's money only on completion of the act of bkpcy. to which his title would relate back, *i.e.* not until after the money had left the agent's hands.—*Re* LEWIS, *Ex p.* HELDER (1883), 24 Ch. D. 339; 53 L. J. Ch. 106; 49 L. T. 612, C. A.

Annotations:—**Distd.** *Re* Glanville, *Ex p.* Jenkins (1885), 33 W. R. 523. **Consd.** *Re* Lamb, *Ex p.* Gibson & Bolland (1886), 55 L. T. 817, D. C. **Distd.** Shears *v.* Goddard (1895), 65 L. J. Q. B. 151; *Re* Sharp, *Ex p.* Gundry *v.* Johnston (1900), 83 L. T. 416.

SUB-SECT. 3.—TO WHAT ACTS OF BANKRUPTCY.

5779. Act subsequent to petitioning creditor's debt.]—The relation to the act of bkpcy. is confined to an act subsequent to petitioning creditor's debt.—*Re* REYNOLDS, *Ex p.* BIRKETT (1814), 2 Rose, 71, L. C.

See, now, 1914 Act, s. 37 (1).

5780. Act in regard to which petitioning creditor estopped.]—Assignees, though neither of them is petitioning creditor, cannot avail themselves of an act of bkpcy. of which petitioning creditor would be estopped from availing himself.—TOPE *v.* HOCKIN (1827), 7 B. & C. 101; 9 Dow. & Ry. K. B. 881; 5 L. J. O. S. K. B. 342; 108 E. R. 663.

Annotations:—**Refd.** *Re* Robinson, *Ex p.* Fernandez (1840), 1 Mont. D. & De G. 114; *Re* Chapman, *Ex p.* Edwards (1884), 13 Q. B. D. 747, C. A. **Mentd.** Pearson *v.* Graham (1838), 7 L. J. Q. B. 247; Kynaston *v.* Crouch (1845), 14 M. & W. 266.

See, now, 1914 Act, s. 37 (1).

See, further, Part III., Sect. 1, sub-sect. 3, *ante.*

5781. ——.]—The doctrine of relation back to the trustee's title to an earlier act of bkpcy. than that upon which the adjudication proceeded,

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PART XX. SECT. 3, SUB-SECT. 2.

5775 i. *Act of bankruptcy—Not date of adjudication.*]—Where the grantor of an unregistered bill of sale has been adjudged bkpt., the title of the grantee will be defeated, if the goods remained in the apparent possession of the grantor at the time of the committal of an act of bkpcy., though not at the time of the order of adjudication, & the title of the assignees will prevail by reason of the relation back to such act of bkpcy.—MERCHANT BANKING CO. OF LONDON *v.* SPOTTEN (1877), I. R. 11 Eq. 586; 11 I. L. T. 153.—IR.

5775 ii. ——.]—Where an execution was levied on the goods of bkpt. after the commission of an act of bkpcy., but before the order of adjudication upon the prior act of bkpcy.:—*Held:* the proceeds of the sale received by the judgment creditor became, under 1883 Act, the property of the official assignee for the benefit of the general creditors of bkpt.'s estate.—*Re* JACKSON, *Ex p.* OFFICIAL ASSIGNEE, CAMPBELL'S CASE (1888), 6 N. Z. L. R. 392.—N.Z.

5775 iii. ——.]—An unregistered bill of sale is void as against the official assignee of the grantor as regards a chattel in the apparent possession of the grantor at the date of the act of bkpcy. to which the bkpcy. of the grantor relates back, although the grantee obtains possession of the chattel before the adjudication & without notice of the act of bkpcy.—SOUTH PACIFIC LOAN & INVESTMENT CO. LTD. *v.* WRIGHT (OFFICIAL ASSIGNEE) (1898), 17 N. Z. L. R. 492.—N.Z.

j. *Presentation of petition.*]—An order of adjudication relates back to, & takes effect from, the date of the presentation of the petition for the purpose of making the properties of insolvent liable to the claims of the creditors.—RAKHALL CHANDRA PURKAIT *v.* SUDHINDRA NATH BOSE (1919), I. L. R. 46 Calc. 991.—IND.

m. ——.]—An adjudication of debtor as an insolvent relates back to the date of the petition.—KLIANJI *v.* BANK OF MADRAS (1916), I. L. R. 39 Mad. 693.—IND.

o. *Date of stoppage of payments.*]—Refusal to pay, unless followed by a cessation of payment, is not sufficient to establish the *ouverture de la faillite* under Code de Commerce of France Act, 441; but as a general stoppage of payments necessarily amounts to a refusal at the time, if such stoppage has taken place, the *ouverture de la faillite* may be carried back to the time of the antecedent refusal.

Where a house in the Mauritius carried on trade in copartnership with one in London, & suspended its payments in consequence of the stoppage of the London house, though not till some time after the arrival of the intelligence of such stoppage, the Judicial Committee:—*Held:* the date of the *ouverture de la faillite* should not be carried back to the failure of the London house, but should be fixed only from the period of the actual stoppage of payments in the island.—D'EPINAY *v.* COCKERELL (1836), 1 Moo. P. C. C. 103; 12 E. R. 751, P. C.—MAURITIUS.

Sect. 3.—Relation back of title of trustee: Sub-sect. 3.]

appears in the first instance to be without qualification, & a more unjust law than that, if subject to no modification, can hardly be conceived, for it would result in this, that, within the requisite number of months before a man became a bkpt., every one of his transactions might be ripped up, & persons who had dealt with him in good faith might lose the fruits of their dealings, & forfeit them for the benefit of the creditors. That is not strictly the meaning of the doctrine, because not only do 1869 Act, ss. 12, 16 recognise the rights of creditors holding security, but s. 94 is preceded by these words, "Nothing in this Act contained shall render invalid," & then follows a list of transactions to which invalidity is not to be imputed (BACON, C.J.) —*Re* CURTOYS, *Ex p.* PILLERS (1881), 17 Ch. D. 653; 44 L. T. 224; 29 W. R. 568; *revsd.* on another point, 17 Ch. D. 660, C. A.

Annotations:—**Mentd.** *Re* Bannister, *Ex p.* Vale (1881), 45 L. T. 200, L.C. & L. JJ.; *Re* Chinn, *Ex p.* Sulger (1881), 17 Ch. D. 839; Butler *v.* Wearing (1885), 17 Q. B. D. 182; *Re* O'Shea's Settlmt., Courage *v.* O'Shea, [1895] 1 Ch. 325, C. A.; Hosack *v.* Robins (1918), 87 L. J. Ch. 545, C. A.

See, further, Sect. 13, *post.*

5782. Bankruptcy proceedings on later act commenced abroad—No relation back to earlier act in England.]—A petition for sequestration against a domiciled Scotsman was preferred on Jan. 26, & a sequestration finally pronounced on Aug. 16. A commission of bkpcy. issued in England on Mar. 15 on an act of bkpcy. committed on Jan. 4: —*Held:* as the sequestration was applied for before the English commission, & was subsequently awarded, it was to be considered as a sequestration from the first application, & being anterior to the English commission, the sequestration was valid, & could not be overreached by relation to the earlier act of bkpcy.—*Re* MOWAT, *Ex p.* GEDDES (1824), 1 Gl. & J. 414, H. L.

Annotations:—**Refd.** Gill *v.* Barron (1868), 5 Moo. P. C. C. N. S. 213, P. C.; *Re* Artola Hermanos, *Ex p.* Châle (1890), 59 L. J. Q. B. 254, C. A.

5783. Declaration of insolvency.]—A. obtained goods by purchase from the sheriff under a writ of *fi. fa.* at his own suit, founded on a warrant of attorney for £600 given to him by S. The writ was put into the sheriff's hands on May 25, 1839, & a bill of sale given to pltf. by the sheriff on June 21, for £600. On May 29 another writ against S. was put into the sheriff's hands, at the suit of M., for £62. A. paid M.'s debt, & the assignment to him was under both writs. A. took possession of the goods, &, on Oct. 5, 1849, B. seized & sold them as a distress for rent due to him from S. S., on Oct. 5, 1849, filed a declaration of insolvency, & thereby committed an act of bkpcy., &, on the 8th, 7 & 8 Vict. c. 96 being then in force, a fiat was awarded against him, founded on that act of bkpcy., under which fiat assignees were appointed. In an action by A. against B. for an irregular & excessive distress of the goods so obtained by him, the defence set up by B. was, that A. had procured the goods by way of fraudulent preference, & that S. caused them to be taken in execution with intent to defeat or delay his creditors, being then indebted to some in a sum sufficient to constitute a good petitioning-creditor's debt, & it was proved, that, on June 14, 1851, which was after the commencement of this action, the assignees under the fiat gave notice to A. that they meant to treat the warrant of attorney, judgment, & execution, as void, & should claim the goods against B., as being wrongfully taken under a distress, & that they also gave notice to B. that they had brought an action against A. to try the validity of the warrant of attorney, & had recovered £230, the value of the goods seized under A.'s writ, & requiring B. to pay to A. the value of the goods distrained, & claiming from B. the damages for the illegal distress, the subject of the action, as the subsequent interference of the assignees had no relation back to the original delivery of the goods to A., so as to avoid the transaction *ab initio*, A. had an undoubted right of action against B. for the illegal distress.

Under 7 & 8 Vict. c. 96, s. 41, the declaration of insolvency, at all events where the adjudication proceeds upon bkpt.'s application, is the only act of bkpcy. to which there can be a relation (PARKE, B.).—STEVENSON *v.* NEWNHAM (1853), 13 C. B. 285; 22 L. J. C. P. 110; 20 L. T. O. S. 279; 17 Jur. 600; 138 E. R. 1208, Ex. Ch.

Annotations:—**Consd.** Billiter *v.* Young (1856), 6 E. & B. 1, Ex. Ch.; *Re* Clark, *Ex p.* Beardmore, [1894] 2 Q. B. 393, C. A. **Refd.** Monk *v.* Sharp (1857), 2 H. & N. 540; Young *v.* Billiter (1860), 8 H. L. Cas. 682, H. L.; Paull *v.* Best (1863), 3 B. & S. 537; Topping *v.* Keysell (1864), 16 C. B. N. S. 258; *Re* Meldrum, *Ex p.* Butcher (1874), 9 Ch. App. 595. **Mentd.** Hardman *v.* Booth (1863), 32 L. J. Ex. 105; *Re* Willmett, *Ex p.* Goss (1864), 9 L. T. 734; Marks *v.* Feldham (1869), 10 B. & S. 371, Ex. Ch.; Clough *v.* L. & N. W. Ry. Co. (1871), L. R. 7 Exch. 26, Ex. Ch.; *Re* Johnson, *Ex p.* Rayner (1872), 41 L. J. Bcy. 26; London & County Banking Co. *v.* London & River Plate Bank (1887), 4 T. L. R. 179; *Re* O'Sullivan, *Ex p.* Ferd. Baller (1892), 61 L. J. Q. B. 228; Allen *v.* Flood, [1898] A. C. 1, H. L.; Quinn *v.* Leathem, [1901] A. C. 495, H. L.; Fitzroy *v.* Cave, [1905] 2 K. B. 364, C. A.; Valentine *v.* Hyde, [1919] 2 Ch. 129.

5784. Debtor's summons—Debt ultimately paid.] —A creditor, on July 21, 1870, served on a non-trader a debtor's summons for a sum exceeding £50. Deft. filed an affidavit denying the debt, & on Aug. 5 obtained the common order that he should give security within seven days, & that on his so doing proceedings should be stayed till the ct., in which proceedings should be taken for recovery of the debt, had come to a decision. On Aug. 12 an order was made by consent giving him a week's further time to complete the security. He never gave the security, & on Feb. 16, 1871, the creditor filed a petition for adjudication, on the ground of neglect to pay, secure, or compound for the debt. *Semble:* if the debt were ultimately paid, the act of bkpcy. was one to which the title of trustees under an adjudication founded on a subsequent act of bkpcy. would not relate back.—*Re* WIER, *Ex p.* WIER (1871), 6 Ch. App. 875; 41 L. J. Bcy. 14; 25 L. T. 369; 19 W. R. 1042, L. JJ.

Annotations:—**Consd.** *Re* Moojen, *Ex p.* Bouchard (1879), 12 Ch. D. 26, C. A. **Mentd.** *Re* Green (1881), 44 L. T. 619, C. A.; *Re* Powell, *Ex p.* Powell, [1891] 2 Q. B. 324.

See 1914 Act, s. 37 (1).

5785. —— Money paid into court.]—An alleged debtor having in Nov. committed an act of bkpcy. by non-compliance with a debtor's summons, the summoning creditor presented a bkpcy. petition against him. He disputed the debt & applied to have the petition dismissed, & an order was made adjourning the petition *sine die*, on the terms of his paying £125 into ct., to abide the result of an action to be brought by the summoning creditor for the alleged debt. The £125 was paid into ct. on Jan. 18, & the action was commenced on Jan. 21. On May 10 debtor was adjudicated a bkpt. on the petition of another creditor. Afterwards judgment was entered in the action for pltf. for the debt claimed & costs:—*Held:* the title of the trustee did not relate back to the act of bkpcy. committed on the debtor's summons so as to defeat the right of the summoning creditor to the £125, but he was entitled to have the £125 paid out to him.—*Re* MOOJEN, *Ex p.* BOUCHARD (1879), 12 Ch. D. 26; 48 L. J. Bcy. 105; 41 L. T. 363; 28 W. R. 129, C. A.

Annotations :—**Refd.** The Cella (1888), 13 P. D. 82, C. A. **Mentd.** Levy *v.* Lovell (1880), 49 L. J. Ch. 305, C. A.; Hood *v.* Newby (1882), 21 Ch. D. 605, C. A.; Tomlinson *v.* Hampson (1894), 38 Sol. Jo. 401; *Re* Gordon, *Ex p.* Navalchand, [1897] 2 Q. B. 516; *Re* Ford, *Ex p.* Maclister (1900), 69 L. J. Q. B. 690; *Re* Ford, *Ex p.* Trustee, [1900] 2 Q. B. 211.

See 1914 Act, s. 37 (1).

5786. —— Previous transfer to bogus company.]—A trader, who was liable under a judgment for the costs of an action, purported to sell his business to a co. which he had formed for the purpose in consideration of fully paid up shares & of the co. undertaking to pay his debts. He was the chairman, managing director, & secretary of the co., & he or his nominee held substantially the whole of the shares in it, & he had the complete control of it, including the power to draw cheques, which he exercised in his own favour. Within three months of such transaction a bkpcy. petition was presented against him, grounded on his non-compliance with a bkpcy. notice in respect of the above costs, & a receiving order was made upon it. His liabilities exceeded £2,000, with assets nil. Between the presentation of the petition & the making of the order, a resolution was passed for the voluntary winding up of the co., & a liquidator was appointed. Upon a motion by the trustee against the liquidator impeaching the validity of the transfer of the business :—*Held :* the transfer was fraudulent & an act of bkpcy., & the title of the trustee to the business related back to the date of the transfer, & overrode the claims of the creditors of the co. in the winding-up, & the liquidator was bound to hand over to the trustee the assets representing the business at the time of the transfer.—*Re* HIRTH, *Ex p.* TRUSTEE, [1899] 1 Q. B. 612; 68 L. J. Q. B. 287; 80 L. T. 63; 47 W. R. 243; 15 T. L. R. 153; 6 Mans. 10, C. A.

5787. Execution of bill of sale of whole property —To secure past debt—Followed by execution on debtor's goods.]—On Feb. 8 creditor levied execution upon the goods of his debtor upon a judgment for less than £50. On Feb. 10 the sheriff not having sold, debtor filed a liquidation petition, & a receiver was appointed. Debtor had, on Jan. 16, executed a bill of sale assigning all his property to secure a past debt :—*Held :* the title of the trustee under the liquidation related back to the execution of the bill of sale, & he was entitled to the goods seized by the execution creditor.—*Re* EDWARDS, *Ex p.* EYLES (1873), L. R. 16 Eq. 99; 42 L. J. Bcy. 55; 37 J. P. 596; 21 W. R. 574.

Annotation :—**Apprvd.** *Re* Matanle, *Ex p.* Schulte (1874), 30 L. T. 478, L. J.

See, further, Sect. 10, *post.*

5788. No relation back to filing of liquidation petition—On adjudication under 1849 Act, s. 223.]—A trader entered into a contract to deliver goods at a stated time at a specified price. He performed part of the contract, but before the time or times for the performance of the remainder he petitioned under 1849 Act, ss. 211 *et seq.*, but no arrangement being effected, he was adjudicated bkpt. on that petition. In the account of debts filed, he inserted a sum as due from him for loss on the unfulfilled parts of the contract. A proof was tendered by the purchaser of the goods, for the amount, less than that specified by bkpt., of the loss by reason of the non-delivery of the goods. The comr. having allowed the proof for the sum claimed :—*Held :* the bkpcy. did not relate back to the presentation of the original petition.—*Re* LAWFORD, *Ex p.* HARRISON (1856), 26 L. J. Bcy. 30; 28 L. T. O. S. 197; 3 Jur. N. S. 228; 5 W. R. 193, L. JJ.

Annotations :—**Consd.** Monk *v.* Sharp (1857), 2 H. & N. 540. **Mentd.** *Re* Robinson & Robson, *Ex p.* Robinson's Assignees (1858), 32 L. T. O. S. 230.

See 1914 Act, s. 37 (1).

5789. —— ——.]—By the rules of the Stock Exchange, money payable by members of the House to a defaulter was to be paid to assignees appointed by the Exchange, & be distributed ratably amongst the House creditors of the defaulter. L., a trader, & a member of the Stock Exchange, was under engagements with members of the Exchange to pay & receive differences on bargains in the public funds to a large amount on the account day. The day before the account day, he wrote to the secretary that he was unable to meet his engagements, & he was declared a defaulter, & G., one of the assignees of the Exchange, received the amount of the differences payable to L. & distributed it ratably amongst the House creditors. At the time when L. wrote the letter he was indebted to his trade creditors, insolvent, & contemplated bkpcy., but that was unknown to G. till L. was adjudicated a bkpt. under the above sect. At the time of the adjudication G. had distributed most of the money received, but had a small portion still in hand. The assignees of L. sued G. for money had & received :—*Held :* assuming the letter by L. was a fraudulent preference of his House creditors, & an act of bkpcy. on which an adjudication on the petition of a creditor might have been supported, the adjudication under s. 223 could not relate back to it, & being voidable only & not void, G. was justified in so far as he had acted on it before the adjudication.—NICHOLSON *v.* GOOCH (1856), 5 E. & B. 999; 25 L. J. Q. B. 137; 26 L. T. O. S. 258; 2 Jur. N. S. 303; 4 W. R. 285; 119 E. R. 752.

Annotations :—**Apld.** Monk *v.* Sharp (1857), 2 H. & N. 540. **Mentd.** Rourke *v.* Short (1856), 2 Jur. N. S. 352; *Re* Ryder (1857), 29 L. T. O. S. 217; Paull *v.* Best (1863), 3 B. & S. 537; Topping *v.* Keysell (1864), 16 C. B. N. S. 258.

5790. —— ——.]—On June 26 pltfs., traders, petitioned the Ct. of Bkpcy. for protection, under 1849 Act, s. 211. They filed an account of debts, & made a proposal according to s. 214. At an adjourned meeting on Aug. 6, pltfs. did not attend, & neither the proposal nor any modification of it was accepted, whereupon the meeting was adjourned to the public ct. & pltfs. were adjudged bkpts. under s. 223. The adjudication was not founded on the petition of a creditor, nor was pltfs.' petition dismissed. On June 26 deft. was indebted to pltfs. On July 6 pltfs. assigned the debt to D. & Co., & gave notice thereof to deft. D. & Co. had at the time of the assignment of the debt to them notice of the petition for arrangement :—*Held :* where a trader was adjudicated bkpt. under s. 223 without the filing of a petition by a creditor, the bkpcy. had no relation back to any act done by bkpt. prior to the adjudication, & pltfs. were entitled to recover the debt as trustees for D. & Co., notwithstanding the bkpcy.—MONK *v.* SHARP (1857), 2 H. & N. 540; 27 L. J. Ex. 29; 30 L. T. O. S. 187; 3 Jur. N. S. 1327; 6 W. R. 129; 157 E. R. 222.

PART XX. SECT. 3, SUB-SECT. 3.

5788 i. *No relation back to filing of liquidation petition—On adjudication under Irish* 1872 *Act.*]—Under the above Act, where the act of bkpcy., on which debtor is adjudged bkpt., is that he has filed a petition for arrangement with his creditors, & that such petition has been dismissed, the property of bkpt. vests in his assignees only from the time of the dismissal of the petition, & their title does not relate back to the time of its presentation.—MERCHANT BANKING CO. OF LONDON *v.* SPOTTEN (1877), I. R. 11 Eq. 586; 11 I. L. T. 153.—IR.

Sect. 3.—*Relation back of title of trustee: Sub-sect.* 3. *Sect.* 4: *sub-sect.* 1, *A., B. & C.*]

Annotations:—**Refd.** Paull *v.* Best (1863), 3 B. & S. 537. **Mentd.** Lee *v.* Rowley (1858), 30 L. T. O. S. 273; *Re* Robinson & Robson, *Ex p.* Robinson's Assignees (1858), 32 L. T. O. S. 230; Topping *v.* Keysell (1864), 16 C. B. N. S. 258; The Wasp (1867), L. R. 1 A. & E. 367; *Re* Bissell, *Ex p.* Duignan (1871), 6 Ch. App. 605, L. C. & L. JJ.

5791. —— Adjudication under 1869 Act, s. 126.]—Where debtor, who has filed a petition for liquidation by arrangement or composition under 1869 Act, ss. 125, 126, containing a statement of his inability to pay his debts, subsequently makes a composition with his creditors under s. 126, but is eventually adjudged a bkpt. under that sect., the adjudication does not relate back to the act of bkpcy. committed in the filing of the petition, unless such act of bkpcy. has occurred within six months before the presentation of the petition for "adjudication," or, if it is the first of several acts of bkpcy. as defined in s. 6, unless it has been committed within twelve months before the order of adjudication, such act of bkpcy. being, after the expiration of those periods, no longer available for adjudication; & after the expiration of those periods, a disposition of his property by the compounding debtor by way of security to a particular creditor is not rendered void on the ground of any relation back of the title of the trustee on a subsequent adjudication under s. 126 (1).

Debtor, who in 1879 had executed a mtge. & registered bill of sale to a creditor as securities for an existing debt & for a further sum advanced to enable him to prosecute an action which, if successful, would benefit his creditors as well as himself, filed, eight days afterwards, a liquidation petition, & then made a composition with his creditors under s. 126, but, in consequence of his non-payment of the composition, was in 1886 adjudicated bkpt. under that sect.:—*Held:* the adjudication did not relate back to the filing of the petition so as to give the trustee under the adjudication a title to claim that the securities should be set aside on the ground of fraudulent preference under s. 92. *Qu.:* whether, if there had been a relation back, the securities would not have been void as constituting a fraudulent preference.

If the adjudication comes within six months, or even twelve months, after the filing of the petition for adjudication containing the statement by debtor, then, under s. 11, the bkpcy. would relate back. But if the interval is greater than that, it would be totally inconsistent with the protection which the Act intends to give to persons dealing with the man who afterwards becomes bkpt., that there should be any such relation back (KAY, J.).—SHARP *v.* MCHENRY, SHARP *v.* BROWN (1887), 38 Ch. D. 427; 57 L. J. Ch. 961; 57 L. T. 606; 3 T. L. R. 847.

Annotations:—**Mentd.** *Re* McHenry, *Ex p.* McDermott (1888), 21 Q. B. D. 580, C. A.; Tuck *v.* Southern Counties Deposit Bank (1889), 42 Ch. D. 471; Barron *v.* Potter, [1915] 3 K. B. 593, C. A.

5792. —— ——.]—When debtor is adjudged a bkpt. under the special power conferred on the ct. by the last clause of the above sect. there is no relation back of the title of the trustee in the bkpcy. to the filing of debtor's petition or to any other prior act of bkpcy.—*Re* MCHENRY, *Ex p.* MCDERMOTT (1888), 21 Q. B. D. 580; 36 W. R. 725; 4 T. L. R. 503, C. A.

5793. Bankruptcy on debtor's petition—No relation back to previous bill of sale.]—R., a trader, under pressure executed a bill of sale, by which he assigned all his property to J., a creditor, & then became bkpt. on his own petition. J. was in possession of the property under the assignment:—*Held:* as the adjudication was on the trader's own petition, there was no relation back of the assignees' title to the date of the bill of sale.—JONES *v.* HARBER (1870), L. R. 6 Q. B. 77; 40 L. J. Q. B. 59; 23 L. T. 606; 19 W. R. 248.

5794. —— Petition & adjudication on same day.]—Debtor presented his own petition at 12.50 P.M. He consented to a receiving order & an immediate order of adjudication was made against him. A distress for rent had been levied on his goods on the same day but at an earlier hour:—*Held:* his bkpcy. commenced at the moment of time when the act of bkpcy. was committed, *viz.* when he presented his petition, notwithstanding that the order of adjudication, being a judicial act, would otherwise have operated from the earliest hour of the same day.—*Re* BUMPUS, *Ex p.* WHITE (1908), 2 K. B. 330; 77 L. J. K. B. 563; 98 L. T. 680; 52 Sol. Jo. 395; 15 Mans. 103.

5795. Composition proceedings taken in first instance—Relation back to original act.]—The title of a trustee to bkpt.'s property relates back, under 1869 Act, s. 11, to the original act of bkpcy., although composition proceedings were taken in the first instance, which were afterwards superseded by bkpcy. When such a supersession takes place, the title of the trustee is prior to that of a creditor, who has seized & sold debtor's goods, with notice of the original act of bkpcy.—BARRON *v.* EHLERS, SEEL & CO. (1884), Cab. & El. 432.

5796. Act on which adjudication professedly founded—Adjudication not annulled.]—By virtue of 1869 Act, ss. 10, 11, an adjudication of bkpcy. is, so long as it stands, conclusive as against a third person, *e.g.*, the holder of a bill of sale executed by bkpt., that the act of bkpcy., on which the adjudication was professedly founded, was in fact committed, & that the title of the trustee relates back to that act of bkpcy.—*Re* FOULDS, *Ex p.* LEAROYD (1878), 10 Ch. D. 3; 48 L. J. Bcy. 17; 39 L. T. 525; 27 W. R. 277, C. A.

Annotations:—**Consd.** *Re* Johnson, *Ex p.* Wigg (1879), 12 Ch. D. 905. **Mentd.** *Re* Tucker, *Ex p.* Tucker (1879), 28 W. R. 219, C. A.; *Re* Sidebotham, *Ex p.* Sidebotham (1880), 14 Ch. D. 458, C. A.; *Re* Langtry (1894), 1 Mans. 169, D. C.; *Re* Hobbins, *Ex p.* Official Receiver (1899), 6 Mans. 212.

5797. Only act more than twelve months before adjudication—Within six months of presentation of petition.]—1869 Act, ss. 6 & 11 are perfectly distinct, & an adjudication may be good, if the act of bkpcy. on which it is founded was committed within six months from the presentation of the petition, though the same act of bkpcy. is the only one to which the title of the trustee can relate back, & was committed more than twelve months before the order of adjudication.—*Re* GREPE, *Ex p.* GREPE (1881), 50 L. J. Ch. 723; 44 L. T. 829; 29 W. R. 824.

5793 i. *Bankruptcy on debtor's petition.*]—The doctrine of relation back applies equally to the bkpcy. of debtor on his own petition, as to his bkpcy. on a creditor's petition.—BOWER *v.* ROSS' OFFICIAL ASSIGNEE (1894), 13 N. Z. L. R. 193.—**N.Z.**

5796 i. *Act on which adjudication professedly founded.*]—*Held:* an adjudication on a creditor's petition under Debtors & Creditors Act, 1876, related back to the act of bkpcy., on which it was founded, although there was no express provision in the Act to that effect.—*Re* MACKAY, 2 J. R. N. S. 231.—**N.Z.**

r. *Act more than three months before adjudication.*]—Where a person is adjudicated a bkpt. upon a creditor's petition, the bkpcy. relates back to & commences at the time of the act of bkpcy. on which the order is made, even if such act is committed more than three months before the date of the order.—*Re* QUARTLEY (1910), 30 N. Z. L. R. 270.—**N.Z.**

SECT. 4.—"THE PROPERTY OF THE BANKRUPT."

See 1914 Act, s. 38.

SUB-SECT. 1.—"MONEY."

A. Money paid into Court.

See, generally, cases in Sect. 13, *post,* & Part IX., Sect. 2, *ante.*

5798. Sum paid to sheriff by absconding debtor to obtain release—Paid into court by sheriff.]—Deft. was arrested as an absconding debtor, &, in order to get released, paid to the sheriff the money for which he was to be held to bail, together with £10 for costs. The sheriff duly paid same into ct., but deft. was prevented, by reason of his bkpcy. intervening, from paying the additional sum of £10 in lieu of putting in special bail, as required under 7 & 8 Geo. 4, c. 71, s. 2.:—*Held:* notwithstanding the bkpcy., the creditor was entitled to have the money in ct. paid over to him, together with such sum for costs as should be allowed by the master.—COOKE *v.* BELL (1863), 2 New Rep. 174; 8 L. T. 431; 11 W. R. 732.

5799. Bail to secure attendance of debtor.]—Debtor was released from prison on payment into ct. of money by two sureties to secure his attendance for examination in bkpcy., but facts were discovered which led to the conclusion that the money was not that of the sureties, but belonged to debtor & was handed to the sureties by debtor or his wife. Debtor had attended for examination, but had since died. By the order directing the payment into ct. the money was to abide the further order of the ct. The trustee having applied for directions with reference to the money:—*Held:* the money should remain where it was, as the trustee could not in any case be entitled to it, & no right by any principle of law had been made out to it, & it would in due course go into the bkpcy. estates account.—*Re* GURWICZ, *Ex p.* TRUSTEE, [1919] 1 K. B. 675; 88 L. J. K. B. 740; 121 L. T. 96; [1918–19] B. & C. R. 203.

B. Money paid by Mistake.

See, cases in Part VI., Sect. 1, Part VII., Sect. 1, & Part IX., Sect. 4, sub-sect. 5, D., *ante.*

C. Money in Hands of Official Assignee of Stock Exchange.

5800. Surplus remaining in hands of official assignee—After settlement with Stock Exchange creditors—Arising out of contracts illegal under Gaming Acts.]—L., a member of the Stock Exchange, had entered into contracts with other members of the Stock Exchange for the sale & purchase of consols. The contracts were really to be carried out by payment or receipt of differences, as stocks might rise or fall. Upon the balance of the transactions L. would have had to pay a large sum on the account day. Previous to the account day L. became a defaulter. According to the rules of the Stock Exchange, which were binding upon all its members, the money due to the defaulter from other members of the Stock Exchange upon dealings there was got in by the official assignees of the Exchange & divided ratably among his creditors on the Exchange. Deft., one of the official assignees, collected the money due to L. from the other members of the Exchange upon the before-mentioned contracts, & *bonâ fide* distributed ratably among L.'s Exchange creditors the whole of such money, except a sum of £138, which remained in his hands at the time when L. was adjudged bkpt. L. was adjudged bkpt. on his own petition, & pltfs. were appointed his assignees. Deft. had no notice of any act of bkpcy. committed by L., until after he was adjudged bkpt. In an action against deft. for money had & received:—*Held:* the £138 was not part of L.'s personal estate which vested in pltfs. as assignees, since the contracts out of which the money was received were illegal & void by 7 Geo. 2, c. 8, & incapable of being enforced by action, & the money was not paid by those who were indebted on such contracts to deft. as agent of L. & for his benefit, but in order that it might

s. *Earliest act available—Prior to act on which adjudication founded.*]—Upon an adjudication on the petition of a creditor, the title of the assignees relates back to the earliest act of bkpcy. which could have been availed of by petitioning creditor, although it was not the act of bkpcy. on which the adjudication was founded. Order of the Ct. of Bkpcy. affirmed on appeal, on the ground that the mtges. in question were fraudulent, the Ct. of Appeal expressing no opinion upon the question of the relation back of the title of the assignees.—*Re* DOMVILE (1878), 1 L. R. Ir. 198; 12 I. L. T. 118; *affd.* on another point (1879), 3 L. R. Ir. 282.—IR.

t. —— *Within three months of adjudication.*]—If the act of bkpcy., upon which a person is adjudicated bkpt., is committed within three months of the date of the order, & prior acts of bkpcy. are subsequently discovered, the bkpcy. relates back to & commences at, the date of the first of such prior acts committed within three months of the date of the order of adjudication.—*Re* QUARTLEY (1910), 30 N. Z. L. R. 270.—N.Z.

PART XX. SECT. 4, SUB-SECT. 1.—A.

5798 i. *Sum to obtain release from custody—In suit by creditor.*]—Deft. was arrested before judgment & was ordered to be released from custody, on depositing in ct. a sum of money sufficient to meet pltf.'s claim in the suit. There was subsequently an attachment of the money by a decree-holder & an adjudication of deft. as an insolvent:—*Held:* the money was paid into ct. to the general credit of the action & charged with a lien in favour of pltf. on the latter obtaining a decree in his favour, & the official receiver's claim was subject to such lien.—RAMIAH AIYAR *v.* GOPALIER (1918), I. L. R. 41 Mad. 1053.—IND.

a. *Sum paid as tender.*]—Deft. in a suit tendered, & by order of ct. paid into ct. a sum of money. Pltf. did not accept the tender as sufficient, but recovered judgment for a larger amount. After judgment, & while the money was still in ct., deft.'s estate was sequestrated as insolvent:—*Held:* the money paid into ct. did not pass to the trustees of the insolvent estate, but had vested in, & was at the disposal of pltf. in the action.—DE ROUBAIX'S TRUSTEES *v.* BREDA'S CURATORS (1876), Buch. 196.—S. AF.

PART XX. SECT. 4, SUB-SECT. 1.—C.

5800 i. *Surplus remaining in hands of official assignee—After settlement with Stock Exchange creditors.*]—F. & L., both members of the Toronto Stock Exchange, & each being the owner of one seat at the board, assigned to pltf. for the general benefit of creditors. The Toronto Stock Exchange by their bye-laws provided that in case of a member becoming insolvent the Exchange should have power to realise the seats by sale, & the proceeds were to be applied in payment of (1) fines & dues to the Exchange, (2) claims arising out of stock exchange transactions of creditors, being members of the Exchange, & the balance, if any, to paid be to insolvent, or his legal representative. The seats of F. & L. were sold & the proceeds remained in the hands of the Exchange. Certain members of the Stock Exchange claiming to be creditors of F. & L. prior to their insolvency, for debts arising out of stock exchange transactions, filed claims prior to the sale of the seats. Pltf. claimed to be entitled to the seats & to the money arising from their sale under the assignment to him for the benefit of creditors:—*Held:* pltf. was entitled to payment to him of the balance of the money arising from the sale of the seats after payment of fines & fees due to the Exchange & claims of creditors, members of the Exchange, arising out of stock exchange transactions.—CLARKSON *v.* TORONTO STOCK EXCHANGE (1887), 13 O. R. 213.—CAN.

5800 ii. —— *After settlement with creditors & deductions authorised by rules.*]—The articles of the Stock Exchange of Adelaide provided that on insolvency the member's share might be sold, the proceeds to be applied (*inter alia*) in paying the purchaser's entrance fee, claims in respect of share dealings with members of the Exchange, who were creditors of the insolvent member, & the balance might be retained by the Exchange, or the whole or part of it might be applied to various objects specified in the articles. It was provided that on winding up the surplus assets were to be distributed among the members. G., a member of the Stock Exchange, was adjudicated insolvent in 1910.

Sect. 4.—"The property of the bankrupt": Sub-sect. 1, C. D. & E.]

be distributed according to the rules of the Exchange, & pltfs. could not recover such money against deft.—NICHOLSON *v.* GOOCH (1856), 5 E. & B. 999; 25 L. J. Q. B. 137; 26 L. T. O. S. 258; 2 Jur. N. S. 303; 4 W. R. 285; 119 E. R. 752.

Annotations:—**Apld.** Monk *v.* Sharp (1857), 2 H. & N. 540. **Distd.** Topping *v.* Keysell (1864), 16 C. B. N. S. 258. **Refd.** Paull *v.* Best (1863), 3 B. & S. 537. **Mentd.** Rourke *v.* Short (1856), 2 Jur. N. S. 352.

5801. —— —— Profits on customer's speculative account.]—A broker on the Stock Exchange was officially declared a defaulter. The same day the official assignee, under the rules of the Stock Exchange, closed all accounts of the broker then open, & received & paid all amounts owing by or to him on the Stock Exchange, &, after payment of all the Stock Exchange liabilities of the broker, there remained a surplus in the hands of the official assignee. Shortly afterwards the broker was adjudicated bkpt. with large outside liabilities. Part of the surplus above-mentioned comprised money which represented differences, being profits, due on contracts made with jobbers on the Stock Exchange by the broker as agent for an outside customer, who was running a speculative account on the Stock Exchange through him, & which the broker, on the day he became a defaulter, had he been then solvent, would have received for the customer:—*Held:* the money was merely a book debt of the broker & formed part of his general assets, & passed to his trustee, the remedy of the customer being to prove in the bkpcy. for the amount.—KING *v.* HUTTON, [1900] 2 Q. B. 504; 69 L. J. Q. B. 786; 83 L. T. 68; 7 Mans. 393, C. A.

Annotation:—**Refd.** *Re* Woodd, *Ex p.* King (1900), 82 L. T. 504.

5802. —— —— Balance collected from jobbers—Sum collected from outside debtors.]—W., a broker on the London Stock Exchange, committed an act of bkpcy., & on the following day was declared a defaulter, & in accordance with the rules of the Exchange the official assignee of the Exchange closed all W.'s transactions on that day, which happened to be "ticket" day, & received & paid the debts to & from W. & distributed them in the Stock Exchange liquidation. W. had liabilities outside the Stock Exchange. The official assignee when he collected the money knew of the act of bkpcy. The official assignee had received £1,262 15*s.* 2*d.* due to W. from jobbers on the Exchange, & £117 15*s.* 2*d.* from W.'s outside clients, & he refused to hand those amounts over to the trustee in W.'s bkpcy., but was willing to hand over the amount of the surplus remaining in his hands:—*Held:* the trustee was not entitled to so much of the £1,262 15*s.* 2*d.* as represented the artificial "making up price" on the "ticket" day, but he was entitled to the balance together with the £117 15*s.* 2*d.*—*Re* WOODD, *Ex p.* KING (1900), 82 L. T. 504; 16 T. L. R. 294; 44 Sol. Jo. 379.

5803. Bankrupt's bank balance collected by official assignee.]—C., a member of the Stock Exchange, became unable to meet his Stock Exchange engagements, & gave notice thereof to the secretary. He then made his statement at the first meeting of creditors, declaring at that time, that he had no debts outside the Stock Exchange, & his Stock Exchange creditors consented to accept a composition, &, to provide for a part of it, he, at the demand of the official assignees, gave them a cheque for £5,000 then standing to his credit in the Bank of England. The official assignees obtained the money & apportioned it among his Stock Exchange creditors. He afterwards confessed to owing debts to a large amount to outside creditors, & was declared a bkpt. The trustee, on behalf of the general creditors, claimed from the official assignees of the Stock Exchange the £5,000:—*Held:* he was entitled to claim it, for what was done by C. amounted to a *cessio* bonorum, & constituted an act of bkpcy.—TOMKINS *v.* SAFFERY (1877), 3 App. Cas. 213; 47 L. J. Bcy. 11; 37 L. T. 758; 26 W. R. 62, H. L.

Annotations:—**Distd.** *Re* Plumbly, *Ex p.* Grant (1880), 13 Ch. D. 667, C. A. **Consd.** *Re* Halstead, *Ex p.* Richardson, [1917] 1 K. B. 695, C. A. **Mentd.** Pearson *v.* Scott (1878), 9 Ch. D. 198; Richardson *v.* Stormont, Todd, [1900] 1 Q. B. 701, C. A.; *Re* Sharp, *Ex p.* Gundry & Johnston (1900), 83 L. T. 416; Ratcliff & Dealtry *v.* Mendelssohn, [1902] 2 K. B. 653, C. A.; Lomas *v.* Graves, [1904] 2 K. B. 557, C. A.

5804. Funds collected from other members of Stock Exchange.]—By the rules of the London Stock Exchange, when a member was declared a defaulter, the contracts for the sale & purchase of stocks & shares, which had been made by him for the next settling or account day, were closed by the official assignee, appointed by that body, at the market prices of the stocks & shares, the subjects of the contracts, at the time of the default, & those members who, on that footing, owed differences upon their contracts with the defaulter were bound by the rules, on pain of being themselves declared defaulters, to pay those differences to the official assignee. The official assignee was bound by the rules to employ the money so received by him in the first place in paying to those members, to whom, upon the same footing, differences were due upon their contracts with the defaulter, the differences so due to them:—*Held:* (1) the money so received by the official assignee, being an artificial fund created by the rules of the Stock Exchange, did not form part of the assets of the defaulter, & did not pass to his trustee; (2) even if the payments made to the official assignee of a defaulter ought to have been made to the trustee, yet, as the official assignee claimed them adversely, the trustee could not recover them from him.—*Re* PLUMBLY, *Ex p.* GRANT (1880), 13 Ch. D. 667; 42 L. T. 387; 28 W. R. 755, C. A.

Annotations:—**Distd.** King *v.* Hutton, [1899] 2 Q. B. 555. **Folld.** *Re* Woodd, *Ex p.* King (1900), 82 L. T. 504. **Consd.** Levitt *v.* Hamblet [1901] 2 K. B. 53, C. A. **Refd.** Beckhuson & Gibbs *v.* Hamblet, [1900] 2 Q. B. 18. **Mentd.** Anderson *v.* Beard, [1900] 2 Q. B. 260; Ratcliff & Dealtry *v.* Mendelssohn, [1902] 2 K. B. 653, C. A.

5805. Assets collected by official assignee & paid over to trustee in error—Whether recoverable by official assignee—Failure to register assignment—1887 Act, s. 4, & 1913 Act, s. 37.]—A stockbroker applied to be, & was, annually re-elected a member of the Stock Exchange up to & including the year beginning Mar. 25, 1914. On July 29, 1914, he made a declaration in writing, in the firm name

His share was declared forfeited, & was sold for £450 gross. 5 per cent. commission was paid on the sale, 10 per cent. was applied to the purchaser's entrance fee, & £50 was paid to B., a member of the Stock Exchange, a creditor of G.'s in respect of share dealings. The official receiver of the Ct. of Insolvency as trustee of G.'s estate, demanded, but was refused the proceeds after payment of the entrance fee. He subsequently assigned to pltf. his right of action in respect of the proceeds for £35:—*Held:* (1) the payment of commission & the deduction of the entrance fee were rightly made, & also the payment of £50 to B.; (2) pltf. was only entitled to a portion of the proceeds, sufficient with the addition of his own purchase-money to satisfy the claims of the creditors & the costs of the insolvency, & the excess was the property of the Stock Exchange, not of insolvent, & so not assignable by the official receiver.—STUART *v.* STOCK EXCHANGE OF ADELAIDE, LTD., [1914] S. A. L. R. 120.—AUS.

under which he carried on business, of his inability to comply with his bargains, & on the same day he was "hammered," *i.e.*, publicly declared a defaulter, & the official assignee proceeded to collect his assets in accordance with the rules of the Stock Exchange. On Nov. 9, or more than three months after the default, a petition in bkpcy. was presented against debtor, & a receiving order was made thereon. In 1915 the official assignee, mistakenly thinking that the petition had been presented on Oct. 27, 1914, handed over to the trustee £6,869 14*s.* 10*d.*, received since the default. On discovering the mistake the official assignee brought a motion against the trustee to recover the money:—*Held:* the assignment to the official assignee was not void as a fraud against the policy of the bkpcy. laws, & the money would have been recoverable on the ground of mistake, but the title of the official assignee was ousted, on the ground that the application for re-election on Mar. 25, the rules of the Stock Exchange, & the declaration of July 29 constituted a deed of arrangement in favour of certain creditors within the above Acts, & was void for non-registration.—*Re* HALSTEAD, *Ex p.* RICHARDSON, [1917] 1 K. B. 695; 86 L. J. K. B. 621; 116 L. T. 386; 33 T. L. R. 191; [1917] H. B. R. 60, C. A.

See, generally, STOCK EXCHANGE.

D. Money deposited at Lloyd's.

5806. Underwriter at Lloyd's—Deposit on admission—Applicable only to claims on policies.]—An underwriter on admission to Lloyd's made a deposit, & covenanted with trustees that it should be applied in making good any default he might make on any risks he might underwrite. He became bkpt.:—*Held:* the general creditors had no claim to the deposit, which was applicable only to claims on the policies he had underwritten.—*Re* HEATHCOTE, *Ex p.* THE TRUSTEE (1912), *Times*, July 17th.

E. Other Cases.

5807. Money paid into bank after business hours—On day of stopping payment.]—Money was paid into a bank on Saturday evening after office hours. On the same evening one of the partners of the bank made a declaration of insolvency without the knowledge of his partner. The bank never again opened for business & both partners were subsequently adjudicated bkpts.:—*Held:* the money so paid in passed to the assignees of the partners.—*Re* NASH & NEALE, *Ex p.* CLUTTON (1850), Fonbl. 167.

5808. Money paid to indemnify bail.]—M. was charged with embezzlement & S. became bail in £100 for M., on receiving from M. £100 to indemnify him against any loss he might sustain by becoming bail:—*Held:* as the contract to indemnify was illegal, & as no loss having been incurred, the £100 might have been recovered back by M., if he had not been adjudicated a bkpt., the money was recoverable by his trustee.—WILSON *v.* STRUGNELL (1881), 7 Q. B. D. 548; 50 L. J. M. C. 145; 45 L. T. 219; 45 J. P. 831; 14 Cox, C. C. 624.

Annotations:—**Mentd.** Herman *v.* Jeuchner (1885), 15 Q. B. D. 561, C. A.; Consolidated Exploration & Finance Co. *v.* Musgrave, [1900] 1 Ch. 37; R. *v.* Porter, [1910] 1 K. B. 369, C. C. A.

5809. Money on person of fugitive offender.]—When a fugitive offender, arrested in England on an extradition warrant for offences committed in a foreign State, becomes bkpt. in England pending the hearing of the charge, the property found on him at the date of his arrest vests in his trustee, subject to this, that it may on his committal be ordered to be delivered up with him to be used as evidence of the crime at the trial, &, in such a case, the Secretary of State, in making the extradition order, should stipulate that, when the criminal proceedings in the foreign State are concluded, the property shall be restored to the jurisdiction of the English Bkpcy. Ct.

In such a case the competent authority in the first instance to decide what property found on prisoner will serve as proof of the crime is the ct. which hears the charge & makes the committal order.—*Re* BOROVSKY & WEINBAUM, *Ex p.* SALAMAN, [1902] 2 K. B. 312; 71 L. J. K. B. 992; 87 L. T. 184; 51 W. R. 48.

What causes of action pass to the trustee.]—*See* Part XXI., Sect. 1, *post.*

PART XX. SECT. 4, SUB-SECT. 1.—E.

c. *Surplus in prior bankruptcy.*]—An official assignee obtained a decree setting aside a voluntary settlement under 13 Eliz. c. 5, & realised the settled property, which yielded a surplus after paying all debts & costs. The settlor having subsequently become again insolvent, an order was made for payment of such surplus to the official assignee under the second insolvency.—GOODMAN *v.* BOULTON (1872), 3 V. R. 20.—**AUS.**

d. *Money borrowed on protected policy.*]—T. having for fourteen years kept up a policy of assurance on his own life payable at his death, borrowed money on the security of the policy:—*Held:* the money borrowed on the security of the policy was not protected from creditors.—*Re* THOMPSON, *Ex p.* OFFICIAL ASSIGNEE, CROSS RESPONDENT (1903), 3 S. R. N. S. W. 166.—**AUS.**

e. *Money paid into bank by receiver in foreclosure suit—Receiver being bankrupt's clerk.*]—A., clerk to B., was appointed receiver in a foreclosure cause instituted by the assignees of C., a bkpt., & on the eve of the bkpcy. of B., being informed of an order of the ct. to pay in the money due by him as receiver, & having funds of B.'s in his hands, he asked him what he should do. B. told him to take care of himself, & A. lodged the money in a bank, to the credit of the assignees of C. A motion by the assignees of B. that the assignees of C. should pay the money to them was refused.—*Re* ATKINSON (1828), 1 Ir. L. Rec. 1st ser. 412.—**IR.**

f. *Retention money on building contract—Cost to surety completing contract exceeding such money.*]—A building contract contained provisions for payment of a percentage of the value of the work done from time to time, the balance to be retained by the building owner & to be claimable by the contractor, part on completion of the work & part three months thereafter. The contractor, after executing a portion of the work, abandoned the contract & became insolvent. Thereupon the surety, who had bound himself as co-principal debtor, completed the building under the original contract, with the consent of the building owner. The cost to the surety of so doing exceeded the amount of the retention money in the hands of the building owner when the contractor threw up the contract:—*Held:* the retention money did not in the first instance vest in the trustee, but the surety was entitled to be recouped out of it for any loss incurred by him in completing the contract, & as such loss exceeded the amount of the fund, the surety was entitled to the whole of the retention money.—CORRANS *v.* TRANSVAAL GOVERNMENT (1909), T. S. 605.—**S. AF.**

g. *Money from sale of land—Bankrupt having equitable interest.*]—Previous to an act of insolvency, lands, in which insolvent, deft. in a suit of ch., had an equitable interest, had been ordered to be sold, & were afterwards sold, & the purchase-money paid to pltf. in equity. The assignee in insolvency having moved that such money be paid into ct. for the benefit of the general creditors:—*Held:* such lands were subject to the order for sale, & motion refused.—YALE *v.* TOLLERTON (1866), 2 Ch. Ch. 49.—**CAN.**

h. *Money in hands of fully paid annuitant.*]—An annuitant continued for some years in possession of insolvent's property when a creditors' assignee was appointed. The chief clerk reported that the annuitant was fully paid & had some money in his hands. The annuitant died shortly before the report was presented. The ct. was asked to make a revesting order upon the sum which was found due being lodged in ct., which was done, & it was directed that a personal representative should be raised to the annuitant.—*Re* BARRETT (1867), 1 I. L. T. Jo. 158.—**IR.**

j. *Money paid away by prior trustee without authority.*]—The account of an estate, formerly in the hands of a derivative exor., who became insolvent & died in 1856, having been pending in ct. for many years, a compromise was effected. Part or a sum of money, paid to the credit of insolvent's estate in pursuance of a compromise, was made over, with the knowledge of the assignee, but without notice to or the sanction of the ct. to A., who had assisted in taking the account. The

Sect. 4.—"The property of the bankrupt": Sub-sect. 2, A. & B.]

SUB-SECT. 2.—"THINGS IN ACTION."

A. Goodwill, Patents, Trade Marks, etc.

5810. Goodwill—Innkeeper.]—The goodwill of the trade of bkpt., *e.g.*, an innkeeper, so far as it is local, passes to his assignees, but so far as it is personal it remains with bkpt.—*Re* THOMAS, *Ex p.* THOMAS (1841), 2 Mont. D. & De G. 294; 10 L. J. Bcy. 75; 5 Jur. 967, Ct. of R.; *revsd.* on another point (1842), 3 Mont. D. & De G. 40, L. C.

Annotations:—**Mentd.** *Re* Marshall, *Ex p.* Zwilchenbart (1844), 3 Mont. D. & De G. 671, Ct. of R.; *Re* Marshall, *Re* Marshall (1846), De G. 273, L. C.

5811. —— Public-house—Premises mortgaged.]—The goodwill of a mortgaged public-house is not a personal goodwill, but on a sale of the house by the mtgee. passes with it, & does not belong to the mtgor.'s trustee.—*Re* KITCHIN, *Ex p.* PUNNETT (1880), 16 Ch. D. 226; 50 L. J. Ch. 212; 44 L. T. 226; 29 W. R. 129, C. A.

Annotations:—**Consd.** West London Syndicate *v.* I. R. Comrs. [1898] 2 Q. B. 507, C. A. **Mentd.** *Re* Knight, *Ex p.* Voisey (1882), 21 Ch. D. 442, C. A.; *Re* Willis, *Ex p.* Kennedy (1888), 21 Q. B. D. 384.

5812. Trade mark—Bankruptcy of registered owner.]—A trade mark passes, on the bkpcy. of the registered owner, to his trustee.—HAMMOND & CO. *v.* MALCOLM BRUNKER & CO. & COLLYNS (1892), 8 T. L. R. 324; 9 R. P. C. 301.

Annotations:—**Mentd.** *Re* Clay & Bock (1892), 67 L. T. 614; *Re* Paine's Trade Mks., Paine *v.* Daniel Breweries (1893), 68 L. T. 801.

See, further, Sect. 18, *post.*

B. Contingent or Defeasible Interests.

5813. Contingent interest or possibility.]—A contingent interest or possibility in bkpt. is assignable by the comrs.

Devise to such of the children of A. as should be living at his death. A. had issue B., who became a bkpt., & got his certificate allowed, after which A. died:—*Held:* such contingent interest was liable to the bkpcy., as the son in the father's lifetime might have released it.—HIGDEN *v.* WILLIAMSON (1732), 3 P. Wms. 132; 24 E. R. 1000, L. C.

Annotations:—**Apld.** Chauncy *v.* Graydon (1743), 2 Atk. 616. **Distd.** Moth *v.* Frome (1761), Amb. 394. **Folld.** Smith *v.* Coffin (1795), 2 Hy. Bl. 444. **Distd.** Johnson *v.* Smiley (1853), 17 Beav. 223; Lee *v.* Olding (1856), 25 L. J. Ch. 580. **Folld.** De Serre *v.* Clarke (1874), 43 L. J. Ch. 821. **Refd.** Jewson *v.* Moulson (1742), 2 Atk. 417. **Mentd.** Gibbins *v.* Eyden (1869), 20 L. T. 516.

5814. Possibility—All that bankrupt might depart with.]—Comrs. of bkpts. may assign a possibility, because 13 Eliz. c. 7, s. 2, expressly empowers the comrs. to assign all that bkpt. might depart with, & besides, 21 Jac. 1, c. 19 enacts that the Act relating to bkpts. shall be construed in the most beneficial manner for creditors (LORD HARDWICKE, C.).—JEWSON *v.* MOULSON (1742), 2 Atk. 417; 26 E. R. 652; *sub nom.* INESON *v.* MOULSTON, Vobe's Case, 9 Mod. Rep. 373, L. C.

Annotations:—**Mentd.** Fitzer *v.* Fitzer (1742), 2 Atk. 511; Hearle *v.* Greenbank (1749), 3 Atk. 695; Wheeler *v.* Caryl (1751), Amb. 121; Price *v.* Rutter (1769), 2 Coop. *temp.* Cott. 230; Worrall *v.* Marlar (1784), 1 Cox, Eq. Cas. 153; Like *v.* Beresford (1797), 3 Ves. 506; Mitford *v.* Mitford (1803), 9 Ves. 87; Lloyd *v.* Williams (1816), 1 Madd. 450; Sturgis *v.* Champneys (1839), 9 L. J. N. S. Ch. 10; Hanson *v.* Keating (1844), 4 Hare, 1; *Re* Barr's Trusts (1858), 27 L. J. Ch. 548.

5815. Expectancy as heir presumptive or apparent.]—Expectancy of an heir either presumptive or apparent is not an interest or possibility capable of being made the subject of assignment.—CARLETON *v.* LEIGHTON (1805), 3 Mer. 667; 36 E. R. 255.

Annotations:—**Consd.** Lyde *v.* Mynn (1833), Coop. *temp.* Brough. 123. **Apld.** *Re* Vizard's Trusts (1866), 1 Ch. App. 588. **Mentd.** Hardman *v.* Ellames (1834), 3 L. J. N. S. Ch. 74.

5816. Chance of receiving legacy.]—In one sense, a man may validly dispose of property which is not his; for instance, he may enter into a covenant, for value, to convey to the covenantee every species of property which might thereafter be bequeathed or devised to him by any stranger, & which he had not, at the time of entering into the covenant, any knowledge of or any expectation of receiving. This is not an interest which can pass to the assignees. The chance of receiving a legacy from a relative a man might sell before his bkpcy., but still, if not sold by him, that chance would not pass to his assignees (ROMILLY, M.R.).—JOHNSON *v.* SMILEY (1853), 17 Beav. 223; 1 Eq. Rep. 397; 22 L. J. Ch. 826; 22 L. T. O. S. 39; 1 W. R. 440; 51 E. R. 1019.

Annotations:—**Refd.** *Re* Inkson's Trusts (1855), 26 L. T. O. S. 146, C. A.; Betteley *v.* Stainsby (1862), 9 Jur. N. S. 446.

5817. Life interest in wife's after-acquired property.]—Under a marriage settlement, the husband was entitled to a life interest in all the wife's after-acquired property. The husband became bkpt., & obtained his certificate. The wife afterwards became entitled to the residuary estate of her deceased sister, as next of kin:—*Held:* the assignees were not entitled to the husband's life interest in the property.—*Re* INKSON'S TRUSTS

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successor in office of the assignee claimed repayment. A. was neither a party to, nor had any control over, the compromised suit, & he owed no duty to the ct. in respect of it nor to the creditors of the estate, & he had taken no unfair advantage of the assignee:—*Held:* there was no grounds upon which the repayment could be claimed.—ABDOOL HOSSEIN ZENAIL ABADI *v.* TURNER (1887), I. L. R. 11 Bom. 620; 14 L. R. Ind. App. 111.—**IND.**

l. *Money compulsorily deposited in railway provident institution.*]—A member of a railway provident institution, who had made compulsory deposits therein, became insolvent, & the usual vesting order was made under Insolvent Debtors Act, s. 7. By the rules of that institution, a member was to be paid, on his retirement from service, the sum of money standing to his credit. At the date of the vesting order, insolvent had not retired from service:—*Held:* the right of insolvent to be paid the sum standing to his credit in the fund, on his retirement from service, vested in the official assignee.—MADRAS OFFICIAL ASSIGNEE *v.* DALGAIRNS (1902), I. L. R. 26 Mad. 440.—**IND.**

m. ——.]—S., a clerk in the employment of a railway Co., agreed with the co. that 5 per cent. of his salary should be deducted every month as his subscription to a "provident fund," & further rate of 1 per cent. as his subscription to a "mutual assurance fund." By the rules of those funds he was entitled to receive back his subscriptions in the event of his dismissal for misconduct. S. became insolvent, & omitted to mention in his sched. the sums standing to his credit in respect of the above two funds:—*Held:* the sums were personal estate of insolvent held by the co. in trust for him, which passed to the official assignee under s. 7 of Stat. 11 & 12 Vict. c. 21, & that they should be entered in his sched. as part of his estate.—*Re* SHREWSBURY'S PETITION (1886), I. L. R. 10 Bom. 313.—**IND.**

q. *Costs.*]—Costs payable to bkpt. trustee by a party in respect of litigation, which bkpt. has prosecuted on behalf of the trust estate, are not assets of bkpt., & his official assignee is not entitled to them to the prejudice of the trust estate or of bkpt.'s solr.—DOUGLAS *v.* DOUGLAS (1907), 7 S. R. N. S. W. 466.—**AUS.**

r. ——.]—A motion was refused, with costs to three pltfs. Before the costs were taxed, two pltfs. became bkpt. The costs were taxed, & a subpœna issued in the name of the three pltfs.:—*Held:* the costs did not pass to the assignees.—DRISCOLL *v.* BLAKE (1852), 2 I. Ch. R. 139.—**IR.**

PART XX. SECT. 4, SUB-SECT. 2.—A.

Hotel licence.]—*See* cases in sub-sect. 2, E *post.*

PART XX. SECT. 4, SUB-SECT. 2.—B.

5813 i. *Contingent interest.*]—Devise of land & dwellings to testator's wife, for life, reversion & remainder to his son, in the event of his surviving his mother. The son became insolvent, & some time after the declaration of insolvency his mother died:—*Held:* at date of insolvency insolvent had a contingent executory interest, which passed to his trustee.—FINLAY'S TRUSTEES *v.* FINLAY (1888), 7 Nfld. L. R. 262.—**NFLD.**

(1855), 21 Beav. 310 ; 26 L. T. O. S. 146 ; 4 W. R. 107 ; 52 E. R. 878.

Annotation :—**Folld.** Gibbins *v.* Eyden (1869), L. R. 7 Eq. 371.

5818. Interest defeasible on appointment—Appointment to bankrupt after bankruptcy.]—At the date of his bkpcy., L. was the sole surviving object of a power of appointment vested in his father, & he was also entitled to a vested but defeasible interest in a moiety of the fund in default of appointment. Two days after the date of his certificate his father made an appointment under the power of the whole fund in his favour :—*Held :* during the bkpcy., & before the certificate, all the assignee had was a defeasible interest, which was afterwards validly defeated, & bkpt. as appointee was entitled to the fund as against his assignees.—LEE *v.* OLDING (1856), 25 L. J. Ch. 580 ; 28 L. T. O. S. 49 ; 2 Jur. N. S. 850 ; 4 W. R. 398.

Annotations :—**Folld.** De Serre *v.* Clarke (1874), L. R. 18 Eq. 587. **Refd.** *Re* Vizard's Trusts (1866), L. R. 1 Eq. 667 ; Sweetapple *v.* Horlock (1879), 11 Ch. D. 745.

5819. —— ——.]—A fund stood limited by will, upon trust for a person for life, remainder to all or such one or more of the children or issue of testator's deceased brother A., in such shares & in such manner as the tenant for life should appoint, & in default of appointment to the children of A. equally. F., one of the children of A., assigned all his property to a trustee for his creditors, by a deed, which was duly registered, but F. never obtained an order of discharge. Afterwards the tenant for life appointed the fund by will to the children of A. equally. All the children of A. living at testator's death survived the tenant for life, so that F. took the same share under the appointment as he would have taken in default of appointment :—*Held :* F.'s interest, in default of appointment, was defeated by the appointment which gave him an interest liable to be defeated by lapse, & which must be considered a new interest, & the share of F. did not pass to the trustee. *Qu. :* whether an appointment by deed to F. of the same share as he would have taken in default of appointment would not also have given him a new interest.—*Re* VIZARD'S TRUSTS (1866), 1 Ch. App. 588 ; 35 L. J. Ch. 804 ; 14 L. T. 815 ; 12 Jur. N. S. 680 ; 14 W. R. 1000, L. JJ.

Annotations :—**Folld.** *Re* A Trust Deed, *Ex p.* James (1866), 15 L. T. 193. **Consd.** Sweetapple *v.* Horlock (1879), 11 Ch. D. 745. **Refd.** De Serre *v.* Clarke (1874), L. R. 18 Eq. 587 ; *Re* Maddy's Estate, Maddy *v.* Maddy, [1901] 2 Ch. 820 ; A.-G. *v.* Selborne, [1902] 1 K. B. 388. C. A.

5820. Right to return of costs—Contingent on success in action.]—A solr., pending a suit in Ch., received from A., his client, the amount of his bill for costs already incurred, upon an agreement, to refund the amount to A. in the event of his obtaining a decree for costs in the suit. A. became bkpt., obtained his certificate, & died. The suit proceeded, the assignees not interfering, & a decree was pronounced under which costs were awarded to A., & were received by the solr. :—*Held :* the contingent right to have the amount advanced by him for costs repaid under the agreement, which was a valid agreement, & made upon a sufficient consideration, was an interest in A., which on his bkpcy. passed to his assignees, who were entitled to recover the sum so paid by A. as money received to their use.—MORGAN *v.* TAYLOR (1859), 5 C. B. N. S. 653 ; 28 L. J. C. P. 178 ; 5 Jur. N. S. 791 ; 7 W. R. 285.

5821. Life interest contingent on obtaining certificate.]—Testatrix provided that in case her nephew, who was an uncertificated bkpt., should obtain his certificate, so as to be enabled to hold & enjoy real & personal estate for his own absolute personal use, enjoyment & benefit, free from the control of any other person, the income of her residue should be paid to him for life. On his subsequent discharge :—*Held :* his life interest passed to his assignees as a contingent interest then coming into possession.—DAVIDSON *v.* CHALMERS, PERRY *v.* CHALMERS (1864), 33 Beav. 653 ; 33 L. J. Ch. 622 ; 10 L. T. 217 ; 10 Jur. N. S. 910 ; 12 W. R. 592 ; 55 E. R. 522.

5822. Interest defeasible on election by wife of bankrupt—Effect of election after bankruptcy—On real & personal property.]—A., upon his marriage, settled real estate of small value, in remainder after the decease of the survivor of himself & his wife, to the use of all the children of the marriage as tenants in common in tail, with cross remainders. He also settled personal estate, after the death of the survivor of himself & his wife, for the benefit of all the children of the marriage in equal shares. By his will A. gave an annuity of £1,000 a year to C., one of his daughters married at the date of the will, for life, for separate use, with a clause of forfeiture upon assignment or incumbrance of the annuity, & declared that the provision made by his will for his daughter C. should be accepted by her in full for any share or interest she might have in the property comprised in the settlement. In A.'s lifetime C.'s husband became insolvent. At A.'s death there were several children of C.'s marriage. C. electing, her husband concurring, to take the annuity under the will, & to renounce all benefit under the settlement :—*Held :* (1) the effect of C.'s election upon the share of personalty comprised in the settlement, which was outstanding in trustees, & subject to her equity was to defeat the interest of the assignee of her husband in that fund ; (2) C.'s election could not defeat the interest of the assignee in the real estate comprised in the settlement, & upon her joining with her husband in barring the estate tail, she was bound to give compensation, out of the annuity, to the extent

t. *Right of re-entry on condition not broken.*]—*Semble :* a right of re-entry on a condition not broken, passed by assignment to the provisional assignee of the heir of the grantor, who had become insolvent.—ORR *v.* STEVENSON (1842), 5 I. L. R. 2.—**IR.**

v. *Spes successionis.*]—A wife bequeathed to her husband an annuity of £100 on the conditions that (1) he should survive her mother, who liferented her estate, (2) he should not become a bkpt., or assign charge, or encumber the said annuity, or attempt to do so, (3) her trustees were to have the power to refuse or discontinue payment of the annuity at their discretion, & without assigning any reason. The husband became bkpt. during his wife's lifetime, & at the date of her death was still undischarged, but he obtained his discharge shortly after, but without informing his trustee of the bequest of the annuity, which was still under the liferent, assuming the second & third conditions contained in his wife's will not to have existed, the annuity vested in bkpt. at the date of testator's death, & was attachable by the creditors in his sequestration.—TRAPPES *v.* GRAHAM (1871), 10 Macph. (Ct. of Sess.) 38 ; 44 Sc. Jur. 25.—**SCOT.**

w. ——.]—A domiciled Scotsman acquired a trading domicile in France, &, becoming bkpt. was sequestrated according to the rules of French law. Returning to Scotland, he executed & registered for preservation there a discharge of his legitim to prevent the legitim fund falling into the hands of his foreign creditors. The French syndic on behalf of the general body of creditors brought proceedings to reduce the discharge & for payment of the legitim :—*Held :* the creditors had the right to challenge a gratuitous alienation by bkpt. of a mere *spes successionis*, though not carried to them by the sequestration, & the transfer of his estate by the sequestration to his trustee did not absolve bkpt. from his equitable duty to his creditors in relation to such a *spes successionis*, & while the law would not compel bkpt. to assign a *spes successionis* to his creditors, it might well forbid him to do any act in relation to a *spes successionis* which was intended to be to the prejudice of creditors.—OBERS *v.* PATON'S TRUSTEES (1897), 24 R. (Ct. of Sess.) 719 ; 4 S. L. T. 350.—**SCOT.**

Sect. 4.—"The property of the bankrupt": Sub-sect. 2, B. C. & D. (a).]

of the realty taken by the assignee.—GRIGGS *v.* GIBSON, MAYNARD *v.* GIBSON (1866), L. R. 1 Eq. 685 ; 35 L. J. Ch. 457 ; 14 W. R. 513.

Options exercisable by bankrupt under contracts.]—*See* No. 7638, *post.*

5823. Interest conditional on donee not being undischarged bankrupt at death of testator—Bankruptcy before death of testator—Subsequent annulment.]—Testator directed his exors. to set apart a sum of money sufficient to produce £100 a year, & pay same to his son J., if not at testator's death an uncertificated bkpt. In Sept., 1865, J. was adjudicated bkpt. on his own petition, in Nov., 1865, testator died, no order of discharge was made, & in Mar., 1866, on the petition of J. with the consent of all his creditors, the adjudication was annulled :—*Held :* the gift to J. failed, being coupled with a condition precedent which was fulfilled, & the annulment of the bkpcy. had no relation back.—COX *v.* FONBLANQUE (1868), L. R. 6 Eq. 482 ; 37 L. J. Ch. 622 ; 16 W. R. 1032.

Annotation :—**Consd.** Ancona *v.* Waddell (1878), 10 Ch. D. 157.

5824. Contingent interest of expectant under limitation to next-of-kin of another.]—*Semble :* the contingent interest of an expectant under a limitation to the next of kin of another person does not pass under a general assignment for creditors.—*Re* DUGGAN'S TRUSTS (1869), L. R. 8 Eq. 697.

Annotation :—**Mentd.** Wood *v.* Boucher (1870), 40 L. J. Ch. 112.

5825. Contingent interest as tenant by curtesy.]—Where a wife's real estate did not fall into possession till after the husband's bkpcy. & discharge :—*Held :* the husband, though there had been issue of the marriage, had not at the time of his bkpcy. any such contingent interest in the estate, as tenant by the curtesy, as would pass to his assignees.—GIBBINS *v.* EYDEN (1869), L. R. 7 Eq. 371 ; 38 L. J. Ch. 377 ; 20 L. T. 516 ; 17 W. R. 481.

Annotations :—**Mentd.** Tomkins *v.* Colthurst (1875), 1 Ch. D. 626 ; Eager *v.* Furnivall (1881), 17 Ch. D. 115 ; *Re* Smith, Hannington *v.* True, Giles *v.* True (1886), 33 Ch. D. 195.

5826. Contingent future interest.]—In 1854 a person entitled to a contingent future interest in a fund, under a bequest to all children living at the death of a tenant for life, took the benefit of Insolvent Act, but did not mention the interest in his schedule. In 1876 the contingent interest vested in possession. In the same year he was found lunatic, & shortly afterwards an order was made giving the holder of the fund liberty to pay it into ct. to the credit of the lunacy, & directing it to be invested & the income paid to the committee. Shortly afterwards the provisional assignee presented a petition in the lunacy, praying that the fund might be transferred to the credit of the insolvency, or that he might be at liberty to take proceedings in the Ch. Div. for its recovery : —*Held :* a transfer of the fund should be made as prayed.—*Re* HINDS (1877), 7 Ch. D. 26 ; 37 L. T. 768 ; 26 W. R. 193, C. A.

Annotation :—**Refd.** *Re* Farnham (1895), 3 Mans. 109, C. A.

C. Interests subject to Discretionary Trusts.

5827. Whole fund applicable for bankrupt only.]—Where trustees under a will have a discretion as to the manner of the application of the trust fund for the benefit of a particular person, but no power to apply it otherwise than for the benefit of that *cestui que trust*, during his life, his interest passes to his assignees, notwithstanding a proviso in the will, that he shall not have the power to sell, mortgage, or anticipate the income of the fund.—GREEN *v.* SPICER (1830), 1 Russ. & M. 395 ; Taml. 396 ; 8 L. J. O. S. Ch. 105 ; 39 E. R. 153.

Annotations :—**Distd.** Twopeny *v.* Peyton (1840), 10 Sim. 487. **Consd.** *Re* Coleman, Henry *v.* Strong (1888), 58 L. J. Ch. 226, C. A. **Mentd.** *Re* Coe's Trust (1858), 4 K. & J. 199.

5828. ——.]—Testator bequeathed a legacy to his exors., upon trust, to pay same to his son, in such smaller or larger portions, at such time or times, & in such way or manner as they should in their judgment & discretion think best :—*Held :* the discretion of the exors. was determined by the insolvency of the legatee, & the legacy vested in the assignee of the insolvent.—PIERCY *v.* ROBERTS (1832), 1 My. & K. 4 ; 39 E. R. 582.

Annotations:—**Consd.** Gerothwohl *v.* Cochrane (1835), 5 L. J. N. S. Ch. 47. **Distd.** Twopeny *v.* Peyton (1840), 10 Sim. 487. **Refd.** Wright *v.* Maunder (1842), 4 Beav. 512. **Mentd.** Casborne *v.* Barsham (1835), 6 Sim. 317 ; Dublin City Distillery *v.* Doherty, [1914] A. C. 823, H. L.

5829. —— Directions as to part unapplied—Whole paid to bankrupt until bankruptcy.]—A. assigned £800 to trustees in trust during the life of B., or such part thereof as they should think proper, or at such other times & in such portions as they should judge expedient to pay the interest to him, or if they should think fit to lay it out in procuring for him diet & other necessaries, but so that he should not have any right to the interest other than the trustees in their uncontrolled discretion should think proper, & so as no creditor of his should have any claim thereon, nor should same be subject to his debts, disposition or engagements, & it was declared that, after his death, the £800 & all savings & accumulations of interest, if any, should be in trust for his children, & if he should have no child, then in trust for C. B. became bkpt. The trustees had paid him the interest down to his bkpcy. :—*Held :* his life interest passed to his assignees.—SNOWDON *v.* DALES (1834), 6 Sim. 524 ; 3 L. J. Ch. 188 ; 58 E. R. 690.

Annotation :—**Distd.** Twopeny *v.* Peyton (1840), 10 Sim. 487.

5830. —— For maintenance & support only—Legatee bankrupt & insane.]—Testatrix bequeathed a share of her residue in trust for her nephew for life. By a codicil, after reciting that her nephew had become a bkpt. & insane, she directed the trustees to apply, during his life, the whole or such part of the interest of the fund, at such times, in such proportions, & in such manner, for the maintenance & support of her nephew, & for no other purpose whatsoever, as they in their discretion should think most expedient :—*Held :* the nephew's assignees were not entitled to any portion of the provision made for him.—TWOPENY *v.* PEYTON (1840), 10 Sim. 487 ; 9 L. J. Ch. 172 ; 4 Jur. 456 ; 59 E. R. 704.

Annotation :—**Dbtd.** Younghusband *v.* Gisborne (1846), 15 L. J. Ch. 355, L. C.

x. ——.]—*Held :* a *spes successionis*, which bkpt. had under a settlement, had vested in his trustee.—SALAMAN *v.* TOD, [1911] S. C. 1214 ; 48 Sc. L. R. 974 ; 2 S. L. T. 172.—**SCOT.**

PART XX. SECT. 4, SUB-SECT. 2.—C.

5827 i. *Whole fund applicable for bankrupt only.*]—An annuity, granted to trustees to be paid by them to a third person, at such times & in such manner as they should think most beneficial for him, upon his own receipt only, without power to him to dispose of it, with a gift over in the event of his doing so, will, upon his insolvency, pass to his assignee.—IRWIN *v.* IRWIN (1845), 8 I. Eq. R. 9.—IR.

5827 ii. ——.]—Circumstances (*see* S. C. on p. 651, *ante*) in which :—*Held :* the third condition taken by itself would not prevent the annuity from falling under the sequestration, but such right only could be taken as was vested in bkpt., subject to the same conditions & qualities.—TRAPPES *v.* GRAHAM (1871), 10 Macph. (Ct. of Sess.) 38 ; 44 Sc. Jur. 25.—**SCOT.**

5831. —— —— Legatee adult male.]—A fund given to trustees, for the maintenance, support, & clothing of an adult male person, the manner & means of such application being in the trustees' discretion, but the whole fund being applicable, forms a beneficial interest in the fund for the *cestui que trust*, which will pass to his assignees.—YOUNGHUSBAND *v.* GISBORNE (1846), 15 L. J. Ch. 355; 7 L. T. O. S. 221; 10 Jur. 419, L. C.
Annotations:—**Consd.** *Re* Coleman, Henry *v.* Strong (1888), 39 Ch. D. 443, C. A. **Mentd.** Watkins *v.* Watkins, [1896] P. 222, C. A.; *Re* Fitzgerald, Surman *v.* Fitzgerald, [1903] 1 Ch. 933.

5832. —— Power on bankruptcy to apply fund for bankrupt's support.]—Testatrix, in the exercise of a power of appointment, directed that the trustees of a fund should stand possessed thereof, upon trust, to pay the income to her son T. during his life, or until he should become a bkpt. or cease to be entitled to receive such income, or any part thereof, for his own personal use or benefit, by any means or for any purpose, & in case any of these events happened, then to "pay to him or apply for his benefit during the remainder of his life" either the whole or so much only of the income as the trustees should in their uncontrolled discretion think fit, & "subject to that interest" the fund was given over to other objects of the power. T. became a bkpt.:—*Held:* notwithstanding the discretionary trust did not extend to benefiting any wife or children of T., such trust was valid, & although the income could not be properly paid to T., the whole or part thereof might be applied by the trustees for his maintenance.—*Re* BULLOCK, GOOD *v.* LICKORISH (1891), 60 L. J. Ch. 341; 64 L. T. 736; 39 W. R. 472; 7 T. L. R. 402.

5833. Whole fund applicable to bankrupt & others in certain events—For support of bankrupt, wife, & children.]—Settlement of husband's estate on his marriage, on trust to pay the rents, etc., "unto or for the maintenance & support of the husband, wife, & children, or otherwise, if the trustees should think proper to permit same to be received by the husband during his life, without power to charge, etc." On the bkpcy. of the husband:—*Held:* a trust had been created for the maintenance & support of the wife & children out of the property during the husband's life.—PAGE *v.* WAY (1840), 3 Beav. 20; 49 E. R. 8.
Annotations:—**Apld.** Kearsley *v.* Woodcock (1843), 3 Hare, 185. **Refd.** Duncan *v.* Campbell (1842), 12 Sim. 616.

5834. —— Trust for bankrupt, wife & children collectively.]—Testator bequeathed his residuary estate to trustees, upon trust, to pay the dividends to his son for life, but if his son should assign or alienate his interest, upon trust to apply the dividends for the maintenance of the son & his family, as the trustees should think fit. The son became bkpt.:—*Held:* his assignees were not entitled to any share of the son's interest, the trust being for the benefit of the son & the wife & the children collectively.—GODDEN *v.* CROWHURST (1842), 10 Sim. 642; 11 L. J. Ch. 145; 59 E. R. 765.
Annotations:—**Dbtd.** Younghusband *v.* Gisborne (1844), 1 Coll. 400; Younghusband *v.* Gisbourne (1846), 15 L. J. Ch. 355, L. C. **Refd.** *Re* Coleman, Henry *v.* Strong (1888), 39 Ch. D. 443; *Re* Bullock, Good *v.* Lickorish (1891), 60 L. J. Ch. 341.

5835. —— Surplus over sum required for maintenance.]—Under the provisions of a will funds were held by trustees, after the forfeiture of a life interest in bkpt., in trust to apply the income for the support of bkpt. & his wife & family in such manner as the trustees should think proper:—*Held:* bkpt. was not of necessity entitled to any part of the income separately from his wife & children, & any interest in bkpt. not applicable for the support of his wife & children passed to his assignees in bkpcy.—KEARSLEY *v.* WOODCOCK (1843), 3 Hare, 185; 1 L. T. O. S. 410; 8 Jur. 120; 67 E. R. 348.
Annotations:—**Folld.** Wallace *v.* Anderson (1853), 16 Beav. 533; Carr *v.* Living (1860), 28 Beav. 644. **Consd.** *Re* Smith, Smith *v.* Smith, [1916] 1 Ch. 369. **Refd.** Rochford *v.* Hackman (1852), 9 Hare, 475; *Re* Coleman, Henry *v.* Strong (1888), 39 Ch. D. 443; *Re* Bullock, Good *v.* Lickorish (1891), 60 L. J. Ch. 341.

5836. —— ——.]—Under a marriage settlement, lands were conserved to trustees, to the use of the husband for life, or until his bkpcy., & then to the wife for life, & on the death of the wife in the lifetime of the husband, to pay the income "in such manner, for the maintenance & support or otherwise for the benefit of the husband & the issue," as they might think proper:—*Held:* the discretionary power of the trustees, as to the application of the income, was not taken away by the bkpcy. so as to entitle the objects to take equally, & inquiry should be directed as to what had been properly applied for the maintenance of the issue, & the assignees were entitled to the surplus.—WALLACE *v.* ANDERSON (1853), 16 Beav. 533; 21 L. T. O. S. 17; 51 E. R. 885.

5837. —— ——.]—*Semble:* if the trustees of a settlement, under a discretionary trust, pay bkpt. more than sufficient for his necessary maintenance, he can be made to account for the excess to his trustee in bkpcy.—*Re* ASHBY, *Ex p.* WREFORD, [1892] 1 Q. B. 872; 66 L. T. 353; 40 W. R. 430; 9 Morr. 77.

5838. —— Right to proceeds so far as discretion exercised in favour of bankrupt.]—A person conveyed certain freehold & leasehold property to trustees, upon trust to pay the rents & profits to his son T. for life, provided that in case T. should be declared bkpt., or be discharged under any Insolvent Act, the trustees should apply the rents & profits in or towards the maintenance, clothing, lodging & support of T. & his then present or any future wife, & his children, or any of them, or otherwise for his, her, their, or any of their use & benefit, in such manner as the trustees should in their discretion think proper. T. was taken in execution for debt., & sent to prison at the suit of a creditor, who obtained a vesting order against him under Judgments Act, 1838 (c. 110). He was afterwards discharged under that Act:—*Held:* upon the discharge taking place, the discretionary power given to the trustees by the settlement might be exercised by them in favour of insolvent, his wife & children collectively, or in favour of any of those persons to the exclusion of the others, &, to whatever extent the power might be exercised in favour of insolvent, the benefit which he would take by the appointment would vest in the assignee.—LORD *v.* BUNN (1843), 2 Y. & C. Ch. Cas. 98; 63 E. R. 43.
Annotations:—**Refd.** Wallace *v.* Anderson (1853), 21 L. T. O. S. 17. **Mentd.** A.-G. *v.* Heywood (1887), 19 Q. B. D. 326, D. C.

D. Rights subject to Forfeiture.

(a) Validity of Forfeiture Clause.

5839. In settlement of funds not belonging to bankrupt—Wife's fortune.]—By a marriage settlement £4,000, money of the father of the intended wife, was settled to the use of the intended husband for life, but if he failed in the world the trustees

PART XX. SECT. 4, SUB-SECT. 2.—D. (a).

5839 i. *In settlement of funds not belonging to bankrupt—Wife's fortune.*]—Real property of the wife was, on the marriage, conveyed to trustees to the use of the husband for life, or until he should commit an act of bkpcy., or until he should make a composition with his creditors, or should make any assignment of his effects for the benefit of his creditors, or until he should

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were not to pay the produce to him, but apply it to the separate maintenance of the wife & children. The husband subsequently became bkpt. :—*Held :* the provision was good against the husband's assignees in bkpcy., as it was not made out of bkpt.'s estate, but was the settlement of the wife's fortune.—LOCKYER *v.* SAVAGE (1733), 2 Stra. 947 ; 2 Eq. Cas. Abr. 260 ; 93 E. R. 959.

Annotations :—**Consd.** Staveley *v.* Parsons (1736), 2 Hov. Suppl. 115. **Folld.** *Ex p.* Cooke (1803) 8 Ves. 353, L. C. ; *Ex p.* Hinton (1808), 14 Ves. 598, L. C. ; Mackintosh *v.* Pogose, [1895] 1 Ch. 505. **Refd.** Lester *v.* Garland (1832), 5 Sim. 205 ; Knight *v.* Browne (1861), 30 L. J. Ch. 649.

5840. —— ——.]—On treaty of marriage in 1709, the wife's father agreed to give £1,000 for her portion, & the husband agreed that it should remain & be to the father, his exors. & administrators, in trust for the wife in case the husband should become insolvent. The money was paid to the husband, who gave a bond for it. In 1734 he became bkpt. :—*Held :* (1) the lapse of time showed the absence of collusion to defeat creditors ; (2) the bond was enforceable against the assignees. —STAVELEY *v.* PARSONS (1736), 2 Hov. Supp. 115 ; 34 E. R. 1019.

5841. —— ——.]—Though a bond by a husband to pay a sum in the event of his bkpcy. or insolvency to trustees for the purpose of settlement cannot stand against the creditors, the property of the wife may be limited to the husband, until he becomes bkpt., etc., & from that event for his wife & children.—*Ex p.* COOKE (1803), 8 Ves. 353 ; 32 E. R. 391, L. C.

Annotation :—**Refd.** Mackintosh *v.* Pogose, [1895] 1 Ch. 505.

5842. —— ——.]—Settlement, previous to marriage, of money, the property of the wife, upon the event of the husband's bkpcy. valid.—*Ex p.* HINTON (1808), 14 Ves. 598 ; 33 E. R. 650, L. C.

5843. —— ——.]—A settlement may be made of a legacy, to which a married woman becomes entitled during coverture, so as to give her husband a life interest determinable on bkpcy. or alienation. —MONTEFIORE *v.* BEHRENS (1865), L. R. 1 Eq. 171 ; 35 Beav. 95 ; 55 E. R. 830.

Annotations :—**Consd.** Mackintosh *v.* Pogose (1894), 2 Mans. 27. **Expld. & Distd.** *Re* Holland, Gregg *v.* Holland, [1901] 2 Ch. 145. **Consd.** *Re* Holland, Gregg *v.* Holland, [1902] 2 Ch. 360, C. A.

5844. —— **Interest given for life.**]—A testator gave his property to trustees to pay the dividends to his son, & directed that they should not be grantable or assignable by way of anticipation. The son became bkpt. :—*Held :* his interest passed to his assignees.

A testator may limit his property till the object of his bounty shall become bkpt., but if he gives it for life he cannot take away the incidents to that estate. If there be a limitation over in the event of bkpcy., neither the person becoming bkpt. nor his assignees, can take any benefit beyond the terms of the will (LORD ELDON, C.)—BRANDON *v.* ROBINSON (1811), 18 Ves. 429 ; 1 Rose, 197 ; 34 E. R. 379.

Annotations :—**Consd.** Rochford *v.* Hackman (1852), 9 Hare, 475. **Refd.** Wilkinson *v.* Wilkinson (1819), 3 Swan. 515 ; Stroud *v.* Norman (1854), Kay, 313 ; Hood-Barrs *v.* Heriot, [1896] A. C. 174, H. L. ; *Re* Fitzgerald, Surman *v.* Fitzgerald, [1903] 1 Ch. 933. **Mentd.** Barton *v.* Briscoe (1822), Jac. 603 ; Massey *v.* Parker (1834), 2 My. & K. 174 ; Benson *v.* Benson (1835), 6 Sim. 126 ; Tullett *v.* Armstrong (1838), 1 Beav. 1 ; *Re* Coe's Trust (1858), 4 K. & J. 199 ; *Re* Dugdale, Dugdale *v.* Dugdale (1888), 38 Ch. D. 176.

5845. —— **Continuing estate cannot be given to subsist after bankruptcy.**]—Property may be given so as to go over in the event of an attempt to alienate, or bkpcy., but a continuing estate cannot be given to subsist after bkpcy.—YOUNGHUSBAND *v.* GISBORNE (1846), 15 L. J. Ch. 355 ; 7 L. T. O. S. 221 ; 10 Jur. 419, L. C.

Annotations :—**Distd.** *Re* Coleman, Henry *v.* Strong (1888), 39 Ch. D. 443, C. A. **Refd.** *Re* Fitzgerald, Surman *v.* Fitzgerald, [1903] 1 Ch. 933. **Mentd.** Watkins *v.* Watkins, [1896] P. 222, C. A.

5846. —— **Where no gift over.**]—Property was vested, by will, for the benefit of a devisee, with an express direction that it should not be subject to the claims of creditors, either under a fiat in bkpcy., or under any Act for the relief of his debtors :—*Held :* notwithstanding the proviso in the will for the forfeiture of the property in the event of the bkpcy. or insolvency of the devisee, there being no gift over the devisee took an estate for life, & having become subsequently insolvent, his interest under the will passed to his creditors, & the ct. possessed the power to make an order on the trustees "to hold & retain" the proceeds of such invested life estate.—*Re* YORKE (1848), 11 L. T. O. S. 184.

become insolvent, or take the benefit of any Act for the relief of insolvent debtors, & after the happening of any of those events, to the separate use of the wife. The husband assigned all his real & personal estate to a trustee for the benefit of his creditors. On a bill filed by a judgment creditor of the husband, the ct. refused to appoint a receiver, his life estate having determined by the assignment.—HAYES *v.* MARSHALL (1847), 10 I. Eq. R. 429, 445.—IR.

5842 i. —— ——.]—A bond from the father of the wife of a trader to trustees, upon her marriage, for her separate use in case of the bkpcy. of her husband :—*Held :* valid.—*Ex p.* OXLEY (1807), 1 Ball & B. 257.—IR.

5844 i. —— *Interest given for life.*]—Testator by his will instituted Z. one of his heirs, burdening the inheritance bequeathed to him with a *fidei commissum*, under the condition that Z. & his wife should enjoy during their life the interest thereof, for their maintenance & support & that of their children, & after the death of Z. & wife, the inheritance should devolve free & unencumbered upon the children, but in case Z.'s wife should enter into a second marriage, she should be entirely deprived of the interest, & the burdened inheritance immediately paid out to the children. By a subsequent clause testator directed that the inheritance, & the rents on interest arising therefrom, should in no respect be liable to arrest or executable for the debts of the *fidei commissary* heirs, but on the contrary should exclusively serve & be applied to their maintenance & support & that of their children, such disposition being made in order to promote the interests & welfare of testator's descendants. After testator's death Z. became insolvent. His wife had previously died :—*Held :* Z.'s interest in the inheritance vested in his trustee for the benefit of his insolvent estate.—ZEEDERBERG *v.* SOUTH AFRICAN ASSOCN. (1867), 5 Searle's Reports 266 ; 2 S. C. 431.—S. AF.

5846 i. —— *Where no gift over.*]—Testators, being husband & wife married in community, executed a mutual will whereby, they bequeathed the whole of the residue of their estate to their children, reserving the usufruct of the whole of the joint estate to the survivor, & it was provided that if any attempt was made to attach the inheritance of any of the children by reason of their insolvency or otherwise before the heirs became entitled to claim payment & before they should have been paid same, then the share or shares so attempted to be attached should not be payable to such heir or heirs, but the exors. should expend same in such way as they might deem best & at their discretion entirely. After testator's death, & before the death of the testatrix who adiated under the will, D., one of the sons, became insolvent :—*Held :* in the absence of any provision making a bequest over of the share of any of the heirs on his insolvency, the trustee of D.'s insolvent estate was entitled to receive the balance due to D. on the death of testatrix for the benefit of his creditors.—PRITCHARD'S TRUSTEE *v.* ESTATE PRITCHARD, [1912] C. P. D. 87.—S. AF.

5846 ii. —— ——.]—Testator, after nominating his children as his heirs, burdened three-fourths of their respective inheritances with *fidei commissum*, & declared that in case of insolvency of any of his children, "the inheritance so burdened shall, immediately upon such insolvency, devolve upon B., who shall be trustee to administer same, in order to pay & apply the interest for the support & maintenance of such child or children ; nevertheless under this condition that after demise of such child or children the capital sum shall devolve upon the heirs." There was no bequest over in case of insolvency. After testator's death, C., one of his sons, became insolvent :—*Held :* the trustees of C.'s insolvent estate were entitled to receive from B. the annual income arising from C.'s *fidei commissary* inheritance for the benefit of his creditors. —HIDDINGH'S TRUSTEE *v.* COLONIAL ORPHAN CHAMBER & HIDDINGH (1883), 2 S. C. 273.—S. AF.

5847. —— ——.]—*Semble :* there is no rule that a life interest may not well be determined by a proviso for cesser, although it be not accompanied by any limitation over. No greater effect can be given to a limitation over than to an express declaration that the interest shall cease.—ROCHFORD *v.* HACKMAN (1852), 9 Hare, 475 ; 21 L. J. Ch. 511 ; 19 L. T. O. S. 5 ; 16 Jur. 212 ; 68 E. R. 597.

Annotations :—**Consd.** Joel *v.* Mills, Harvey *v.* Mills (1857), 3 K. & J. 458 ; *Re* Catt's Trusts (1864), 2 Hem. & M. 46. **Folld.** Pearson *v.* Dolman (1866), L. R. 3 Eq. 315. **Consd.** Hurst *v.* Hurst (1882), 21 Ch. D. 278. **Mentd.** *Re* Stultz (1833), 22 L. J. Ch. 917 ; Hare *v.* Burges (1857), 4 K. & J. 45 ; Craven *v.* Brady (1869), 4 Ch. App. 296, L. C. ; *Re* Amherst's Trusts (1872), L. R. 13 Eq. 464 ; *Re* Machu (1882), 21 Ch. D. 838 ; *Re* Moore, Trafford *v.* Maconochie (1887), 39 Ch. D. 116 ; *Re* Dugdale, Dugdale *v.* Dugdale (1888), 38 Ch. D. 176 ; Adams *v.* Adams, [1892] 1 Ch. 369, C. A. ; *Re* Holford, Holford *v.* Holford, [1894] 3 Ch. 30, C. A. ; *Re* Carew, Carew *v.* Carew, [1896] 1 Ch. 527 ; *Re* Riggs, *Ex p.* Lovell, [1901] 2 K. B. 16 ; Wynn *v.* Conway Corpn., [1914] 2 Ch. 705, C. A.

See, generally, SETTLEMENTS ; WILLS.

5848. —— ——.]—A testator gave personal estate to a grandson, to be paid at twenty-one, unless that should happen in the lifetime of himself (testator) or of his daughter, & then to be paid as soon as conveniently might be after the deaths of himself & his daughter, & if he should become bkpt. or insolvent before his legacy became payable, his interest under the will should cease as if he were dead. The grandson attained twenty-one in the lifetime of testator, & became bkpt. during the lifetime of the daughter. There was no gift over :—*Held :* the share of the residue vested at twenty-one, & passed to his assignee.—BIRD *v.* JOHNSON (1854), 23 L. T. O. S. 320 ; 18 Jur. 976 ; 2 W. R. 692.

5849. —— **Whether clause void for repugnancy.**]—A testator devised a freehold estate to the use of his daughter, "her heirs & assigns" for her separate use "subject, nevertheless, to the proviso hereinafter contained for determining her estate & interest in the event therein mentioned." In a subsequent part of the will was a proviso that in case his daughter should at any time be declared a bkpt., then & thenceforth the devise thereinbefore made to her should be void, & the premises should thenceforth go, remain & be to the use of her children :—*Held :* the devise did not operate as a conditional limitation, & the condition in the proviso was void for repugnancy, & accordingly the daughter was entitled to the property for an absolute estate in fee simple.—*Re* MACHU (1882), 21 Ch. D. 838 ; 47 L. T. 577 ; 30 W. R. 887.

Annotations :—**Consd.** *Re* Dugdale, Dugdale *v.* Dugdale (1888), 38 Ch. D. 176. **Mentd.** *Re* Hewett, Eldridge *v.* Iles, [1918] 1 Ch. 458.

5850. —— ——.]—A testator by his will gave personal estate to his children as tenants in common. He then gave to trustees real estate & personal estate on trust to pay the rents & profits to his children as tenants in common during their lives, with benefit of survivorship. He then provided that if by act or operation of law any interests given by his will in trust for his children should be aliened whereby same should vest in any other person, then his trustees should apply the interest so aliened to & among the other persons entitled to same by survivorship, as in the case of the death of the person so aliening. One of his children was at the time of his death a bkpt. : —*Held :* as to the absolute gift of a share of personal estate the clause of forfeiture was repugnant & had no effect.—METCALFE *v.* METCALFE, [1891] 3 Ch. 1 ; 60 L. J. Ch. 647 ; 65 L. T. 426 ; 7 T. L. R. 558, C. A. ; *affg.* (1889), 43 Ch. D. 633.

Annotations :—**Distd.** *Re* Chapman, Perkins *v.* Chapman, [1904] 1 Ch. 431, C. A. **Refd.** *Re* James, Clutterbuck *v.* James (1890), 62 L. T. 454. **Mentd.** West *v.* Williams, [1899] 1 Ch. 132, C. A.

5851. —— ——.]—A will contained the following forfeiture clause :—"Provided always, that if, by reason or virtue of bkpcy. or any other act or deed of any beneficiary under this my will, or by operation of law, any share, interest, legacy, income or any other benefit given by this my will, or any part thereof, if his or her own absolute property, in the absence of this proviso to the contrary would become vested in or payable to or for the benefit of any assignees or assignee, creditors or creditor of such beneficiary, then, as to the whole or such part or parts of the said share, interest, legacy, income, or other benefit as shall or but for this proviso would be so vested in or payable to any assignees or assignee, creditors or creditor of the said beneficiary the trusts or trust hereinbefore declared in favour of such beneficiary shall thenceforth cease & determine, & my said trustees or trustee shall thenceforth, as respects all or as much of the said share, interest, legacy, income or other benefit as to which there shall have been such cessor or determination as aforesaid, hold or pay the same, in trust to hold & apply such share, interest, legacy, income or other benefit, or any part thereof, to or for the use, maintenance or benefit of such beneficiary, or his or her family in such manner & at such times or periods as my said trustees shall in their absolute & uncontrolled discretion think best, having regard to all the circumstances of the case." One beneficiary had become bkpt. :—*Held :* the clause was repugnant & void so far as it applied to absolute gifts, & the trustee in bkpcy. of bkpt. beneficiary took his share free from the forfeiture clause. In deciding whether such a forfeiture clause is bad regard must be had as to whether as a whole the clause is an attempt to cut down & prevent what was to have been obtained under the gifts or not.—*Re* SMITH, SMITH *v.* SMITH, [1916] 1 Ch. 369 ; 85 L. J. Ch. 473 ; 114 L. T. 680 ; 60 Sol. Jo. 368 ; [1916] H. B. R. 66.

5852. —— **Attempt to avoid bankruptcy laws.**]—Testatrix devised & appointed real & personal estate upon trust for B., his heirs & assigns, & directed that, in the event of his doing or suffering anything whereby he should be deprived of the beneficial enjoyment thereof, then the trust for his benefit should determine, & the property should go & be held in trust for his wife :—*Held :* the events upon which the executory devise was

a. —— *Where gift over.*]—Testator left property to his son, S., & a daughter, with the proviso that, if either failed to pay to the estate before the date of distribution any debt that he or she might owe to the estate, the share of such child should be divided among the other children. A substitutional gift followed to the children of any child, who might die in testator's lifetime, & it was also provided that in the event of any of his children becoming bkpt. the share of such child should be absolutely forfeit & should go to his or her children. S. became bkpt. before the date of distribution with a debt to the estate unpaid :—*Held :* the gift over to S.'s children in the event of his bkpcy. was valid, & the share did not vest in the official assignee.—SOLE *v.* WARD, [1919] N. Z. L. R. 212.—**N.Z.**

b. —— ——.]—When there is in a will a clear gift over to some specific person in case of the insolvency of the beneficiary or in the event of an attachment the ct. will recognise such a provision.—VICKERS' TRUSTEE *v.* CLOETE (1914), C. P. D. 575.—**S. AF.**

5849 i. —— *Whether clause void for repugnancy.*]—Testator devised his estate upon trust for all his sons who should attain the age of twenty-one years, as tenants in common, & declared that none of his sons should have power to sell, charge, or anticipate his share, & if he should do so, he should absolutely forfeit all right & title to such share, which should go & be divided between the other sons. One son, before the property was divided, was adjudicated a bkpt. on his own petition :—*Held :* the condition as to forfeiture was not repugnant to the gift, nor an unreasonable restraint upon alienation.—OFFICIAL ASSIGNEE *v.* PARKINSON, [1885] 4 N. Z. L. R. 145. —**N.Z.**

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to take effect was (1) alienation, (2) bkpcy. or judgment & execution; the first was unlimited, & therefore void; the second was an attempt to avoid the operation of the bkpcy. laws, & was also void; & B. was absolutely entitled.—*Re* DUGDALE, DUGDALE *v.* DUGDALE (1888), 38 Ch. D. 176; 57 L. J. Ch. 634; 58 L. T. 581; 36 W. R. 462.

5853. —— Resettlement under joint power by bankrupt & another.]—By a settlement made in 1873, real estates were limited to such uses & for such trusts as A. & B. should by deed jointly appoint, with remainder to B. for life, with remainders over. The property settled was not B.'s property, & he was not a party to the deed. By a resettlement, made in 1888, A. & B. in exercise of their joint power of appointment under the deed of 1873, appointed the same estates to trustees for a term of years to raise by way of mtge. certain sums of money to pay (*inter alia*) the private debts of B., which were scheduled to the deed, with remainder to the trustee during the life of B. to permit him to receive the income until he should become bkpt., with a discretionary trust over, in the happening of that event, for the benefit of B., his wife & children or relatives, with remainders over. In 1889 B. was adjudicated bkpt., & in 1890 A. died:—*Held:* the deed of 1888 was not a settlement by B. of his own property on himself, & the discretionary trust over was valid, & took effect.—*Re* ASHBY, *Ex p.* WREFORD, [1892] 1 Q. B. 872; 66 L. T. 353; 40 W. R. 430; 9 Morr. 77.

5854. In settlement by bankrupt—Of his own property.]—Settlement on marriage of freehold estates of inheritance, & leaseholds for lives & years by a man not indebted in trade, or intending it, to the use of himself for life, unless he shall embark in trade, & in the life of his wife become bkpt., & from his bkpcy. to secure an annuity for his wife, & subject thereto for his heirs, exors., etc. On his afterwards engaging in trade, & becoming bkpt.:—*Held:* the settlement was void as against his creditors.—HIGINBOTHAM *v.* HOLME (1812), 19 Ves. 88; 34 E. R. 451; *sub nom.* HIGGINBOTHAM *v.* HOLME, Mont. 479, n.

Annotations:—**Consd.** Whitmore *v.* Mason (1861), 2 John. & H. 204. **Apld.** *Re* Jeavons, *Ex p.* Mackay, *Ex p.* Brown (1873), 8 Ch. App. 643, L. JJ. **Expld.** *Re* Stephenson, *Ex p.* Brown (1893), 4 Mans. 13. **Distd.** *Re* Stephenson, *Ex p.* Brown, [1897] 1 Q. B. 638. **Refd.** Holmes *v.* Penney (1856), 3 K. & J. 90; Knight *v.* Browne (1862), 9 W. R. 515; *Re* Thompson, *Ex p.* Williams (1877), 7 Ch. D. 138, C. A.; Mackintosh *v.* Pogose, [1895] 1 Ch. 505; *Re* Halstead, *Ex p.* Richardson, [1917] 1 K. B. 695, C. A. **Mentd.** Lester *v.* Garland (1832), Mont. 471; *Ex p.* Boddam (1860), 2 De G. F. & J. 625, L. JJ.; *Re* Bowes, *Ex p.* Jackson (1880), 14 Ch. D. 725, C. A.; *Re* Harrison, *Ex p.* Jay (1880), 14 Ch. D. 19, C. A.; *Re* Detmold, Detmold *v.* Detmold (1889), 40 Ch. D. 585; *Re* Holland, Gregg *v.* Holland, [1902] 2 Ch. 360, C. A.

5855. —— ——.]—By a settlement of 1878, property of the settlor was assigned by him to trustees upon trust to pay the income to him until his death or bkpcy.:—*Held:* the limitation until bkpcy. was void as against his creditors, & his life interest passed to the trustee in bkpcy.—*Re* BREWER'S SETTLEMENT, MORTON *v.* BLACKMORE, [1896] 2 Ch. 503; 65 L. J. Ch. 821; 75 L. T. 177; 45 W. R. 8.

Annotation:—**Refd.** *Re* Johnson, *Ex p.* Matthews & Wilkinson, [1904] 1 K. B. 134, D. C.

5856. —— Of property partly of bankrupt & partly of wife—Good to extent of wife's fortune.]—A trader on his marriage received a fortune of £5,000 with his wife, & settled a sum of stock in trust for himself for life, with limitations over for the benefit of his wife & children, in the event of his becoming bkpt. or insolvent. It was provided that if he should survive his wife, & the issue of the marriage should fail, & he should then be or should have been a bkpt., fifteen sixty-sixths of the stock should belong to the wife's next of kin in blood. No part of the £5,000 was settled; but

5854 i. *In settlement by bankrupt—Of his own property.*]—By the marriage settlement of a trader, his bond & the rents of his house were given to trustees, for his wife & children, in the event of his bkpcy.:—*Held:* void upon such event.—*Ex p.* OXLEY (1807), 1 Ball & B. 257.—**IR.**

5854 ii. —— ——.]—G. previous to entering into a partnership trade, executed a bond for £500 to a trustee upon trust, that upon his failure in trade, or bkpcy., the interest should be paid to his wife for her life, with a power of appointment to her. G. & his partner became bkpts.:—*Held:* the bond was voluntary, & should not be set up against the creditors.—GARDINER *v.* SHANNON (1804), 2 Sch. & Lef. 228.—**IR.**

5854 iii. ——.]—A limitation in a settlement, of the settlor's property to himself for life, or until he shall become insolvent, with a provision that it shall go over on his insolvency, is not valid.—CASEY'S TRUSTS (1855), 4 I. Ch. R. 247.—**IR.**

5854 iv. —— ——.]—*Semble:* a settlement of the husband's property in consideration of marriage, to secure an annuity for the wife on his bkpcy., or insolvency, is not void at law, upon the event of his insolvency, as against his creditors & assignees in insolvency.—GILL *v.* MORGAN (1839), Smythe, 60.—**IR.**

5854 v. —— ——.]—By a marriage settlement, lands belonging to the husband were conveyed to trustees, in trust for the husband until he should be declared a bkpt., or should become an insolvent, or make or enter into any compromise with his creditors, or should take the benefit of Insolvent Act, & after the determination of the trust declared for his benefit, during the joint lives of the husband & wife, in trust to permit the wife to receive same for her sole & separate use & benefit. The husband took the benefit of Insolvent Act:—*Held:* the ct. had jurisdiction to make a decree declaring the limitation to the separate use of the wife on the husband's insolvency, fraudulent & void, although it might be void at law, & although the legal estate should be in the wife, & not in the trustees.—CLARKE *v.* CHAMBERS (1857), 8 I. Ch. R. 26.—**IR.**

5854 vi. —— ——.]—C., a trader, previous to his marriage with his second wife, executed a marriage settlement, conveying property to trustees to his own use for life, "or until he should become bkpt. or insolvent within the meaning of any law for the relief of or relating to insolvent debtors or bkpts.," & after the termination in his lifetime of the use declared in his favour by the happening of one of the events above mentioned, to the use of his trustees, upon trusts in favour of his wife for life, for her separate use. There were also subsequent limitations declared in favour "of all & every or such one or more exclusively of the others or other of the child or children or remoter issue of the settlor." C. having become embarrassed in his business transactions, executed an assignment of all his estate to trustees, for the benefit of his creditors:—*Held:* the limitations both in favour of the wife & of all the children of C., including those of his former marriage, were valid as against his creditors.—WYLD *v.* CALDWELL (1869), 8 N. S. W. S. C. R. 36.—**AUS.**

5856 i. —— *Of property partly of bankrupt & partly of wife—Good to extent of wife's fortune.*]—A trader by settlement on marriage, in consideration of £1,000, the wife's fortune, conveyed his house to trustees to his own use till bkpcy., then, if the wife should be alive, to raise £1,000 for her separate use. On the bkpcy. of the husband:—*Held:* the trustees would not be restrained by injunction, on the application of the assignees, from proceeding to recover possession of the house, at law, as the property, though strictly the husband's, was in reality the fortune of the wife.—HIGGINSON *v.* KELLY (1810), 1 Rose, 368; 1 Ball & B. 252.—**IR.**

5856 ii. ——.]—In contemplation of a marriage, it was agreed that the father of the intended wife should give to M., the intended husband, £200 as a marriage portion, to be applied by M. in the purchase of furniture, which was to be settled on the wife. By an indenture of settlement, reciting that M. was possessed of a house, premises, & furniture, M. assigned same to trustees on trust to permit M. to occupy & enjoy such house & premises so long as he should continue solvent, & upon the bkpcy. of M., to raise, by sale or mtge. of the premises & furniture, £500, & to hold same in trust for the separate use of the intended wife, & of any children of the marriage. The furniture so put in settlement comprised articles purchased by M. partly out of the £200, which was advanced by his father-in-law, & partly out of money belonging to M. M., continuing in possession of the furniture, was adjudged bkpt.:—*Held:* so much of the furniture as was not purchased out of the marriage portion passed to M.'s assignees, the trusts in

the whole of the settled fund was the husband's property, & it did not appear, from any of the expressions in the settlement, what was the consideration for the provision as to fifteen sixty-sixths of the stock:—*Held:* the limitations over in the event of the bkpcy. of the husband were good to fifteen sixty-sixths of the trust fund, that being the proportion of the trust fund which the wife's fortune would have purchased, but were void as to the remainder.—LESTER *v.* GARLAND (1832), Mont. 471; 5 Sim. 205; 1 L. J. Ch. 185; 58 E. R. 314.

Annotations:—**Consd.** Whitmore *v.* Mason (1861), 2 John. & H. 204. **Apld.** Mackintosh *v.* Pogose, [1895] 1 Ch. 505. **Refd.** Fraser *v.* Thompson (1859), 1 Giff. 49.

5857. —— —— ——.]—A person settled on his marriage, by bond given to trustees, £1,200 (part thereof being £150 the property of his intended wife) upon trusts for himself for life, except in the event of his bkpcy. or insolvency, &, in that event, upon trust for his wife for life for her separate use; & subject thereto upon trusts for the issue of the marriage; the husband became bkpt.:—*Held:* such a limitation was a fraud upon the bkpcy. laws, but the wife had an equity against bkpt. in regard to the performance of his contract under the bond to the extent of £150.—*Re* SHUTE, *Ex p.* SHUTE (1833), 3 Deac. & Ch. 1; Mont. & B. 385; 2 L. J. Bcy. 25, Ct. of R.

Annotations:—**Distd.** *Re* Saunders, *Ex p.* Saunders (1834), 3 Deac. & Ch. 568, Ct. of R. **Consd.** *Re* Prior, *Ex p.* Young (1835), 4 L. J. Bcy. 60. **Mentd.** Jones *v.* Mossop (1844), 3 Hare, 568.

5858. —— —— ——.]—A wife allowed her separate property to pass into her husband's hands, but not as a gift nor a loan for the purposes of his trade. The husband applied part to his own use, & settled the remainder, together with property of his own, upon trust, with a proviso for cesser on his bkpcy. He became bkpt. The wife had no notice of any fraudulent intention on her husband's part:—*Held:* the proviso for the cesser was good to the extent of the wife's property received by the husband.—MACKINTOSH *v.* POGOSE, [1895] 1 Ch. 505; 72 L. T. 251; 43 W. R. 247; 39 Sol. Jo. 218; 2 Mans. 27; 13 R. 254; *sub nom.* MACINTOSH *v.* POGOSE, 64 L. J. Ch. 274.

Annotations:—**Consd.** *Re* Tetley, *Ex p.* Jeffrey (1896), 66 L. J. Q. B. 111. **Apld.** *Re* Johnson, *Ex p.* Matthews & Wilkinson, [1904] 1 K. B. 134, D. C.

5859. —— —— **Good against mortgagee.**]—In a settlement under which the settlor takes a life interest, a gift over on bkpcy. or alienation, though void as against the assignees in bkpcy., is valid as against a mtgee.—KNIGHT *v.* BROWNE (1861), 30 L. J. Ch. 649; 4 L. T. 206; 7 Jur. N. S. 894; 9 W. R. 515.

Annotations:—**Distd.** *Re* Pearson, *Ex p.* Stephens (1876), 3 Ch. D. 807. **Apld.** *Re* Detmold, Detmold *v.* Detmold (1889), 40 Ch. D. 585. **Refd.** Mackintosh *v.* Pogose, [1895] 1 Ch. 505.

—— **Damages awarded to husband in divorce suit.**]—*See* Sect. 11, sub-sect. 1, *post.*

5860. In lease—Clause of re-entry on tenant committing act of bankruptcy.]—A proviso in a lease that the landlord shall re-enter on the tenant's committing any act of bkpcy. whereon a commission shall issue, is good.—ROE d. HUNTER *v.* GALLIERS (1787), 2 Term Rep. 133; 100 E. R. 72.

Annotations:—**Refd.** Doe *v.* Carter (1798), 8 Term Rep. 57; Doe *v.* Bevan (1815), 3 M. & S. 353; Stevens *v.* Copp (1868), L. R. 4 Exch. 20.

5861. —— **Of public-house—Lease determinable on bankruptcy of lessee—Covenant to assign licence at end of term.**]—*Re* BRITNOR, *Ex p.* ROYLE, No. 5950, *post.*

5862. In building contract—Whether void as against policy of bankruptcy laws.]—A building contract provided (*inter alia*) that in case the lessee should, before the completion of the houses, become bkpt. or file a petition for liquidation, it should be lawful for the lessor to enter upon the premises, & same to have again, repossess, & enjoy, together with all materials & buildings thereon. Before the completion of the houses, the builder filed a liquidation petition, & on the same day the lessor entered upon the land under the terms contained in the agreement, & seized the bricks & other

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relation thereto not taking effect as against his creditors, but so much of the furniture as was purchased with the marriage portion was bound by the trusts of the settlement in favour of the wife & children, & was divested on M.'s bkpcy. accordingly.—JAMES *v.* WHARTON, *Re* MASON (1878), 12 I. L. T. 181.—IR.

5856 iii. —— —— ——.]—By a settlement of 1856, made on the marriage of C., a trader, with E., after reciting that C. was entitled to leaseholds, & that, in consideration of E.'s fortune of £2,000, he had executed to the trustees his bond with warrant to secure that sum & interest, the leaseholds were conveyed upon trust for C. for life, or until bkpcy., & then for E. for her separate use for life, with further trusts for the issue. It was also provided that the trustees should hold the bond upon trust to enter up judgment thereon immediately after the marriage, &, when so required by E., to enforce payment, &, if necessary, levy the amount out of the real & personal estate of C., & hold the produce upon trusts similar to those declared of the leaseholds, with an ultimate trust in favour of the survivor of C. & E. The trustees levied £950 on the bond, & in 1864 a cause petition to administer the trusts of a will, under which C. derived the leaseholds, was filed against him. A receiver was appointed over the leaseholds & other lands, to which C. was absolutely entitled under the will, & in 1878 there were standing to the credit of the matter £950 Govt. Stock, substantially representing accumulated rents of the leaseholds, & also £1,800 Stock, the proceeds of their sale. C. had become bkpt. The trustees having applied for payment of the two last-mentioned sums, & their claim being opposed by the assignees, it was decided the trusts of the leaseholds in E.'s favour were valid to the extent of her fortune:—*Held:* the trustees alone were entitled to the accumulated rents, &, during C.'s life, to receive & apply the income of the fund representing the *corpus* of the leaseholds towards the discharge of his debt to them, & E. was entitled for life to the interest of the amount realised on C.'s bond.—CORR *v.* CORR (1879), 3 L. R. Ir. 435.—IR.

5856 iv. —— —— ——.]—A trader by marriage settlement, dated Feb. 10, 1897, & in consideration of £500 paid to him as his wife's fortune, assigned to trustees the premises in which he resided & carried on business, together with the goodwill of the business, stock-in-trade, & trade debts (including future acquired property), on trust "for & during this life, or until he should become bkpt. or become insolvent in his circumstances, or effect or attempt to effect a composition with his creditors, or do or suffer any act, deed, or thing whereby the property might, if belonging absolutely to him become vested in or payable to any person or persons," & from & after the determination of the trust in his favour upon trust to enter upon & sell the trust property, & out of the proceeds of sale to pay to his wife, if living, £1,000 for her separate use, & to pay the surplus, if any, to him, his exors., administrators & assigns. The settlor also assigned to the trustees a policy of insurance on his own life for £500, upon trust out of the proceeds to pay to his wife, if surviving, the deficiency, if any, in the £1,000 to be paid to her out of the trust property, & to hold the residue in trust for the settlor, his exors., administrators & assigns. The settlor carried on the business on the premises until 1913, when he was declared a person of unsound mind, & his wife was appointed committee of his person & estate, & authorised to carry on the business It was then found that the settlor had become insolvent:—*Held:* (1) the trust to raise £1,000 for the wife in the event of her husband's insolvency was only valid to the extent of £500, the amount of her fortune paid to him; (2) the claim of the wife to the extent of £500 took priority so far as the settled property was concerned over the general creditors of the husband.—DOHERTY *v.* POWER, [1916] 1 I. R. 337.—IR.

c. *In lease—Clause accelerating rent & forfeiting lease on tenant becoming bankrupt.*]—Deft. leased premises to M., the lease containing a clause that should the lessee at any time (*inter alia*) become bkpt. or insolvent, three months' rent should immediately become payable forthwith, & distress might be made to collect such rent, & the term thereby demised should immediately become forfeited & void:—*Held:* the clause was invalid as against an intervening assignee under Assignments Act.—MCKINNON *v.* COHEN (1914), 26 W. L. R. 828; 16 D. L. R. 72; 7 Alta. L. R. 317; 5 W. W. R. 126 3—CAN.

Sect. 4.—"The property of the bankrupt": Sub-sect. 2, D. (a) & (b).]

loose building materials upon the land, which were later claimed by the trustee in the liquidation :—*Held :* the owner of the land, having stipulated that in certain events the loose materials upon the land should belong to him, which he was perfectly entitled to do, was entitled to re-enter & seize the materials at once, as he had done.—*Re* GARRUD, *Ex p.* ANDREW (1879), 41 L. T. 562, n.

5863. —— ——.]—A building agreement contained a clause providing that on the builder's becoming bkpt. or insolvent all improvements, materials, & effects on the land, not actually demised to the builder, should become absolutely forfeited to the landlord, & the landlord was to be at liberty to re-enter ground, & to take possession of the chattels & effects, & to relet or sell & enjoy same, as fully as if the agreement had never been made. The builder filed a petition. At this time there was a quantity of materials on the land, placed there by the builder. Up to the time of the filing of the petition the builder had made no default in performing his agreement :—*Held :* the provision for forfeiture of the materials to the landlord on the bkpcy. of the builder was void, as contrary to the policy of the bkpcy. law, & the materials on the land were the property of the trustee.—*Re* HARRISON, *Ex p.* JAY (1880), 14 Ch. D. 19 ; 42 L. T. 600 ; 44 J. P. 409 ; 28 W. R. 449, C. A.

Annotations :—**Distd.** *Re* Garrud, *Ex p.* Newitt (1881), 16 Ch. D. 522, C. A. **Apld.** Borland's Trustee *v.* Steel, [1901] 1 Ch. 279.

See, also, No. 5751, *ante,* Nos. 5921, 5952 *et seq., post.*

5864. In shipbuilding contract—Whether void as against bankruptcy laws.]—A shipbuilding contract provided (*inter alia*) that in the event of the bkpcy. or insolvency of the builder, it should be lawful for the buyer to cause the ship to be completed by any person he might see fit to employ, & to employ such materials belonging to the builder as should be then on his premises, & which should either have been intended to be or be considered to & applicable for the purpose :—*Held :* the clause, so far as it related to the bkpcy. of the builder, was a fraud upon the bkpcy. law & void as against the trustee.—*Re* WALKER, *Ex p.* BARTER, *Ex p.* BLACK (1884), 26 Ch. D. 510 ; 53 L. J. Ch. 802 ; 51 L. T. 811 ; 32 W. R. 809, C. A.

Annotation :—**Apld.** Merry *v.* Pownall, [1898] 1 Ch. 306.

5865. In partnership deed—Provision that bankrupt's share shall be taken at valuation.]—Articles of partnership provided that on the bkpcy. & insolvency of a partner, the partnership should be immediately void as to him. By a deed, four years subsequent, the partners declared (after a recital that such was their intention in the articles), that in the event of bkpcy. or insolvency, the remaining partners should have the option to take his share at a valuation. One of the partners having become bkpt. a few months after the execution of the latter deed :—*Held :* his assignees were not bound by it. *Qu. :* whether a provision in articles of partnership, that on the bkpcy. of a partner his share shall be taken by the solvent partners, at a sum to be fixed by valuation, & payable by instalments in a course of years, is not void by the stats. concerning bkpts.—WILSON *v.* GREENWOOD (1818), 1 Swan. 471 ; 1 Wils. Ch. 223 ; 36 E. R. 469, L. C.

Annotations :—**Consd.** Hall *v.* Hall (1850), 3 Mac. & G. 79, L. C. ; Whitmore *v.* Mason (1861), 2 John. & H. 204 ; Collins *v.* Barker, [1893] 1 Ch. 578. **Apld.** *Re* Johnson, *Ex p.* Matthews & Wilkinson, [1904] 1 K. B. 134, D. C. **Refd.** Tibbits *v.* Phillips (1853), 10 Hare, 355. **Mentd.** Francis *v.* Spittle (1840), 9 L. J. Ch. 230, L. C. *Re* Fernandes, *Ex p.* Hope (1844), 3 Mont. D. & De G. 720 ; Knight *v.* Browne (1861), 30 L. J. Ch. 649 ; Mackintosh *v.* Pogose, [1895] 1 Ch. 505.

5866. ——.]—A partnership deed contained a clause providing that if any of the partners became bkpt. it should be lawful for the other copartners to expel him, purchasing his share at a valuation as fixed by another clause :—*Held :* this arrangement between the partners, although within the terms of their deed of association, did not bind third parties, & the trustee for the creditors of W. was entitled to an account of the partnership assets & profits.—*Re* WILLIAMS, *Ex p.* WARDEN (1872), 21 W. R. 51.

5867. —— **Provision that share in mining lease shall go to copartners.**]—A provision in a deed of partnership that, in the event of the bkpcy. or insolvency of a partner, his share in a mining lease (forming part of the partnership property) shall go over to his copartners, is void, as being in fraud of the bkpcy. laws.—WHITMORE *v.* MASON (1861), 2 John. & H. 204 ; 31 L. J. Ch. 433 ; 5 L. T. 631 ; 8 Jur. N. S. 278 ; 10 W. R. 168 ; 70 E. R. 1031.

Annotations :—**Consd.** Mackintosh *v.* Pogose, [1895] 1 Ch. 505. *Whitmore* v. *Mason* is an express authority that the mere existence of valuable consideration does not entitle the owner of property to settle it on himself until bkpcy. (STIRLING, J.) ; Borland's Trustee *v.* Steel, [1901] 1 Ch.

¶5865 i. *In partnership deed—Provision that bankrupts share shall be taken at valuation—Ships registered in names of all partners.*]—Three parties, *viz.*, two individuals & A. & Co., entered into a contract of copartnery for the conveyance of goods between Glasgow & Liverpool by sailing vessels. The contract declared that each of the three parties was to hold one-third share of each vessel, but that the whole partners were to be equally interested in all of the vessels, & that on the bkpcy. of any of them, the remaining solvent parties were to be entitled to take the shares of the vessels of bkpt. at a valuation, & to carry on the trade. The contract of copartnery was not referred to in the register of any of the vessels of the co., & the two individuals & A. & Co. were registered as part owners to the extent respectively of 22, 21, & 21-64th shares. On the bkpcy. of A. & Co. :—*Held :* the shares of the vessels set forth in the register as belonging to bkpts., were transferred to their trustee, & fell to be dealt with under the sequestration.—M'ARTHURS *v.* JOHNSTONE (TRUSTEE OF M'BRAIR & JOHNSTONE) (1844), 16 Sc. Jur. 513.—SCOT.

d. *Under articles of stock exchange—Article that share of member forfeited on insolvency.*]—One of the articles of the Stock Exchange of Adelaide provided that on insolvency membership ceased, & the member's share was forfeited :—*Held :* such provision was void as a fraud upon the insolvency law, & the official receiver was not bound thereby.—STUART *v* STOCK EXCHANGE OF ADELAIDE, LTD., [1914] S. A. L. R. 120.—AUS.

f. *In bye-laws of friendly society—Provision that payment to widow of member should be made to her only or to her order.*]—The rules of society for the purpose of granting annuities & other benefits to the widows of members, provided that all payments to be made to the widow of a member should be paid to herself only, or to her order, & to no other person. The widow of a member became entitled to an annuity, & subsequently took the benefit of Insolvent Debtor's Act :—*Held :* the restriction on alienation was inoperative.—IRVIN *v.* PRESBYTERIAN WIDOWS' FUND ASSOCIATION (1855), 5 I. Ch. R. 1.—IR.

g. *In consent order in action to enforce option—Provision that on insolvency purchaser might obtain transfer on payment.*]—A., the holder of a licence, agreed that he would give B. the first option of purchasing it for £40. A. attempted to sell the licence to C., whereupon B. brought an action against A. & C., claiming specific performance of the agreement & an injunction to restrain the sale to C., & an order was made by consent, ordering that, "upon payment of £40, by B. when required to do so, to A., his exors., or administrators, A., his exors., administrators, or his official assignee, D., should he become insolvent," should transfer the licence to B. provided that, "if A. should become insolvent, B. should be entitled to pay £40 & obtain a transfer of the licence," & granting a "perpetual injunction against A., his exors., administrators, or assigns in insolvency, should he ever become involvent," from transferring the licence to any person other than B. A. afterwards became insolvent, & D. was appointed the official assignee of his estate :—*Held :* the proviso for the transfer of the licence to B. on the insolvency of A. was void as against the policy of the insolvency law.—WHYTE *v.* WILLIAMS (1903), 29 V. L. R. 69.—AUS.

279; *Re* Halstead, *Ex p.* Richardson, [1916] 2 K. B. 902. **Refd.** *Re* Walker, *Ex p.* Barter, *Ex p.* Black (1884), 26 Ch. D. 510, C. A.; *Re* Halstead, *Ex p.* Richardson, [1917] 1 K. B. 695, C. A. **Mentd.** Merry *v.* Pownall, [1898] 1 Ch. 306.

5868. —— Clause providing for cesser & retention of bankrupt's share as loan.]—Partnership articles contained a clause providing for cesser of partnership on bkpcy. & retention of bkpt.'s share as a loan to remaining partners. Three partners became bkpt., & the trustees in their bkpcy. sued to have the bkpcy. clause declared invalid, & for the appointment of a receiver & manager of the business:—*Held:* the clause must be treated as void & the solvent partner should be appointed receiver & manager, but must give security, pass his accounts, allow them all reasonable access to the books, & pay the balances in his hands into a bank to be agreed.—COLLINS *v.* BARKER, [1893] 1 Ch. 578; 62 L. J. Ch. 316; 68 L. T. 572; 41 W. R. 442; 9 T. L. R. 167; 37 Sol. Jo. 193; 3 R. 237.

5869. In company articles—Article that bankrupt shall sell to particular persons at particular price.]—There is nothing obnoxious to the bkpcy. law in articles which *bonâ fide* provide that a shareholder shall, in the event of his bkpcy. sell his shares to particular persons at a particular price, which is fixed for all persons alike, & is not shown to be less than the fair price which might otherwise be obtained.—BORLAND'S TRUSTEE *v.* STEEL BROTHERS & CO., LTD., [1901] 1 Ch. 279; 70 L. J. Ch. 51; 49 W. R. 120; 17 T. L. R. 45.

Annotations:—**Mentd.** S. E. Ry. Co. *v.* Associated Portland Cement Manufacturers (1900) Ltd., [1910] 1 Ch. 12, C. A.; Hickman *v.* Kent or Romney Marsh Sheep Breeders Assocn. (1915), 84 L. J. Ch. 688; Brown *v.* British Abrasive Wheel Co., [1919] 1 Ch. 290.

5870. In assignment of royalties—Clause providing for retention on bankruptcy.]—A. sold a patent to B., in consideration of B. paying royalties to A. B. at the same time lent A. £12,500, & it was agreed that B. should retain one-half of the royalties, as they became payable, towards satisfaction of the debt, provided that, if A. became bkpt. or made an arrangement with his creditors, B. might retain the whole of the royalties in satisfaction of the debt. A. became a liquidating debtor:—*Held:* B. had a lien on one-half only of the royalties, & the proviso that he might retain the whole of the royalties in case of A.'s bkpcy., etc., was a fraud upon the bkpcy. laws & void.

A man is not allowed, by stipulation with a creditor, to provide for a different distribution of his effects in the event of bkpcy. from that which the law provides (JAMES, L.J.).—*Re* JEAVONS, *Ex p.* MACKAY, *Ex p.* BROWN (1873), 8 Ch. App. 643; 42 L. J. Bcy. 68; 28 L. T. 828; 21 W. R. 664, L. JJ.

Annotations:—**Distd.** *Re* Britnor, *Ex p.* Royle (1877), 46 L. J. Bcy. 85. **Apld.** *Re* Thompson, *Ex p.* Williams (1877), 7 Ch. D. 138, C. A.; *Re* Harrison, *Ex p.* Jay (1880), 14 Ch. D. 19, C. A. **Mentd.** *Re* Steele, *Ex p.* Conning (1873), L. R. 16 Eq. 414; Edwards *v.* Edwards (1876), 34 L. T. 472, C. A.; *Re* King, *Ex p.* King (1876), 34 L. T. 466; Brantom *v.* Griffits (1877), 36 L. T. 4, C. A.; *Re* Walden, *Ex p.* Odell (1878), 39 L. T. 333, C. A.; *Re* Garrud, *Ex p.* Andrew (1879), 41 L. T. 562, n.; Jarvis *v.* Jarvis (1893), 63 L. J. Ch. 10.

(b) Whether Forfeiture incurred.

5871. Shall not on any account be alienated—Bankruptcy.]—A. by will gave an annuity to B. directing that B.'s receipt only should be a discharge for it, that it should not on any account be alienated, & if same should be so alienated it should cease & determine. B. became a bkpt., & his comrs. assigned the annuity with his other effects to the assignees:—*Held:* the annuity ceased.—DOMMETT *v.* BEDFORD (1796), 6 Term Rep. 684; 3 Ves. 149; 101 E. R. 771.

Annotations:—**Distd.** Doe d. Mitchinson *v.* Carter (1798), 8 Term Rep. 57. **Consd.** R. *v.* Robinson (1811), Wight. 386. **Distd.** Lear *v.* Leggett (1829), 2 Sim. 479. **Apld.** Rochford *v.* Hackman (1852), 9 Hare, 475. **Consd.** Joel *v.* Mills, Harvey *v.* Mills (1857), 3 K. & J. 458. **Refd.** Avison *v.* Holmes (1861), 30 L. J. Ch. 564.

5872. "Agreeing to sell, assign, charge, or dispose of"—Taking benefit of Insolvent Act.]—Bequest of an annuity, with condition to fall into the residue upon signing an instrument, agreeing to sell, assign, charge, or dispose of, or empower any person to receive, etc., in the most comprehensive terms:—*Held:* the condition broken by taking the benefit of an Insolvent Act.—SHEE *v.* HALE (1807), 13 Ves. 404; 33 E. R. 346.

Annotations:—**Folld.** Rochford *v.* Hackman (1852), 9 Hare, 475. **Refd.** Doe d. Palmer *v.* Andrews (1827), 4 Bing. 348; Lear *v.* Leggett (1830), 1 Russ. & M. 690; Avison *v.* Holmes (1861), 30 L. J. Ch. 564; Power *v.* Hayne (1869), L. R. 8 Eq. 262; Hatton *v.* May (1876), 3 Ch. D. 148; *Re* Riggs, *Ex p.* Lovell, [1901] 2 K. B. 16.

5873. Charge "so as not to be entitled to its personal receipt & enjoyment"—Bankruptcy.]—A testator gave his son a life interest, upon condition that if he charged it so as not to be entitled to its personal receipt & enjoyment, his interest should determine & should devolve in the same manner as if he were dead. The son became bkpt.:—*Held:* the life interest passed to his assignee, the assignment by operation of law to

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PART XX. SECT. 4, SUB-SECT. 2.—D. (b).

h. "*Without power to dispose of*"—*Insolvency.*]—An annuity granted to trustees, to be paid by them to a third party, without power to him to dispose of it, with a gift over in the event of his doing so, will, upon his insolvency, pass to his assignee.—IRWIN *v.* IRWIN (1845), 8 I. Eq. R. 9.—IR.

j. "*Shall make any assignment for the benefit of his creditors*"—*Assignment for creditors.*]—A lease provided that if the lessee should make any assignment for the benefit of his creditors, the then current year's rent should immediately become due & payable, & might be distrained for, but that in other respects the term should immediately become forfeited & at an end. The lessee made an assignment for the benefit of his creditors to pltf., who went into possession of the premises:—*Held:* the lease did not become void because of the assignment, but only voidable.—LINTON *v.* IMPERIAL HOTEL CO. (1889), 16 A. R. 337.—CAN.

k. "*Become a bankrupt or insolvent within the meaning of any law for the relief of or relating to insolvent debtors or bankrupts*"—*Assignment to trustees for benefit of creditors.*]—C., a trader, conveyed property to trustees (*inter alia*) to his own use for life "or until he should become a bkpt. or insolvent within the meaning of any law for the relief of or relating to insolvent debtors or bkpts.," & having afterwards become embarrassed in his business transactions, executed an assignment of all his estate to trustees, for the benefit of his creditors:—*Held:* C., by making the assignment, did not become a bkpt., nor an insolvent "within the meaning of any law for the relief of or relating to insolvent debtors or bkpts."—WYLD *v.* CALDWELL (1869), 8 N. S. W. S. C. R. 36.—AUS.

l. "*Become bankrupt, or take the benefit of any Act, etc., or assign his property for the benefit of his creditors*"—*Insolvency.*]—By a post-nuptial settlement, the wife's father conveyed a term of years, on trust for the husband, for life, or until he should become bkpt., or take the benefit of any Act. etc., or assign his property for the benefit of his creditors, or otherwise fail in his circumstances, & from any such event on trust to pay the wife during her life the rents, etc., after the decease of both, in trust for the children, provided that, if the husband should become bkpt., or take the benefit of Insolvent Act, or assign his property for the benefit of his creditors, or otherwise fail in his circumstances, his life interest should cease, & the trustees should pay the rents to the wife, for her separate use. The husband & wife, by a deed not acknowledged by the wife, mortgaged all the estate & interest, of which the wife "was then, or should or might, upon or after the death of the husband, be in anywise entitled to," & all the estate, etc., both at law & in equity, of the wife to the premises. A petition was filed to foreclose the mtge. The husband, pending the suit, took the benefit of the Insolvent Act:—*Held:* (1) temporary embarrassment of the husband, did not bring into operation the limitation to the separate use of the wife; (2) the insolvency of the husband after the filing of the petition, did not entitle the mtgee. to a decree to sell the wife's separate estate.—BESTALL *v.* BUNBURY (1861), 13 I. Ch. R. 549.—IR.

Sect. 4.—"The property of the bankrupt": Sub-sect. 2, D. (b).]

his assignees not amounting to alienation within the words of the will.—WILKINSON *v.* WILKINSON (1815), Coop. G. 259; 2 Rose, 445; 35 E. R. 551; *subsequent proceedings* (1819), 3 Swan. 515.

Annotation:—**Refd.** Avison *v.* Holmes (1861), 30 L. J. Ch. 564.

5874. "By any ways or means whatsoever sell dispose of or incumber"—Bankruptcy.]—Bequest to trustees in trust to pay H. an annuity during his life, provided that if H. should by any ways or means whatsoever sell, dispose of, or incumber the right, etc., he might have for life, then his interest to cease, & the trustees to apply the same for the benefit of his children:—*Held:* on the bkpcy. of H., his interest ceased, & his children became entitled.—COOPER *v.* WYATT (1821), 5 Madd. 482; 56 E. R. 980.

Annotations:—**Distd.** Lear *v.* Leggett (1829), 2 Sim. 479; Whitfield *v.* Prickett (1838), 2 Jur. 344; Pym *v.* Lockyer (1841) 12 Sim. 394. **Expld.** Brandon *v.* Aston (1843), 2 Y. & C. Ch. Cas. 24. **Consd.** *Re* Harvey, *Ex p.* Pixley *v.* Harvey (1889), 60 L. T. 710. **Refd.** Rochford *v.* Hackman (1852), 9 Hare, 475. **Mentd.** *Re* Catt's Trusts (1864), 10 Jur. N. S. 536.

5875. "Assign over"—Assignment for benefit of creditors—Subsequently avoided on bankruptcy.]—A lease contained a proviso for re-entry of the lessor, & that the lease should be void on the lessee's assigning without the licence of the lessor. The lessee in Jan., 1825, executed a deed which purported to convey all his real & personal property to trustees, for the benefit of his creditors. In Apr., 1825, a commission of bkpcy. issued against the lessee, & he was duly declared a bkpt.: *Held:* the deed of Jan., 1825, being an act of bkpcy. & void, it did not operate as a valid assignment of the tenant's interest in the lease, &, therefore, there was no forfeiture.—DOE d. LLOYD *v.* POWELL (1826), 5 B. & C. 308; 8 Dow. & Ry. K. B. 35; 108 E. R. 115; *subsequent proceedings, sub nom.* POWELL *v.* LLOYD (1828), 2 Y. & J. 372, Ex. Ch.

Annotations:—**Refd.** *Re* O'Sullivan, *Ex p.* Baller (1892), 61 L. J. Q. B. 228; *Re* Riggs, *Ex p.* Lovell [1901], 2 K. B. 16; Stein *v.* Pope, [1902] 1 K. B. 595, C. A.

5876. "Not subject to his debts, paid into his own hands & his receipt only sufficient discharge"—Bankruptcy.]—A testator gave an annuity for life for the annuitant's personal support. He directed it should not be subject to his debts, & should be paid into his own hands, his receipt only to be a sufficient discharge:—*Held:* it passed on bkpcy. to his assignees.—GRAVES *v.* DOLPHIN (1826), 1 Sim. 66; 5 L. J. O. S. Ch. 45; 57 E. R. 503.

Annotations:—**Distd.** *Re* Fitzgerald, Surman *v.* Fitzgerald (1904), 73 L. J. Ch. 436, C. A. **Refd.** *Re* Fitzgerald, Surman *v.* Fitzgerald, [1903] 1 Ch. 933. **Mentd.** Rochford *v.* Hackman (1852), 9 Hare, 475.

5877. "In case the power should become vested in or in trust for more than five persons"—Bankruptcy when more than five creditors.]—An Act for enlarging the term granted to a patentee for the enjoyment of his patent, enacted, that in case the power, privilege, or authority, granted by the letters patent, should at any time become vested in, or in trust for more than the number of five persons, or their representatives, at any one time, otherwise than by devise or succession all liberties, privileges, & advantages vested in the patentees, their exors., administrators, or assigns, should cease, determine, & become void. The patentees became bkpt., & creditors exceeding five in number proved under the commission:—*Held:* the clause applied only to an assignment by act of the party, & not to an assignment by operation of law, & the interest of the assignees of bkpt. in the patent had not ceased.—BLOXAM *v.* ELSEE (1827), 6 B. & C. 169; 9 Dow. & Ry. K. B. 215; 5 L. J. O. S. K. B. 104; 108 E. R. 415.

Annotations:—**Mentd.** Slatterie *v.* Pooley (1840), 6 M. & W. 664; Neilson *v.* Harford (1841), 8 M. & W. 806; Allen *v.* Rawson (1845), 1 C. B. 551; Beard *v.* Egerton (1846), 3 C. B. 97; Palmer *v.* Wagstaff (1854), 9 Exch. 494; Ward *v.* Hill (1903), 20 R. P. C. 189.

5878. "Should charge, or attempt to charge, affect, or incumber"—Bankruptcy.]—Stock was given upon trust for A. for life, & after his decease, for his children, with a proviso, that A.'s life interest should not be subject to any alienation or disposition by sale, mtge., or otherwise, in any manner whatsoever, & in case he should charge, or attempt to charge, affect, or incumber same, such mtge., sale, or other disposition, so made by him, should operate as a complete forfeiture thereof, & same should devolve upon the persons next entitled:—*Held:* on A.'s bkpcy., his life interest passed to his assignees, to the exclusion of his children.—LEAR *v.* LEGGETT (1830), 1 Russ. & M. 690; 39 E. R. 265, L. C.; *affg.* (1829), 2 Sim. 479.

Annotations:—**Consd.** Brandon *v.* Aston (1843), 2 Y. & C. Ch. Cas. 24. **Distd.** Rochford *v.* Hackman (1852), 9 Hare, 475. **Consd.** Avison *v.* Holmes, Penny *v.* Avison (1861), 1 John. & H. 530. **Folld.** *Re* Harvey, *Ex p.* Pixley *v.* Harvey (1889), 60 L. T. 710. **Refd.** *Re* Amherst's Trusts (1872), L. R. 13 Eq. 464; *Re* Carew, Carew *v.* Carew, [1896] 1 Ch. 527; *Re* Riggs, *Ex p.* Lovell, [1901] 2 K. B. 16.

5879. "Person entitled to use & occupy house should reside therein"—Bankruptcy of tenant for life—Allowance to bankrupt to enable him to reside.]—An estate was settled on A. for life, with remainder to B. for life, with remainders over, with a stipulation that the person entitled to the mansion should reside therein, upon pain of forfeiting all benefit under the settlement. B. became bkpt. twenty years before he came into possession:—*Held:* B. had such an interest in remainder as passed to his assigns (there being no devise over in case of bkpcy.), liable to be defeated on non-compliance with the conditions of the settlement; & the ct. sanctioned an agreement between bkpt. & his assignees, by which a reasonable allowance was made to bkpt. to induce him to serve the estate by residing in the mansion.—

m. "*Become bankrupt, or take the benefit of any Act for the relief of insolvent debtors—Inability to pay creditors.*]—Where an agreement provided that if the hirers became bkpt., or took the benefit of any Act for the relief of insolvent debtors, it should cease & determine:—*Held:* "bkpt." in the agreement referred not merely to inability to pay creditors, but to adjudication as insolvent in course of law.—MEINTJES' TRUSTEES *v.* WILLIAMS (1916), E. D. L. 202.—S. AF.

o. "*Become bankrupt, or apply for or obtain his discharge under any Act for the relief of insolvents"—Petition for discharge under Insolvent Act—Afterwards dismissed by consent.*]—A decree declared C. entitled to the dividends of a fund for his life, provided he should not become bkpt. or insolvent, & that from & after his decease, or in case of his bkpcy. or insolvency, A. & V. would be entitled upon the trusts of C.'s marriage articles. By the articles the fund was vested in them, upon trust to permit C. to receive the dividends for his life, provided he should not become a bkpt., or apply for or obtain his discharge under any Act for the relief of insolvent debtors; & if C. should, during the joint lives of himself & his wife, become a bkpt., or apply for or obtain his discharge under any Act for the relief of insolvents, then to pay the dividends to the separate use of his wife, & if the wife should not be living at the time of such bkpcy. or insolvency, or should, after the happening of either of the events, die in the lifetime of C., leaving issue of the marriage, upon trust to apply the dividends to the benefit of the issue, as C. should appoint. C., after his wife's death, presented a petition for his discharge under Insolvent Act, which was afterwards dismissed with the consent of his creditors. The sched. filed in the Insolvent Ct. showed that he was in a state of insolvency:—*Held:* (1) the limitation over on the bkpcy. or insolvency of C. had taken effect; (2) the word "insolvent," in a deed was to be

Re GOLDNEY, *Ex p.* GOLDNEY (1839), 3 Deac. 570 ; Mont. & Ch. 75 ; 8 L. J. Bcy. 17, Ct. of R.

5880. "Assign, dispose of in any manner by way of anticipation"—Vesting order on petition under Judgments Act, 1838 (c. 110).]—Bequest of an annuity, with a condition that it should be forfeited in case the annuitant should assign or otherwise dispose of in any manner by way of anticipation the annuity, which was to be for his sole & personal use & benefit only. The annuitant became insolvent, & the creditors obtained a vesting order on petition under s. 36 of the above Act :—*Held :* the property having been taken out of the insolvent by operation of law the assignees were entitled to it.—PYM *v.* LOCKYER (1841), 12 Sim. 394 ; 11 L. J. Ch. 8 ; 59 E. R. 1183.

Annotations :—**Consd.** Brandon *v.* Aston (1843), 2 Y. & C. Ch. Cas. 24. **Distd.** Rochford *v.* Hackman (1852), 9 Hare, 475. **Refd.** *Re* Carew, Carew *v.* Carew, [1896] 1 Ch. 527.

5881. "From & after giving up possession"—Ejectment by purchaser from assignees.]—Testator bequeathed to S. the residue of a term in a house, in case he should so long live & inhabit the house, & after his decease, or giving up possession of the house, or in case he should mortgage same, then to M. the wife of S., to hold the premises unto her for the remainder of the term, in case she should so long live therein, & continue the widow of S., & unmarried. S. resided on the premises till he & his wife were turned out of possession, a commission of bkpcy. having issued against him, under which the assignees sold the property. S. died, & the widow brought ejectment for the premises :—*Semble :* his being turned out of the premises after they were sold by the assignees, was not a "giving up possession" within the meaning of the will.—DOE d. SHAW *v.* STEWARD (1834), 1 Ad. & El. 300 ; 3 Nev. & M. K. B. 372 ; 3 L. J. K. B. 141 ; 110 E. R. 1220.

Annotation :—**Consd.** Duberley *v.* Day (1852), 16 Beav. 33.

5882. "Should mortgage, charge, sell, expose to sale, assign, or incumber or give receipts by anticipation"—Bankruptcy.]—Clause divesting a life interest in case the annuitant "should mortgage, charge, sell, expose to sale, assign, or incumber" his interest, or give receipts for same by anticipation :—*Held :* not to divest the life interest on bkpcy.—WHITFIELD *v.* PRICKETT (1838), 2 Keen, 608 ; 7 L. J. Ch. 187 ; 2 Jur. 344 ; 48 E. R. 762.

5883. "Assign, or charge, or alienate"—Bankruptcy.]—A testator bequeathed his residuary estate to trustees, to pay the dividends to his son for life, but if his son should assign, or charge, or alienate his interest, then upon trust to apply the dividends for the maintenance & support of his son, & any wife & child or children he might have, & for the education of such issue as the exors. should think fit. The son became bkpt. :—*Held :* the assignees were not entitled to any share of the son's interest, the trust being for the benefit of the son, & the wife, & the children collectively.—GODDEN *v.* CROWHURST (1842), 10 Sim. 642 ; 11 L. J. Ch. 145 ; 59 E. R. 765.

Annotations :—**Consd.** Younghusband *v.* Gisborne (1846), 15 L. J. Ch. 355 ; *Re* Bullock, Good *v.* Lickorish (1891), 60 L. J. Ch. 341. **Mentd.** *Re* Coleman, Henry *v.* Strong (1888), 39 Ch. D. 443, C. A.

5884. "Sell, mortgage, incumber or anticipate"—Taking benefit of Judgments Act, 1838 (c. 110).]—Testator bequeathed an annuity to his nephew for life, declaring that his nephew should have no power to sell, mtge., incumber, or anticipate it, & that, in case he should attempt so to do, same should cease & be no longer payable to him ; & after the decease of his nephew, or any such attempt to sell, mtge., incumber, or anticipate the annuity, testator ordered the fund out of which the annuity was to be paid to be divided amongst his nephew's children. The nephew took the benefit of the above Act :—*Held :* this was a forfeiture of the annuity, & the children were entitled to the fund.—BRANDON *v.* ASTON (1843), 2 Y. & C. Ch. Cas. 24 ; 7 Jur. 10 ; 63 E. R. 11.

Annotations :—**Consd.** *Re* Jeffery, Burt *v.* Arnold, [1891] 1 Ch. 671 ; *Re* Holford, Holford *v.* Holford, [1894] 3 Ch. 30, C. A. **Refd.** Churchill *v.* Marks (1844), 1 Coll. 441. **Mentd.** Rochford *v.* Hackman (1852), 9 Hare, 475 ; *Re* Stultz (1853), 22 L. J. Ch. 917, L. JJ. ; *Re* Smith (1862), 2 John. & H. 594 ; *Re* Catt's Trusts (1864), 10 Jur. N. S. 536.

5885. "Assign, charge, or otherwise dispose of, or attempt or agree so to do, or do any act whereby share becomes vested in another"—Bankruptcy.]—Bequest of a share in certain trust funds, in trust for A. provided that, if A. should, during the life of B. or C., assign, charge or otherwise dispose of his share in the principal or interest thereof, or attempt or agree so to do, or do any act whereby his share would become vested in some other person, all his interest should become absolutely forfeited, in trust to pay the annual produce, during the lives of B. & C., for the support & maintenance of A., & of his wife & family, or otherwise for his & their benefit, in such manner as the trustees should think proper, & after the death of B. & C. should settle the share so forfeited, in trust for A. & his family, in such manner as they should in their discretion think proper. A. assigned all his property to trustees for his creditors, & a fiat being issued against him he was declared bkpt. :—*Held :* upon the execution by A. of the assignment, his share in the trust moneys became subject to the trust declared by the will for the benefit of A. & his wife & family.—KEARSLEY *v.* WOODCOCK (1843), 3 Hare, 185 ; 1 L. T. O. S. 410 ; 8 Jur. 120 ; 67 E. R. 348.

Annotations :—**Distd.** *Re* Coleman, Henry *v.* Strong (1888), 39 Ch. D. 443, C. A. **Consd.** *Re* Bullock, Good *v.* Lickorish (1891), 60 L. J. Ch. 341. **Refd.** Wallace *v.* Anderson (1853), 16 Beav. 533 ; *Re* Smith, Smith *v.* Smith, [1916] 1 Ch. 369. **Mentd.** Rochford *v.* Hackman (1852), 9 Hare, 475 ; Carr *v.* Living (1860), 28 Beav. 644.

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construed in the ordinary sense of a person who was unable to pay his debts, & not in the technical sense of one discharged as an insolvent debtor. —CAULFIELD *v.* MAGUIRE (1856), 5 I. Ch. R. 78.—IR.

p. "*If he shall not then be or subsequently become bankrupt*"—*Bankruptcies annulled.*]—Testatrix, in 1889, devised real estate to trustees, upon trust, to pay the rents & profits thereof to her brother, Lord D., during his life, should he not at the time of her death be, or subsequently thereto become, a bkpt., &, upon the failure or determination of such trust, to pay the rents & profits to Lord S., during his life, & from & after his death to hold the real estate "upon trust for the person who shall at the decease of Lord S. be Lord D., if he shall not then be, or subsequently become, bkpt., or have done or suffered anything whereby the rents & profits, or any part thereof, would, through his act or default, or by operation or process of law, or otherwise, if belonging absolutely to him, have become vested in or payable to some other person or persons, & his heirs in tail general, according to their respective seniorities." Testatrix died on Mar. 6, 1890, prior to which date the Lord D., mentioned in the will, had been several times adjudicated a bkpt., the last of such adjudications having been made by an order of the English Ct. of Bkpcy. dated Nov. 1, 1889. Lord D. obtained his discharge under the bkpcy. of 1889 on July 9, 1896, & by an order of July 16, 1900, all his other bkpcies. then outstanding were annulled. At the date of the death of testatrix in 1890, Lord S. entered into possession of the real estate devised by the will of testatrix, & continued in possession until his death, on Mar. 6, 1901. On the death of Lord S. Lord D. made no claim to the estate, & the vendor thereupon entered into possession of the lands, & subsequently entered into agreements with the tenants for the sale to them of the lands under the Irish Land Act, 1903. Lord D. died in 1904, leaving an infant son, the present Lord D., who was born in 1903, his heir-at-law :—*Held :* (1) the late Lord D. took nothing under the will while a bkpt. ; (2) on the death of Lord S., Lord D., having then obtained his discharge from his last

Sect. 4.—"*The property of the bankrupt*": *Sub-sect.* 2, *D.* (*b*).]

5886. "Be declared bankrupt or be discharged under any Insolvent Act"—Discharge after vesting order obtained under Judgments Act, 1838 (c. 110).]—A person conveyed certain freehold & leasehold property to trustees, upon trust to pay the rents & profits to his son T. for life, provided that in case T. should be declared bkpt., or be discharged under any Insolvent Act, the trustees should apply the rents & profits in or towards the maintenance, clothing, lodging, & support of T. & his then present or any future wife, & his children, or any of them, or otherwise for his, her, their, or any of their use & benefit, in such manner as the trustees should in their discretion think proper. T. was taken in execution for debt, & sent to prison at the suit of a creditor, who obtained a vesting order against him under the above Act. The insolvent was afterwards discharged under that Act:—*Held:* the life-estate of the insolvent was forfeited at the time of his discharge.—LORD *v.* BUNN (1843), 2 Y. & C. Ch. Cas. 98; 63 E. R. 43.

Annotations:—**Refd.** Wallace *v.* Anderson (1853), 21 L. T. O. S. 17; A.-G. *v.* Heywood (1887), 19 Q. B. D. 326.

5887. "Attempt to sell or dispose of"—Taking benefit of Insolvent Act.]—Testator, after giving several annuities, begged it to be understood that if any of his annuitants should attempt to sell or dispose of their interest in his annuities to them (which he wished only for their peculiar & particular benefit), from that moment his bequest to them was to terminate for ever, & the principal & interest of each bequest to revert to his general fund. One of the annuitants petitioned for the benefit of Insolvent Debtors Act, having entered the annuity in his schedule, together with the effect of the clause in the will above-mentioned, &, afterwards, the usual vesting order was made by the Insolvent Debtors Ct.:—*Held:* his annuity ceased on his presenting the petition.—MARTIN *v.* MAUGHAM (1844), 14 Sim. 230; 3 L. T. O. S. 433; 8 Jur. 609; 60 E. R. 346.

Annotations:—**Follid.** Rochford *v.* Hackman (1852), 9 Hare, 475. **Apld.** Adams *v.* Adams, [1892] 1 Ch. 369, C. A. **Refd.** *Re* Porter, Coulson *v.* Capper, [1892] 3 Ch. 481. **Mentd.** *Re* Swain, Monckton *v.* Hands, [1905] 1 Ch. 669, C. A.

5888. "In any manner sell, assign, transfer, incumber or otherwise dispose of or anticipate"—Taking benefit of Insolvent Act.]—Personal estate was bequeathed to A. for life, with a gift over, & a proviso that, if A. should in any manner sell, assign, transfer, incumber, or otherwise dispose of or anticipate his share the bequest for A. should become utterly void, as if same had not been mentioned in the will, or as if A. were dead. A. being in prison for debt, presented a petition for his discharge under Judgments Act, 1838 (c. 110), & thereupon the vesting order was made:—*Held:* there was a valid limitation over of the share of A.; A.'s taking the benefit of the Insolvent Act was a voluntary alienation of his share & was one of the events on which the limitation over was to take effect, & the interest did not pass to the assignee.

Property cannot be given for life any more than absolutely without the power of alienation being incident to the gift, & although a life interest be expressed to be given, it may be well determined by an apt limitation over.—ROCHFORD *v.* HACKMAN (1852), 9 Hare, 475; 21 L. J. Ch. 511; 19 L. T. O. S. 5; 16 Jur. 212; 68 E. R. 597.

Annotations:—**Refd.** *Re* Amherst's Trusts (1872), L. R. 13 Eq. 464; *Re* Riggs, *Ex p.* Lovell, [1901] 2 K. B. 16. **Mentd.** *Re* Stultz (1853), 22 L. J. Ch. 918, n.; Hare *v.* Burgess (1857), 4 K. & J. 45; Joel *v.* Mills (1857), 3 K. & J. 458; *Re* Catt's Trusts (1864), 2 Hem. & M. 46; Pearson *v.* Dolman (1866), L. R. 3 Eq. 315; Craven *v.* Brady (1869), 4 Ch. App. 296. L. C.; *Re* Stone's Estate (1869), 18 W. R. 222; Hurst *v.* Hurst (1882), 21 Ch. D. 278, C. A.; *Re* Machu (1882), 21 Ch. D. 838; *Re* Dugdale, Dugdale *v.* Dugdale (1888), 38 Ch. D. 176; *Re* Moore, Trafford *v.* Maconochie (1888), 39 Ch. D. 116, C. A.; Adams *v.* Adams, [1892] 1 Ch. 369, C. A.; *Re* Holford, Holford *v.* Holford, [1894] 3 Ch. 30, C. A.; *Re* Carew, Carew *v.* Carew, [1896] 1 Ch. 527; Wynn *v.* Conway Corpn., [1914] 2 Ch. 705, C. A.

5889. "Make any composition although a commission of bankruptcy should not issue"—Composition on which commission could not have issued.]—Funds belonging to an intended wife were, in 1823, settled on a wife for life, with remainder to the husband for life or until he should be declared bkpt. or "make any composition with his creditors for the payment of his debts, although a commission of bkpcy. should not issue against him." in which events the fund was to be held in trust for the children of the marriage equally. In 1842 his principal creditors agreed to take a composition on their debts secured by bills. The wife died in 1852:—*Held:* the composition, though made during the wife's life, operated as a forfeiture of the husband's interest.—SHARP *v.* COSSERAT (1855), 20 Beav. 470; 3 W. R. 473; 52 E. R. 684.

5890. "In case he shall assign, mortgage, or in any manner anticipate same or attempt or agree to assign"—Offer of legacy as security—Declaration of insolvency—Followed by bankruptcy.]—A testator gave a legacy to his nephew upon his attaining the age of twenty-five, but "in case he shall assign, mortgage, or in any manner anticipate same, or attempt or agree to assign, mortgage, or otherwise anticipate the same," then over. The legatee, being pressed for the payment of a debt, offered to give the legacy as a security; but the creditor being advised that no valid security could be given, nothing further was done in the matter.

The legatee subsequently signed a declaration of insolvency, upon which he was afterwards adjudicated a bkpt.:—*Held:* the attempt to assign must be such an act as but for the clause would have operated as an effectual assignment, & the bkpcy. must be treated as *in invitum*, & not within the conditions of forfeiture.—GRAHAM *v.* LEE (1857), 23 Beav. 388; 26 L. J. Ch. 395; 29 L. T. O. S. 46; 3 Jur. N. S. 550; 5 W. R. 328; 53 E. R. 152.

& only annulled bkpcy., became capable of taking the estate tail, & answered the description of the "*persona designata*" to take the estate on the death of Lord S., Lord D. not having subsequently become bkpt., the estate passed on his death to his heir in tail.—*Re* CHICHESTER'S ESTATE, [1908] 1 I. R. 297, 303; 42 I. L. T. 57.—IR.

r. *Sell, charge, or anticipate his share—Bankruptcy on own petition.*]—Testator devised his estate upon trust for all his sons who should attain the age of twenty-one years, as tenants in common, & declared that none of his sons should have power to sell, charge, or anticipate his share, & if he should do so, he should absolutely forfeit all right & title to such share, which should go & be divided between the other sons. One son, before the property was divided, was adjudicated a bkpt. on his own petition:—*Held:* there was a forfeiture of bkpt.'s share, which passed to the brothers.—OFFICIAL ASSIGNEE *v.* PARKINSON, [1885] 4 N. Z. L. R. 145.—N.Z.

t. "*Be by his act or default, or by operation of law, so disposed of as to prevent his personal enjoyment thereof—Bankruptcy—Subsequent discharge but sequestration not annulled.*]—Testator gave to trustees real & personal estate upon trust to pay the annual income to his children as tenants in common during their lives, but subject to the trust following: "As to the share of such yearly income of my children being a son, accruing due in his life-time, in trust to pay him so much of the same yearly income as would not, although same were payable to him, be by his act or default, or by operation of law so disposed of as to prevent his personal enjoyment thereof & to apply so much thereof as would, if same were payable to him, be disposed of as last aforesaid, for the benefit of his wife, children & other issue for the time being in existence etc." One of his children, subsequently to testator's death became bkpt., & obtained a certificate of discharge. The estate

5891. "Mortgage, assign, charge or incumber"—"Assignment by reason of bankruptcy or insolvency"—Mortgage by bankrupt—Subsequent assignment for benefit of creditors followed by bankruptcy.]—By the settlement on A.'s marriage, he, in consideration of £1,000 paid to him, & of the future property of the wife assigned to him, settled his real property on himself till mtge., alienation, or bkpcy., & then upon trust as to £300 a year for the wife's separate use. A. first mortgaged his interest, & afterwards conveyed his real & personal estate to a trustee for the benefit of his creditors & became bkpt:—*Held:* the event on which the £300 was to go to the wife occurred at the date of the mtge.—BROOKE *v.* PEARSON (1859), 27 Beav. 181; 34 L. T. O. S. 20; 5 Jur. N. S. 781; 7 W. R. 638; 54 E. R. 70.

Annotations:—**Followed.** Knight *v.* Browne (1861), 30 L. J. Ch. 649. **Refd.** *Re* Detmold, Detmold *v.* Detmold (1889), 40 Ch. D. 585. **Mentd.** Mackintosh *v.* Pogose, [1895] 1 Ch. 505.

5892. "Shall have acquired bonâ fide interest for valuable consideration"—Bankruptcy abroad—Proviso to forfeiture clause in policy.]—B., a merchant domiciled at Valparaiso, effected an insurance on his life with an insurance co. in London, of which deft. was a director. The policy by a condition indorsed, was to be void if the insured committed suicide, "but, if any third party have acquired a *bonâ fide* interest therein by assignment or by legal or equitable lien for a valuable consideration, or as security for money, the assurance shall nevertheless, to the extent of such interest, be valid & of full effect." While the policy was in force, B. declared himself bkpt., &, by that act itself, made, according to the law of Valparaiso, a cession of all his property to the ct. before whom the declaration was made, & the property thereupon vested, by operation of law, in the Escribano, or official notary, of the ct. After that B. committed suicide. At a meeting of creditors, after his death, pltfs., who were themselves creditors, were duly appointed assignees to the estate, which thereupon, by operation of law, shifted from the Escribano to them as such assignees. In an action by pltfs., as such assignees, to recover the amount insured by the policy:—*Held:* pltfs, were not third parties having a *bonâ fide* interest by assignment or by legal or equitable lien for a valuable consideration, or as security for money, within the exception.—JACKSON *v.* FORSTER (1859), 1 E. & E. 470; 29 L. J. Q. B. 8; 33 L. T. O. S. 290; 5 Jur. N. S. 1247; 7 W. R. 578; 120 E. R. 986, Ex. Ch.

5893. "Be insolvent"—Composition reciting inability to pay debts in full.]—By a marriage settlement, property of the intended wife was settled upon trust for the wife for life, to her separate use with remainder to the husband, "until he should be insolvent," & immediately after his death, or insolvency, then upon trusts for the children.

During the wife's lifetime a deed poll containing a recital that the husband was unable to pay his debts in full was executed by certain persons, creditors of the husband, by which, in consideration of a composition paid to them by the husband, & accepted by them in full satisfaction, they released & discharged him & his lands, etc., & effects, from their debts, & from all actions or claims in respect thereof:—*Held:* the payment of the composition, & acceptance of the release by the husband, was an insolvency within the meaning of the settlement, & his interest thereupon became forfeited.—*Re* MUGGERIDGE'S TRUSTS (1860), John. 625; 29 L. J. Ch. 288; 6 Jur. N. S. 192; 8 W. R. 234; 70 E. R. 569.

Annotations:—**Followed.** Freeman *v.* Bowen (1865), 35 Beav. 17. **Refd.** Montefiore *v.* Enthoven (1867), L. R. 5 Eq. 35; London & Counties Assets Co. *v.* Brighton Grand Concert Hall & Picture Palace, [1915] 2 K. B. 493, C. A. **Mentd.** *Re* Greenwood, Goodhart *v.* Woodhead, [1902] 2 Ch. 198.

5894. "Become vested in or payable to any other person"—Judgment on warrant of attorney to provisional assignee.]—Testator limited real & personal estate to trustees A. B. for life; with a limitation over in case he should thereafter become bkpt. or insolvent, etc., or if by his act or default the rents, etc., should become vested in or payable to any other person. The tenant for life was insolvent before the date of the will, there was the usual power of attorney, & judgment was entered up by the provisional assignee, but nothing further done, & the tenant for life did not in any manner alienate after the date of the will:—*Held:* judgment, without more, only operated as an equitable charge, & did not vest the rents in or make them payable to the assignees.—SEYMOUR *v.* LUCAS (1860), 1 Drew. & Sm. 177; 29 L. J. Ch. 841; 3 L. T. 10; 8 W. R. 599; 62 E. R. 345.

Annotations:—**Consd.** White *v.* Chitty (1866), L. R. 1 Eq. 372; West *v.* Williams, [1898] 1 Ch. 488. **Refd.** Trappes *v.* Meredith (1871), 7 Ch. App. 248, L. C.; Ashburton *v.* Nocton, [1915] 1 Ch. 274, C. A. **Mentd.** Samuel *v.* Samuel (1879), 12 Ch. D. 152.

5895. "Assign or underlet"—Assignment for benefit of creditors.]—A lessee, under a lease containing a covenant not to assign, with a proviso for re-entry in case of breach, by executing a deed of assignment of all his personal property for the benefit of creditors, commits a breach of that covenant & forfeits his lease.—HOLLAND *v.* COLE (1862), 1 H. & C. 67; 31 L. J. Ex. 481; 6 L. T. 503; 27 J. P. 56; 8 Jur. N. S. 1066; 10 W. R. 563; 158 E. R. 803,

Annotations:—**Distd.** Porter *v.* Kirkus (1867), L. R. 2 C. P. 590. **Refd.** *Re* Riggs, *Ex p.* Lovell, [1901] 2 K. B. 16.

5896. "Until he should become insolvent"—Deed of inspectorship reciting inability to pay debts in full.]—The income of a fund was payable to a trader for life or until he should become insolvent. He executed a deed of inspectorship, reciting that he was unable to pay his debts in full:—*Held:* his interest in the fund had thereby determined.—

was not released, nor was the sequestration order annulled. During the bkpcy. income had been due to bkpt. which, but for the forfeiture clause, the official assignee might have received:—*Held:* the forfeiture had taken effect & the interest given under the will to the bkpt. had passed away from him for ever.—*Re* TAYLOR, *Ex p.* OFFICIAL ASSIGNEE; HART (1894), 15 N. S. W. B. 113.—**AUS.**

v. "*Do or suffer anything whereby his share would through his act or by operation of law become vested in or payable to other persons*"—*Petition in insolvency—Subsequently withdrawn.*]—By a settlement executed by pltf.'s father, property was conveyed to trustees upon trust to pay the income thereof to the settlor for life, & after his death to his sons, in equal shares, for the maintenance of them & their respective families. The deed provided that, in case any beneficiary became insolvent, "or do or suffer anything whereby his share or any part thereof would through his act or by operation of law" become vested in or payable to other persons, then the share & interest of such person should cease, & for the remainder of his life should be paid for the maintenance & support of the family of such persons. One of the sons of the settlor, filed his petition in insolvency, but a few months afterwards he withdrew it:—*Held:* the forfeiture clause did not take effect.—HORMUSJI NOWROJI DAVUR *v.* DADABHOY NOWROJI DAVUR (1895), I. L. R. 20 Bom. 310.—**IND.**

w. "*Bankruptcy or assignment*"—*Bankruptcy annulled before income payable.*]—On a gift by will of income, with a forfeiture clause on the bkpcy. of or assignment by the donee, where the bkpcy. is at an end & bkpt's. estate has been revested in the donee before the first payment of income under the will becomes due, so that no right to receive the income has accrued to the assignee, the forfeiture clause does not take effect.—*Re* SIBBALD, HYMAN *v.* SIBBALD (1904), 23 N. Z. L. R. 805.—**N.Z.**

Sect. 4.—"*The property of the bankrupt*": *Sub-sect.* 2, *D.* (*b*).]

FREEMAN *v.* BOWEN (1865), 35 Beav. 17; 55 E. R. 800.

Annotation:—**Refd.** Montefiore *v.* Enthoven (1867), L. R. 5 Eq. 35.

5897. "By any act or default or by operation of law alien, charge or dispose of"—Debtor's petition for adjudication—No steps taken to realise & bankruptcy annulled.]—Gift by will of a share in residuary real & personal estate to L. for life; but if he should "by any act or default, or by operation of law, alien, charge, or dispose of the life interest, or in any manner anticipate the same to or in favour of any other person or persons," the gift to be void, & the share to go to the children of L. At the death of testatrix L. was a bkpt., having been adjudicated a few days before on his own petition. Assignees were appointed, but no steps were taken to realise the assets, & within a twelvemonth the bkpcy. was, by an act of the creditors under their statutory powers, annulled:—*Held*: a forfeiture of the life estate, within the meaning of the clause in the will, had not taken place.—LLOYD *v.* LLOYD (1866), L. R. 2 Eq. 722.

Annotations:—**Distd.** Cox *v.* Fonblanque (1868), 16 W. R. 1032; *Re* Parnham's Trusts (1872), L. R. 13 Eq. 413. **Consd.** Ancona *v.* Waddell (1878), 10 Ch. D. 157. **Distd.** Robertson *v.* Richardson (1885), 30 Ch. D. 623. **Consd.** *Re* Broughton, Peat *v.* Broughton (1887), 57 L. T. 8. **Refd.** Trappes *v.* Meredith (1869), L. R. 9 Eq. 229; Metcalfe *v.* Metcalfe, [1891] 3 Ch. 1, C. A.; *Re* Loftus-Otway, Otway *v.* Otway, [1895] 2 Ch. 235.

5898. "Do or suffer anything whereby the income would become vested in or payable to some other person"—Bankruptcy—Annulled before claim by assignee.]—Testator devised freeholds to C. for life, with a clause of forfeiture providing that if C. should be declared bkpt., or should assign., charge, or incumber his life interest or any part or parts thereof, or should do or suffer anything whereby same or any part thereof would, through his act or default, or by operation or process of law, or otherwise, if belonging absolutely to him, become vested in or payable to some other person or persons, then & thenceforth the rents to which, but for that provision, he would be entitled, should during the remainder of his life interests from time to time sink into & be added to & form part of testator's general personal estate. In testator's lifetime, C. was adjudicated a bkpt., & had not obtained his order of discharge at testator's death; but no creditors' assignee was ever appointed; & within four months after testator's death, bkpt. applied for & obtained an annulment of the bkpcy. The official assignee had not, during the interval, applied for or obtained possession of the rents, C. himself having been in occupation of the estate:—*Held*: as bkpt., by his diligence, had obtained an annulment of the bkpcy. before any claim made, or property handed or paid over, the forfeiture contemplated by testator had not occurred.—WHITE *v.* CHITTY (1863), L. R. 1 Eq. 372; 35 L. J. Ch. 343; 13 L. T. 750; 12 Jur. N. S. 181; 14 W. R. 366.

Annotations:—**Distd.** Cox *v.* Fonblanque (1808), 16 W. R. 1032. **Consd.** Trappes *v.* Meredith (1871), 7 Ch. App. 248, L. C. **Distd.** *Re* Parnham's Trusts (1872), L. R. 13 Eq. 413. **Dbtd. but Folld.** *Re* Parnham's Trusts (1876), 46 L. J. Ch. 80. **Apld.** Ancona *v.* Waddell (1878), 10 Ch. D. 157. **Consd.** Samuel *v.* Samuel (1879), 12 Ch. D. 152. **Distd.** Robertson *v.* Richardson (1885), 30 Ch. D. 623. **Consd.** *Re* Broughton, Peat *v.* Broughton (1887), 57 L. T. 8. **Distd.** Metcalfe *v.* Metcalfe, [1891] 3 Ch 1, C. A. **Consd.** *Re* Loftus-Otway, Otway *v.* Otway, [1895] 2 Ch. 235. **Refd.** Trappes *v.* Meredith (1869), L. R. 9 Eq. 229; *Re* Spearman, Spearman *v.* Lowndes (1900), 82 L. T. 302, C. A. **Mentd.** Metcalfe *v.* Metcalfe (1889), 43 Ch. D. 633; West *v.* Williams (1898), 79 L. T. 575, C. A.

5899. "Assign over, assure, mortgage, or in any manner incumber or part from"—Petition for liquidation by arrangement.]—Under a settlement in a will, it was provided that if the tenant for life of the income of a sum of stock should at any time during his life "assign over, assure, mortgage or in any manner incumber, or by any instrument in writing, parol agreement, or otherwise howsoever, part from" the income, the life estate should be forfeited:—*Held*: the presentation by the tenant for life of a petition, under the arrangement clauses of the 1869 Act, operated as a forfeiture of his life estate.—*Re* AMHERST'S TRUSTS (1872), L. R. 13 Eq. 464; 41 L. J. Ch. 222; 25 L. T. 870; 20 W. R. 290.

Annotations:—**Distd.** *Re* Moon, *Ex p.* Dawes (1886), 17 Q. B. D. 275, C. A. **Folld.** *Re* Gates (1895), 39 Sol. Jo. 331; *Re* Cotgrave, Mynors *v.* Cotgrave, [1903] 2 Ch. 705. **Refd.** *Re* Riggs, *Ex p.* Lovell, [1901] 2 K. B. 16.

5900. "Until his bankruptcy or insolvency"—Adjudication of insolvency in South Australia.]—A domiciled Englishman devised leaseholds in England to trustees in trust, to pay the rents to his son during his life or until his bkpcy. or insolvency, & on his death, or bkpcy. or insolvency, which should first happen, to pay & apply same for the benefit of his children, in such manner as he should by deed or will appoint; & in default of such appointment, for the benefit of all his children equally, & in default of such issue to pay the son absolutely. For some time previous to the death of testator, the son resided in Australia, & after his father's death was there adjudicated an insolvent. He had five children:—*Held*: the insolvency operated as a forfeiture.—*Re* AYLWIN'S TRUSTS (1873), L. R. 16 Eq. 585; 42 L. J. Ch. 745; 28 L. T. 865; 21 W. R. 864.

Annotations:—**Refd.** *Re* Bedson's Trusts (1884), 25 Ch. D. 458; *Re* Master's Settlmt., Master *v.* Master, [1911] 1 Ch. 321.

5901. "Become bankrupt or insolvent, etc."—Signing composition deed reciting inability to pay debts in full.]—By a will property was given upon trust for A. during his life, or until he should become bkpt. or insolvent, or make a general assignment for the benefit of his creditors, or otherwise deprive himself, or be deprived by law, of the beneficial enjoyment thereof, & after the happening of any such event, over. A. executed a composition deed containing a recital that he was unable to pay his debts in full:—*Held*: (1) the gift over took effect; (2) the accuracy of the recital could not be disputed by A.—BILLSON *v.* CROFTS (1873), L. R. 15 Eq. 314; 42 L. J. Ch. 531; 37 J. P. 565; 21 W. R. 504.

5902. "Till bankruptcy, or until he should do or suffer anything to deprive himself of enjoyment of income"—Bankruptcy annulled before any income payable.]—A testator gave the income of property to one of his trustees for life, or till bkpcy., or till he should do or suffer anything to deprive himself of the enjoyment of the income. He was adjudicated bkpt., the bkpcy. was annulled, & ultimately his property revested in himself. The trustees managed the property so that there was no income payable to him in the meantime:—*Held*: he had not forfeited his life interest.—ROBINS *v.* ROSE (1874), 43 L. J. Ch. 334; 30 L. T. 152.

5903. "Do or permit any act, deed, matter, or thing whereby the same should be aliened, charged, or incumbered"—Bankruptcy.]—A testator devised his real estates to trustees charged with the payment of an annuity of £150 to each of his younger sons, & declared that if any son entitled to an annuity should at any time do or permit any act, deed, matter, or thing whatsoever whereby same should be aliened, charged, or incumbered in any manner whatsoever, the annuity should thereupon absolutely cease. One of testator's

younger sons failed to comply with a debtor's summons, & was adjudicated a bkpt. on the petition of the creditor who had issued the debtor's summons :—*Held :* the annuity had ceased under the clause in the will, & did not go to the trustee in the bkpcy.—*Re* THROCKMORTON, *Ex p.* EYSTON (1877), 7 Ch. D. 145 ; 47 L. J. Bcy. 62 ; 37 L. T. 447 ; 26 W. R. 181, C. A.

5904. " Be bankrupt or file a petition in liquidation "—Petition under 1883 Act.]—A lease of a mill for twenty-one years contained a proviso that if the lessees should during the term be bkpts., or file a petition in liquidation, the term should cease. After 1883 Act came into operation, the lessees presented a bkpcy. petition, & a receiving order was made :—*Held :* the presentation of the petition caused a forfeiture of the term.—*Re* WALKER, *Ex p.* GOULD (1884), 13 Q. B. D. 454 ; 51 L. T. 368 ; 1 Morr. 168, D. C.

Annotation :—**Apprvd.** *Re* Burden, *Ex p.* Wood (1888), 21 Q. B. D. 24, D. C.

5905. " Do or suffer anything " whereby income would become vested in any other person—Petition for liquidation by arrangement—No claim by trustee to income.]—Under the trusts of a marriage settlement a life interest in property brought into settlement by the wife was given, after her death, to the husband, subject to forfeiture in the event of his bkpcy. or liquidation, with a gift over. In Oct., 1881, he filed a liquidation petition, & a trustee of his property was appointed, & in 1883, he obtained a discharge. In 1884, the wife died. In 1885, the trustee assigned for value to debtor all the property belonging to him at the commencement of the liquidation & devolving on him subsequently, up to the date of the discharge, other than that which had been already received by the trustee. The liquidation was never formally closed, but the trustee had never made any claim to the income of the settled fund :—*Held :* as, before the reassignment by the trustee to debtor, income had become due to him, which but for the forfeiture clause, the trustee might have received, the forfeiture had taken effect.—ROBERTSON *v.* RICHARDSON (1885), 30 Ch. D. 623 ; 55 L. J. Ch. 275 ; 33 W. R. 897.

Annotations :—**Consd.** Metcalfe *v.* Metcalfe, [1891] 3 Ch. 1, C. A. **Refd.** *Re* Broughton. Peat *v.* Broughton (1887), 57 L. T. 8 ; Metcalfe *v.* Metcalfe (1889), 43 Ch. D. 633.

5906. " Commit an act of bankruptcy or any act whereby the rents should be forfeited to or vested in another "—Adjudged insolvent in colony.]—In 1838 a settlement of real estate in England was made, & thereby the trustees were to pay the rents & profits to S. for life or until he should commit an act of bkpty., or commit any act, or any event should occur, whereby the rents, if settled absolutely upon or in trust for him, should be forfeited to or become vested in any other person whomsoever, & there was a gift over upon the happening of any such event. In 1875 S. was adjudged insolvent in New South Wales, whereby all property of the insolvent " wheresoever the same might be known or found " vested in a comr. :—*Held :* the property had become forfeited & had gone over to those in remainder.—*Re* LEVY'S TRUSTS (1885), 30 Ch. D. 119 ; 54 L. J. Ch. 968 ; 53 L. T. 200 ; 33 W. R. 895.

Annotation :—**Mentd.** *Re* Sumner's S. E., [1911] 1 Ch. 315.

5907. " Or until he should be declared bankrupt or become insolvent "—Debtor's firm liquidated by arrangement.]—Presentation by a firm of a petition for liquidation under 1869 Act, followed by acceptance by the creditors of a composition, operated as a forfeiture of an interest limited in 1862 to the use of A., who was a member of the firm, during his life, " or until he should be declared bkpt., or become an insolvent within the meaning of some Act of Parliament for the relief of insolvent debtors."—NIXON *v.* VERRY (1885), 29 Ch. D. 196 ; 54 L. J. Ch. 736 ; 53 L. T. 18 ; 33 W. R. 633.

5908. " Assign, charge or otherwise dispose of or should become bankrupt or do or suffer anything, etc."—Filing bankruptcy petition—Signing composition deed.]—A composition deed executed by a debtor who had filed a bkpcy. petition recited that debtor, in accordance with his desire to pay his creditors 20*s.* in the pound had agreed to assign to a trustee all the property set forth in a schedule to the deed. In the operative part of the deed debtor " in pursuance of the said agreement " assigned to the trustee the property set forth in the schedule & all the interest of debtor in the property, " & all other the estate if any " of debtor. A life interest in certain property to which debtor was entitled under the trusts of a post-nuptial settlement was not mentioned in the schedule.

The life interest was subject to a proviso that if debtor should assign, charge, or otherwise dispose of the income, or should become bkpt., " or do or suffer anything whereby the income, if payable to him absolutely, would become vested in any other person," then the trust declared in his favour should cease, & during the remainder of his life the trustees might apply the income for the benefit of his wife & children :—*Held :* neither the filing of the bkpcy. petition nor the execution of the composition deed worked a forfeiture of debtor's life interest.—*Re* MOON, *Ex p.* DAWES (1886), 17 Q. B. D. 275 ; 55 L. T. 114 ; 34 W. R. 753 ; 2 T. L. R. 506, C. A.

Annotations :—**Distd.** *Re* Sartoris's Estate, Sartoris *v.* Sartoris, [1892] 1 Ch. 11, C. A. **Consd.** *Re* Riggs, *Ex p.* Lovell, [1901] 2 K. B. 16. **Refd.** *Re* James, Clutterbuck *v.* James (1890), 62 L. T. 454 ; *Re* Gates (1895), 39 Sol. Jo. 331 ; Crouch *v.* Crouch, [1912] 1 K. B. 378, D. C. **Mentd.** *Re* Garnett, Robinson *v.* Gandy (1886), 55 L. T. 562, C. A. ; *Re* Knight & Tabernacle Permanent Bldg. Soc. (1892), 67 L. T. 403, C. A. ; *Re* Cotgrave, Mynors *v.* Cotgrave, [1903] 2 Ch. 705 ; Postmaster General *v.* National Telephone Co. (1908), 72 J. P. 307, C. A. ; Loraine *v.* Loraine & Murphy (1912), 82 L. J. P. 29, C. A. ; Cohen *v.* Popular Restaurants, [1917] 1 K. B. 480.

5909. " Do something " whereby income would by operation of law become vested in or payable to other person—Sequestration in colony—Annulled after income payable to trustee & claim by him.]—A testator gave his residuary real & personal estate to trustees upon trust, to pay one-third of the rents & proceeds to his son until he should die or become bkpt., or assign, charge, or incumber, or attempt to assign charge, or incumber same or any part thereof, or do something whereby same or some part thereof would by operation of law or otherwise if belonging absolutely to him become vested in, or payable to, some other person or persons, with a gift over on the failure or determination of the trust. Shortly before the death of testator insolvency proceedings were instituted against the son in Melbourne where he was living, & trustees of his estate were appointed, who gave notice to the trustees of testator's will to pay over to them any sums in their hands to which bkpt. was entitled. The insolvency proceedings were very shortly afterwards annulled ; the insolvency trustees had not received anything from the trustees of the will :—*Held :* notwithstanding the annulment of the insolvency proceedings, the clause of forfeiture had taken effect.—*Re* BROUGHTON, PEAT *v.* BROUGHTON (1887), 57 L. T. 8.

5910. " Through his act, default, or operation of law became vested in or payable to some other person "—Receiver appointed by judgment creditor.]

Sect. 4.—"The property of the bankrupt": Sub-sect. 2, D. (b).]

—By a marriage settlement a sum of stock belonging to the intended husband was settled upon trust to pay the income to the husband for life, "or till he shall become a bkpt., or shall assign, charge, or incumber the said income, or shall do or suffer something whereby the same or some part thereof would, through his act, default, or by operation or process of law, if belonging absolutely to him, become vested in or payable to some other person or persons" with a gift over to the wife for her life. A creditor recovered judgment for debt against the husband, & obtained an order, which was made in the presence of the husband, appointing himself receiver of the income due or becoming due upon the stock. The husband was afterwards adjudicated a bkpt. upon a subsequent act of bkpcy.:—*Held:* the gift over in favour of the wife took effect on the making of the order appointing a receiver in the action.—*Re* DETMOLD, DETMOLD *v.* DETMOLD (1889), 40 Ch. D. 585; 58 L. J. Ch. 495; 61 L. T. 21; 37 W. R. 442.

Annotations:—**Consd.** *Re* Tetley, *Ex p.* Jeffrey (1896), 66 L. J. Q. B. 111; *Re* Spearman, Spearman *v.* Lowndes (1900), 82 L. T. 302, C. A.; *Re* Johnson, *Ex p.* Matthews & Wilkinson, [1904] 1 K. B. 134, D. C. **Apld.** *Re* Perkin's Settlmt. Trusts, Leicester-Warren *v.* Perkins, [1912] W. N. 99. **Refd.** Mackintosh *v.* Pogose, [1895] 1 Ch. 505. **Mentd.** *Re* Holland, Gregg *v.* Holland, [1901] 2 Ch. 145.

5911. "Alienating, charging, incumbering or disposing of same"—Bankruptcy.]—A testator directed his trustees to pay to his son H., during the life of his wife, a sum of £250 a year, & after her decease to stand possessed of one-fourth of the trust funds to pay the income to H. during his life, & after his death in trust for his children, with a proviso that H. should not have power to alienate, charge, incumber, or dispose of the said income, whether original or accruing, to which he would be entitled after his wife's death; & in the event of his alienating, charging, incumbering, or disposing of the same, or any part thereof, the trustees should cease to pay him either the sum of £250 per annum, or the income of the share, whether original or accruing; & such last-mentioned income should accumulate during the life of H., & the accumulations thereof should be held by the trustees in trust for the person or persons who should be entitled to the share of H. at his decease. H. was adjudicated bkpt.:—*Held:* the bkpcy. did not operate as a forfeiture, & the trustee in bkpcy. was entitled to the income.—*Re* HARVEY, *Ex p.* PIXLEY *v.* HARVEY (1889), 60 L. T. 710; 37 W. R. 620; 6 Morr. 95.

5912. "Become a bankrupt, or do or suffer something whereby income becomes vested in another"—Sequestration in Scotland—Recalled before trustee appointed.]—H. was entitled under a will to the income of a legacy for his life, or until "he shall become a bkpt. . . . or shall do or suffer something whereby same or some part thereof would, through his act or default, or by operation of law, or otherwise, if belonging absolutely to him, become vested in or payable to some other person or persons." Sequestration of the estate of H. was awarded in Scotland, upon a petition by himself & another, but at the first meeting resolutions for winding up the estate by a deed of arrangement were passed, & no trustee was elected. The sequestration was subsequently recalled. Between the dates of the presentation of the petition & the recall certain dividends & sums of interest payable in respect of the legacy came into the hands of the trustees of that legacy, & were lodged in a bank. According to Scottish law H. was made a bkpt. by the sequestration; but until the election & confirmation of a trustee a sequestered estate did not become vested in another person:—*Held:* although there was a bkpcy., the right to receive the income had not vested in any other person, & the forfeiture clause did not operate as a defeasance.—*Re* JAMES, CLUTTERBUCK *v.* JAMES (1890), 62 L. T. 454; 6 T. L. R. 240.

Annotation:—**Consd.** *Re* Sartoris's Estate, Sartoris *v.* Sartoris, [1892] 1 Ch. 11, C. A.

5913. "If lessee should become bankrupt"—Bankruptcy of lessee after assignment with consent of landlord.]—A lease of a house for a term of years contained a covenant by the lessee not to assign the premises without the consent in writing of the lessor, "such consent not to be withheld to a respectable & responsible tenant," & a proviso for re-entry if (*inter alia*) "the lessee, his exors., administrators or assigns should become bkpt." The lessee assigned the lease, with the consent of the lessor, & subsequently to such assignment, became bkpt.:—*Held:* the proviso for re-entry referred only to the bkpcy. of the person who for the time being was possessed of the term, & consequently no forfeiture had been incurred.—SMITH *v.* GRONOW, [1891] 2 Q. B. 394; 60 L. J. Q. B. 776; 65 L. T. 117; 40 W. R. 46; 7 T. L. R. 596.

Annotations:—**Refd.** Horsey Estate *v.* Steiger, [1899] 2 Q. B. 79, C. A.; *Re* Rewman, *Ex p.* Official Receiver, [1899] 2 Q. B. 587.

5914. "Become bankrupt, or do or suffer something whereby it would become payable to be vested in another"—Receiving order made.]—A testator bequeathed the income of his residuary estate to his son during his life, or until he should assign or dispose of the income or some part thereof, "or become bkpt., or do or suffer something whereby the said income if belonging absolutely to him, or some part thereof, would become payable to or vested in some other person." A petition in bkpcy. was filed against the son, & a receiving order made. A meeting of creditors was held & twice adjourned, & nothing further had been done in the matter:—*Held:* though the income did not vest in the official receiver, it would, by force of the receiving order have become payable to him if it had belonged absolutely to the tenant for life, & the interest of the tenant for life had determined.—*Re* SARTORIS'S ESTATE, SARTORIS *v.* SARTORIS, [1892] 1 Ch. 11; 61 L. J. Ch. 1; 65 L. T. 544; 40 W. R. 82; 8 T. L. R. 51; 36 Sol. Jo. 41, C. A.

Annotation:—**Expld. & Folld.** *Re* Laye, Turnbull *v.* Laye, [1913] 1 Ch. 298.

5915. "Sell, assign, transfer, mortgage, incumber, or otherwise dispose of or anticipate"—Filing petition.]—A will contained a proviso that in case any of testator's sons should before the decease of the testator & his wife in any manner sell, assign, transfer, mortgage, incumber, or otherwise dispose of or anticipate his expectant share under the will or become bkpt., the trustees should pay the income of the son's share to his wife or widow during her life & after her death should hold the share in trust for his children absolutely. Some of testator's sons had after their father's death but during their mother's lifetime voluntarily filed petitions for liquidation under 1869 Act:—*Held:* the sons' interests had been disposed of & vested in the official receiver as the result of the voluntary act of the sons in filing their petition.—*Re* GATES (1895), 39 Sol. Jo. 331.

5916. "Be liable to be deprived of beneficial enjoyment"—Act of bankruptcy—Pending petition subsequently dismissed.]—A testatrix gave a life interest to her son, subject to a prior life interest, subject to gift over if he should do anything

whereby he was "liable to be deprived" of the beneficial enjoyment thereof. Before his interest fell into possession he committed an act of bkpcy. & a petition was presented. His interest then fell in, & the petition was dismissed; but before the dismissal an instalment of the income became payable:—*Held:* the forfeiture clause had come into operation & the gift over took effect.—*Re* LOFTUS-OTWAY, OTWAY *v.* OTWAY, [1895] 2 Ch. 235; 64 L. J. Ch. 529; 72 L. T. 656; 13 R. 536; *sub nom. Re* OTWAY, OTWAY *v.* OTWAY, 43 W. R. 501; 39 Sol. Jo. 449.

5917. "Become bankrupt, or do or suffer something whereby it becomes vested in or payable to another"—Bankruptcy in New Zealand—Debtor domiciled in England.]—The interest of a fund was given to a legatee for life, or until he should become "bkpt.," or do or suffer something whereby same should become "vested in or payable to" some other person.

The legatee, being a domiciled Englishman, was adjudicated bkpt. in New Zealand on a creditor's petition, after the death of the testatrix. The adjudication was subsequently annulled:—*Held:* the interest was not forfeited by the colonial bkpcy.—*Re* HAYWARD, HAYWARD *v.* HAYWARD, [1897] 1 Ch. 905; 66 L. J. Ch. 392; 76 L. T. 383; 45 W. R. 439; 41 Sol. Jo. 367; 4 Mans. 130.

Annotations:—**Consd.** *Re* Anderson, [1911] 1 K. B 896; *Re* Craig, Catling *v.* Esson (1916), 86 L. J. Ch. 62.

5918. "Any event should occur whereby income might become alienated by law or vested in any other person"—Receiving order.]—By a settlement, dated in 1859, made upon the marriage of A. & B., property of the husband was vested in trustees upon trust to invest same, & to pay the interest, dividends, & annual produce thereof unto or permit same to be received by the husband until he should be outlawed, or be found or declared bkpt., or become an insolvent debtor within some Act of Parliament for the relief or relating to insolvent debtors, or should do or commit any other act, or any other event should occur whereby the income or any part thereof would or might, if thereby settled absolutely upon or in trust for him, become alienated by law or vested in any other person or persons, & from & after the decease of the husband, or the sooner determination of the trust thereinbefore declared for his benefit, upon trust to pay the whole of such interest, dividends, & annual produce unto, or permit the same to be received by, the wife & her appointees or assigns during her life for her separate use, & subject thereto upon trust for the children of the marriage as therein mentioned. A receiving order was made against the husband in 1885, but was rescinded in Feb., 1886:—*Held:* by the receiving order there had been an alienation by law within the settlement, &, as the alienation by law occurred in favour of the husband's creditors generally, the gift over to the wife was void.—*Re* SPEARMAN, SPEARMAN *v.* LOWNDES (1899), 82 L. T. 302; 43 Sol. Jo. 604; *revsd.* without affecting this point (1900), 82 L. T. 302, C. A.

5919. "Assign or underlet"—Declaration of trust.]—A lessee who had covenanted not to assign without the consent of the lessor, & that upon breach of any of his covenants, or if he should execute an assignment for the benefit of his creditors, the lessor should have the right to re-enter, executed a deed of assignment of all his estate, except leaseholds, to a trustee for the benefit of his creditors, & declared therein that he would stand possessed of his leaseholds upon trust for the trustee to assign & dispose of same as the trustee should direct. The lessor served on the trustee under the deed a notice of breach of covenant by the execution of the deed of assignment:—*Held:* as the deed of assignment did not contain a legal assignment of the land leased, it did not constitute a breach of the covenant not to assign it.—GENTLE *v.* FAULKNER, [1900] 2 Q. B. 267; 69 L. J. Q. B. 777; 82 L. T. 708; 16 T. L. R. 397; 44 Sol. Jo. 483, C. A.

Annotations:—**Refd.** Matthews *v.* Usher (1900), 69 L. J. Q. B. 856, C. A.; *Re* Masters & G. W. Ry. Co. (1901), 70 L. J. K. B. 516, C. A.

5920. —— Bankruptcy.]—A lease contained a covenant not to assign without licence, & a proviso for re-entry on bkpcy. of the lessee or breach of any covenant. The lessee having been adjudicated bkpt. on his own petition, the lessor purported to determine the lease under the proviso of re-entry, & obtained peaceable possession from the lessee without giving any notice under Conveyancing Act, 1881 (c. 41), s. 14:—*Held:* the lessor's re-entry was void as against the lessee's trustee in bkpcy., for the statutory notice was necessary before the lessor could obtain possession either peaceably or by action.—*Re* RIGGS, *Ex p.* LOVELL, [1901] 2 K. B. 16; 70 L. J. K. B. 541; 84 L. T. 428; 49 W. R. 624; 45 Sol. Jo. 408; 8 Mans. 233.

Annotations:—**Refd.** Cohen *v.* Popular Restaurants, [1917] 1 K. B. 480. **Mentd.** *Re* Cotgrave, Mynors *v.* Cotgrave, [1903] 2 Ch. 705.

5921. "Become bankrupt"—Receiving order—Be adjudicated bankrupt.]—A builder by deed assigned all his interest under a building agreement to H. to secure advances. The deed provided that, if the builder should "become bkpt.," H. might take possession of the land comprised in the building agreement & complete any unfinished houses. A receiving order was afterwards made against the builder, & adjudication followed. H. took possession under the mtge. when the receiving order was made, on the ground that the builder had "become bkpt.":—*Held:* "become bkpt." meant "be adjudicated a bkpt.," & the builder not being in default under the mtge. when the receiving order was made, H. was not then entitled to take possession.—*Re* WEIBKING, *Ex p.* WARD, [1902] 1 K. B. 713; 71 L. J. K. B. 389; 86 L. T. 24; 50 W. R. 460; 9 Mans. 131

5922. "Alienating or incumbering, or agreeing to alienate or incumber"—Bankruptcy.]—Under a will property was given to one for life with a gift over in the event of his "alienating or incumbering, or agreeing to alienate or incumber," his interest. He presented a petition in bkpcy., & on the same day was adjudicated a bkpt. on his own application:—*Held:* the petition in bkpcy. & adjudication consequent thereon constituted an alienation within the meaning of the gift over.—*Re* COTGRAVE, MYNORS *v.* COTGRAVE, [1903] 2 Ch. 705; 72 L. J. Ch. 777; 89 L. T. 433; 52 W. R. 411; 10 Mans. 377.

5923. "Have reasonable cause to believe contractor was unduly delaying payment"—Receiving order made—On contractor's petition.]—Bkpt. entered into a contract to do work for a public authority. The contract empowered the engineer to order direct payment by the public authority to those supplying machinery to the contractor, in case he should have reasonable cause to believe that the contractor was unduly delaying payment to them. The contractor presented his own petition, & at the date of the receiving order some of the firms who had supplied machinery were unpaid. The engineer subsequently ordered direct payment to be made to them out of the money which remained due from the public authority to bkpt. at the date of the receiving order:—*Held:* the engineer was entitled to make such order, & the trustee could not recover such money

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from the public authority, as by presenting his own petition bkpt. had "unduly delayed proper payment" to the machinery firms within the contract.—*Re* WILKINSON, *Ex p.* FOWLER, [1905] 2 K. B. 713; 74 L. J. K. B. 969; 54 W. R. 157; 12 Mans. 377.

5924. "Whereby the income becomes payable to some other person"—Receiving order made—Effect of receipt of income before rescission.]—A testator directed trustees to pay the income of a trust fund to a son until he should die or do or suffer something whereby the income or part thereof would if belonging absolutely to him, "become payable to some other person." In 1910, a receiving order was made against the son. In 1911, the creditors having accepted a scheme for payment by instalments of their debts in full with provision for a composition of 7*s.* 6*d.* in the event of debtor's death, the ct. discharged the order:—*Held:* assuming that while the receiving order was in force moneys payable to debtor came to the trustees' hands, the receiving order operated to make those moneys "payable to some other person," & a forfeiture of the life interest had taken place. *Qu.:* whether the same result would follow if no income had come to hand while the receiving order was in force.—*Re* LAYE, TURNBULL *v.* LAYE, [1913] 1 Ch. 298; 82 L. J. Ch. 218; 108 L. T. 324; 57 Sol. Jo. 284; 20 Mans. 124.

5925. "Have his affairs liquidated by arrangement or composition"—Scheme for payment in full by instalments.]—A testator, who made his will & died in 1883, directed a trustee to pay the income of a trust fund to a son until he should die or "have his affairs liquidated by arrangement or composition." In 1910, a receiving order was made against the son. In 1911, the creditors having accepted a scheme for payment by instalments of their debts in full with provision for a composition of 7*s.* 6*d.* in the event of debtor's death, the ct. discharged the order:—*Held:* debtor was not by the scheme "having his affairs liquidated by arrangement of composition," those words contemplating liquidation by arrangement or composition as recognised by 1869 Act,—*Re* LAYE, TURNBULL *v.* LAYE, [1913] 1 Ch. 298; 82 L. J. Ch. 218; 108 L. T. 324; 57 Sol. Jo. 284; 20 Mans. 124.

5926. "Be or become in any manner applicable to any other purpose" than maintenance of bankrupt—Judgment on warrant of attorney to provisional assignee—In lifetime of testator.]—A testator bequeathed the dividends of certain stock to his nephew, solely for the maintenance of himself & his family, declaring that such dividends should not be capable of being charged with his debts or engagements, & that he should have no power to charge, assign, anticipate, or encumber them; but that if he should attempt so to do, or if the dividends, by bkpcy., insolvency, or otherwise, should be assigned or become payable to any other person, or be or become applicable to any other purpose than for the maintenance of the nephew & his family, his interest therein should cease, & the stock be held upon trusts for his children. Long subsequent to the date of the will, & a few weeks prior to a codicil confirming it, the nephew took the benefit of Insolvent Debtors Act, 1820 (c. 119); some years afterwards testator died:—*Held:* this insolvency operated as a forfeiture of the life interest given to the nephew by the will.—YARNOLD *v.* MOORHOUSE (1830), 1 Russ. & M. 364; 39 E. R. 141.

Annotations:—**Consd.** Bird *v.* Johnson (1854), 23 L. T. O. S. 320. **Distd.** Violett *v.* Brookman (1857), 26 L. J. Ch. 308. **Refd.** Rochford *v.* Hackman (1852), 9 Hare, 475.

5927. "Until he shall become bankrupt" "upon his becoming bankrupt"—Bankruptcy before settlement.]—Trust funds were settled by deed upon trust to pay the income to the settlor for life, &, after his death to pay the income of a part thereof to E. for life, or "until he should become bkpt."; &, after his decease or "upon his becoming bkpt." in trust to pay the income of such part to the wife or widow of E. for her separate use with remainder to the child or children of E. with a trust for accumulation in case E. should have no such children or wife, & he should have forfeited his life interest. E. was at the time of the execution of the deed of settlement an uncertified bkpt.:—*Held:* the income of E.'s share belonged to his wife for her separate use, to the exclusion of the assignee.—MANNING *v.* CHAMBERS (1847), 1 De G. & Sm. 282; 16 L. J. Ch. 245; 9 L. T. O. S. 146; 11 Jur. 466; 63 E. R. 1069.

Annotations:—**Folld.** Sharp *v.* Cosserat (1855), 20 Beav. 470; Seymour *v.* Lucas (1860), 1 Drew. & Sm. 177. **Distd.** Trappes *v.* Meredith (1871), 7 Ch. App. 248, L. C. **Consd.** Samuel *v.* Samuel (1879), 12 Ch. D. 152. **Refd.** *Re* Sheppard's Trust (1855), 1 K. & J. 269; Barnes *v.* Jennings (1866), L. R. 2 Eq. 448; White *v.* Chitty (1866), L. R. 1 Eq. 372; West *v.* Williams, [1898] 1 Ch. 488.

5928. "Until he should make any composition"—Composition during prior life interest.]—In 1823 funds were settled on a wife for life, remainder to the husband for life or "until he should . . . make any composition with his creditors for the payment of his debts, although a commission of bkpcy. should not issue against him," with a gift over in that event.

In 1846, the wife being still alive, the principal creditors of the husband, eleven in number, signed a deed whereby in consideration of a composition of 10*s.* in the pound of their respective claims paid by instalments as therein mentioned, they released the husband from all their demands:—*Held:* although the composition was not an act of bkpcy. on which a commission might have issued, nevertheless a forfeiture had been incurred.—SHARP *v.* COSSERAT (1855), 20 Beav. 470; 3 W. R. 473; 52 E. R. 684.

5929. "Shall be insolvent, shall become insolvent"—Insolvency during prior life interest.]—Under a settlement of realty on trust for a wife for her separate use for life, & after her decease for her husband "until he should be bkpt. or insolvent," & after his death, or if he should become bkpt. or insolvent, then over:—*Held:* the gift over took effect upon the husband's becoming insolvent during his wife's life.—*Re* MUGGERIDGE'S TRUSTS (1860), John. 625; 29 L. J. Ch. 288; 6 Jur. N. S. 192; 8 W. R. 234; 70 E. R. 569.

Annotations:—**Refd.** Freeman *v.* Bowen (1865), 35 Beav. 17; Montefiore *v.* Enthoven (1867), L. R. 5 Eq. 35. **Mentd.** *Re* Greenwood, Goodhart *v.* Woodhead, [1902] 2 Ch. 198; London & Counties Assets Co. *v.* Brighton Grand Concert Hall & Picture Palace, [1915] 2 K. B. 493, C. A.

5930. "Shall at any time hereafter become insolvent"—Insolvency before date of will.]—Testator limited real & personal estate to trustees for A. B. for life; with a limitation over in case he should thereafter become bkpt. or insolvent or if by his act or default the rents, etc., should become vested in or payable to any other person. The tenant for life was insolvent before the date of the will; there was the usual power of attorney, & judgment was entered up, but nothing further done & the tenant for life did not in any manner alienate after the date of the will:—*Held:* the insolvency before the date of the will was within the words "shall thereafter become bkpt." etc.—

SEYMOUR *v.* LUCAS (1860), 1 Drew. & Sm. 177 ; 29 L. J. Ch. 841 ; 3 L. T. 10 ; 8 W. R. 599 ; 62 E. R. 345.

Annotations :—**Folld.** Trappes *v.* Meredith (1871), 7 Ch. App. 248. **Consd.** Samuel *v.* Samuel (1879), 12 Ch. D. 152. **Refd.** White *v.* Chitty (1866), L. R. 1 Eq. 372 ; West *v.* Williams, [1898] 1 Ch. 488. **Mentd.** Ashburton *v.* Nocton, [1915] 1 Ch. 274, C. A.

5931. "Shall be declared bankrupt"—Bankruptcy before death of testator.]—Testator devised freeholds to C. for life, with a clause of forfeiture on bkpcy. In testator's lifetime, C. was adjudicated a bkpt., & had not obtained his order of discharge at testator's death, but no creditors' assignee was ever appointed ; within four months after testator's death, bkpt. applied for & obtained an annulment of the bkpcy. The official assignee had not, during the interval, applied for or obtained possession of the rents, C. himself having been in occupation of the estate :—*Held :* the clause must extend to a bkpcy. occurring in testator's lifetime.—WHITE *v.* CHITTY (1866), L. R. 1 Eq. 372 ; 35 L. J. Ch. 343 ; 13 L. T. 750 ; 12 Jur. N. S. 181 ; 14 W. R. 366.

Annotations :—**Distd.** *Re* Parnham's Trusts (1872), L. R. 13 Eq. 413. **Apld.** Ancona *v.* Waddell (1878), 10 Ch. D. 157. **Consd.** Samuel *v.* Samuel (1879), 12 Ch. D. 152 ; *Re* Broughton, Peat *v.* Broughton, (1887) 57 L. T. 8 ; *Re* Loftus-Otway, Otway *v.* Otway, [1895] 2 Ch. 235. **Refd.** Cox *v.* Fonblanque (1868), 16 W. R. 1032 ; Trappes *v.* Meredith (1871), 7 Ch. App. 248, L. C. ; *Re* Parnham's Trusts (1876), 46 L. J. Ch. 80 ; Robertson *v.* Richardson (1885), 30 Ch. D. 623 ; Metcalfe *v.* Metcalfe, [1891] 3 Ch. 1, C. A. ; *Re* Spearman, Spearman *v.* Lowndes (1900), 82 L. T. 302, C. A. **Mentd.** Metcalfe *v.* Metcalfe (1889), 43 Ch. D. 633 ; West *v.* Williams (1898), 79 L. T. 575, C. A.

5932. "Shall become bankrupt"—Existing sequestration known to testator.]—A testatrix, knowing that her husband was a bkpt., gave him a life annuity, subject to a proviso if he should become bkpt. or should assign the annuity, it should cease, & subject to a further proviso, that it should be lawful for the trustees of her will at any time to refuse payment of the annuity, which in that case was to go over :—*Held :* the existing bkpcy. operated as a forfeiture of the annuity, notwithstanding the words of futurity in the will & the discretion given to the trustees.—TRAPPES *v.* MEREDITH (1871), 7 Ch. App. 248 ; 41 L. J. Ch. 237 ; 26 L. T. 5 ; 20 W. R. 130, L. C.

Annotations :—**Consd.** *Re* Parnham's Trusts (1876), 46 L. J. Ch. 80 ; Samuel *v.* Samuel (1879), 12 Ch. D. 152, C. A. ; Metcalfe *v.* Metcalfe, [1891] 3 Ch. 1, C. A. **Refd.** Ancona *v.* Waddell (1878), 10 Ch. D. 157 ; Gibbons *v.* Gibbons (1881), 6 App. Cas. 471, P. C. ; Metcalfe *v.* Metcalfe (1889), 43 Ch. D. 633 ; *Re* Loftus-Otway, Otway *v.* Otway, [1895] 2 Ch. 235 ; *Re* Chapman, Perkins *v.* Chapman, [1904] 1 Ch. 431, C. A.

5933. By operation of law . . . be personally deprived of receipt & benefit of bequest—Bankruptcy at & after determination of prior life interest—Annulled after income payable.]—By a will a fund was given (subject to a prior life interest) to R. for life, but it was provided that if (amongst other things) by act or operation of law he should be personally deprived of the receipt & benefit of the bequest, then the life interest should cease, & the income should go to the persons entitled in remainder. At the time of the determination of the prior life interest, & for several years afterwards, R. was a bkpt., & in consequence of such bkpcy. the fund was paid into ct. under Trustee Relief Act. Before any petition was presented for payment of the fund, or application of the income thereof for the benefit of the persons entitled in remainder, R. procured the annulment of this bkpcy. on the terms that the past dividends should be paid to the assignee :—*Held :* R. had nevertheless forfeited his life interest.—*Re* PARNHAM'S TRUSTS (1872), L. R. 13 Eq. 413 ; 41 L. J. Ch. 292 ; 20 W. R. 396.

Annotations :—**Consd.** Ancona *v.* Waddell (1878), 10 Ch. D. 157 ; *Re* Loftus-Otway, Otway *v.* Otway, [1895] 3 Ch. 235.

5934. —— Bankruptcy during prior life interest—Annulled during prior life interest.]—A testator bequeathed a sum of stock to trustees, upon trust, after the death of a tenant for life, to divide the income equally among the sons of his sister, with a declaration that in the event of any one of such sons assigning or otherwise disposing of the life interest thereinbefore given, or if by act or operation of law he should be personally deprived of the benefit of such bequest, his life interest should immediately cease & determine ; & on such event occurring, the income should be paid to the person or persons entitled to same under the bequest thereinafter contained. After the death of testator a son of the sister was adjudicated bkpt. ; but he obtained an annulment of the bkpcy. before the death of the tenant for life :—*Held :* there was no forfeiture of his life interest.—*Re* PARNHAM'S TRUST (1876), 46 L. J. Ch. 80.

Annotations :—**Consd.** Samuel *v.* Samuel (1879), 12 Ch. D. 152. **Refd.** Metcalfe *v.* Metcalfe (1889), 43 Ch. D. 633 ; *Re* Loftus-Otway, Otway *v.* Otway, [1895] 2 Ch. 235.

5935. "Shall become bankrupt"—Existing sequestration known to testator.]—A life interest in property was given by will, & there was a clause providing that if the annuitant "should become insolvent or be declared bkpt.," his interest should absolutely cease & be forfeited, & go over as in the will provided. The annuitant became bkpt. before the date of the will to the knowledge of testatrix. The bkpcy. was annulled three years after testatrix's death, but before the time had arrived at which any payment could have been made to the residuary legatee in whose favour the gift over operated :—*Held :* no forfeiture took place.—ANCONA *v.* WADDELL (1878), 10 Ch. D. 157 ; 48 L. J. Ch. 116 ; 40 L. T. 31 ; 27 W. R. 186.

Annotations :—**Distd.** Robertson *v.* Richardson (1885), 30 Ch. D. 623 ; Metcalfe *v.* Metcalfe, [1891] 3 Ch. 1, C. A.

5936. "Shall be aliened whereby the same would vest in any other person"—Bankruptcy before death of testator.]—A testator by his will gave to his trustees real & personal estate in trust to pay the rents & profits to his children as tenants in common during their respective lives with benefit of survivorship. He then declared that if by any act or by operation of law any interests given by his will in trust for his children should be aliened, whereby same should vest in any other person, then the trustees should apply the interest so aliened to & among the other persons entitled to same by survivorship, as in the case of the death of the persons so aliening. One of testator's children became a bkpt. between the date of the will & testator's death. Within a year after testator's death she became entitled to property which when sold was sufficient to pay the debts & costs ; but the bkpcy. was not annulled until more than two years after that. The trustees of the will had paid the rents & profits of the other children, considering that they were forfeited :—*Held :* the life interest of the legatee in the rents & profits was forfeited by her bkpcy.—*Re* METCALFE, METCALFE *v.* METCALFE, [1891] 3 Ch. 1 ; 60 L. J. Ch. 647 ; 65 L. T. 426 ; 7 T. L. R. 558, C. A.

Annotations :—**Consd.** *Re* Chapman, Perkins *v.* Chapman, [1904] 1 Ch. 431, C. A. **Refd.** *Re* James, Clutterbuck *v.* James (1890), 62 L. T. 454. **Mentd.** West *v.* Williams, [1899] 1 Ch. 132, C. A.

(*c*) *Effect of Forfeiture.*

5937. Life interest—Rents between vesting order & discharge.]—A person conveyed certain freehold & leasehold property to trustees, upon trust to pay the rents & profits to his son T. for life,

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provided that in case T. should be declared bkpt., or be discharged under any Insolvent Act, the trustees should apply the rents & profits in or towards the maintenance, clothing, lodging & support of T. & his then present or any future wife, & his children, or any of them, or otherwise for his, her, their, or any of their use & benefit, in such manner as the trustees should in their discretion think proper. T. was taken in execution for debt, & sent to prison at the suit of a creditor, who obtained a vesting order against him under Judgments Act, 1838 (c. 110). The insolvent was afterwards discharged under that Act:—*Held:* from the date of the vesting order to the time of his discharge, the rents & profits of the estate belonged to the assignee under the Act; & upon the discharge taking place the discretionary power given to the trustees by the settlement might be exercised by them.—LORD *v.* BUNN (1843), 2 Y. & C. Ch. Cas. 98; 63 E. R. 43.

Annotations:—**Consd.** A.-G. *v.* Heywood (1887), 19 Q. B. D. 326. **Mentd.** Wallace *v.* Anderson (1853), 21 L. T. O. S. 17.

5938. —— Gift over on mortgage.]—By the settlement on A.'s marriage, he, in consideration of £1,000 paid to him, & of the future property of the wife assigned to him, settled his real property on himself till mtge., alienation, or bkpcy., & them upon trust as to £300 a year for the wife's separate use. A. first mortgaged his interest, & afterwards conveyed his real & personal estate to a trustee for the benefit of his creditors & became bkpt.:—*Held:* the wife's title having vested at the date of the mtge., the question as to the validity of the gift to her in the event of bkpcy. did not arise.—BROOKE *v.* PEARSON (1859), 27 Beav. 181; 34 L. T. O. S. 20; 5 Jur. N. S. 781; 7 W. R. 638; 54 E. R. 70.

Annotations:—**Folld.** Knight *v.* Browne (1861), 30 L. J. Ch. 649. **Apld.** *Re* Detmold, Detmold *v.* Detmold (1889), 40 Ch. D. 585. **Mentd.** Mackintosh *v.* Pogose, [1895] 1 Ch. 505.

5939. —— Share accruing through failure of class of beneficiaries.]—Under a limitation in a will until bkpcy., with a gift over in that event:—*Held:* a share which accrued after bkpcy. & certificate, by the death of one of a class without issue, went over upon the bkpcy. with the original share under the trusts of the will.—DORSETT *v.* DORSETT (1861), 30 Beav. 256; 31 L. J. Ch. 122; 8 Jur. N. S. 146; 10 W. R. 96; 54 E. R. 887.

5940. —— Gift over on appointment of receiver.]—By a marriage settlement executed in 1881, a sum of stock belonging to the intended husband was settled upon trust to pay the income to the husband for life, "or till he shall become a bkpt., or shall assign, charge, or incumber the said income, or shall do or suffer something whereby the same or some part thereof would, through his act, default, or by operation or process of law, if belonging absolutely to him, become vested in or payable to some other person or persons." On the determination of the trust in favour of the husband, the trustees were to pay the income to the wife for her life. In June, 1888, a creditor recovered judgment for debt against the husband, & on July 19 he obtained an order, which was made in the presence of the husband, appointing himself receiver of the income due or becoming due upon the stock. The husband was afterwards adjudicated a bkpt. upon a subsequent act of bkpcy.:—*Held:* the gift over in favour of the wife having taken effect on the making of the order appointing a receiver in the action, she was entitled, as against the official receiver, to all dividends accrued subsequently to the making of that order.—*Re* DETMOLD, DETMOLD *v.* DETMOLD (1889), 40 Ch. D. 585; 58 L. J. Ch. 495; 61 L. T. 21; 37 W. R. 442.

Annotations:—**Consd.** *Re* Tetley, *Ex p.* Jeffrey (1896), 66 L. J. Q. B. 111; *Re* Spearman, Spearman *v.* Lowndes (1899), 82 L. T. 302; *Re* Holland, Gregg *v.* Holland (1902), 86 L. T. 542, C. A. **Folld.** *Re* Johnson, *Ex p.* Matthews & Wilkinson, [1904] 1 K. B. 134, D. C.; *Re* Perkins' Settlmt. Trusts, Leicester-Warren *v.* Perkins, [1912] W. N. 99. **Mentd.** Mackintosh *v.* Pogose, [1895] 1 Ch. 505.

5941. —— Income between death of wife & death of bankrupt.]—By a marriage settlement certain funds belonging to the wife were settled upon trust to pay the income to the wife for life, & after her death to the husband until he should become bkpt. or alienate same or until his death, whichever should first happen; & after the decease of the survivor of the wife & husband, then upon trust for the children of the marriage. The husband became a liquidating debtor, & then the wife died, leaving her husband surviving:—*Held:* the limitation over had taken effect, & the income of the trust fund between the death of the wife & the death of the husband belonged to the children.—*Re* AKEROYD'S SETTLEMENT, ROBERTS *v.* AKEROYD, [1893] 3 Ch. 363; 63 L. J. Ch. 32; 69 L. T. 474; 7 R. 405, C. A.

Annotations:—**Mentd.** Mara *v.* Browne (1895), 65 L. J. Ch. 225, C. A.; *Re* Warner, Watts *v.* Silvey (1917) 62 Sol. Jo. 159.

5942. —— From what date income vests in trustee.]—Where a person entitled to the receipt of dividends until he shall do or suffer to be done any act whereby same if payable to himself would become vested in some other person, commits an act of bkpcy. which is followed by adjudication, the date upon which the dividends vest in the trustee, & are forfeited, is, under the doctrine of relation back, the date of the act of bkpcy., not the date of the adjudication.—MONTEFIORE *v.* GUEDALLA, [1901] 1 Ch. 435; 70 L. J. Ch. 180; 83 L. T. 735; 49 W. R. 269; 45 Sol. Jo. 205; 8 Mans. 126.

5943. —— Forfeited on first bankruptcy—Effect on second bankruptcy.]—By a settlement made in 1893 the settlor assigned property to trustees on trust to pay to him the annual income until he was declared bkpt.; thereafter this rights were to cease, & the trustees were to have power to apply at their discretion the income or any part thereof for his personal maintenance & support, & were to apply the residue for the benefit of his children, if any, or to accumulate it & add it to the *corpus*, which was ultimately to go to his relatives. In 1900 the settlor was adjudicated bkpt., & the trustee in bkpcy., applied to set aside the settlement, & it was set aside so far as was necessary to pay bkpt.'s debts provable in the bkpcy. The trustees of the settlement by consent raised a sufficient sum to pay bkpt.'s debts in full & the costs, but the bkpcy. was not annulled. In 1902 the settlor was adjudicated bkpt. for the second time, & the trustee in that bkpcy. applied again to set aside the settlement, but was refused on the ground that at the time of making the settlement bkpt. was in a position to pay his debts without the aid of the settled property. The trustee in bkpcy. then applied for a declaration that bkpt.'s life estate under the settlement vested in the trustee in bkpcy. Throughout these transactions bkpt. was unmarried:—*Held:* the first bkpcy. had operated under the settlement as a forfeiture of the settlor's life estate, & it did not, therefore, vest in the trustee of the second bkpcy.—*Re* JOHNSON, *Ex p.* MATTHEWS & WILKINSON, [1904] 1 K. B. 134; 73 L. J. K. B. 220; 90 L. T. 61; 52 W. R. 304; 11 Mans. 14, D. C.

Annotation :—**Apld.** *Re* Burroughs-Fowler, Burroughs-Fowler's Trustee *v.* Burroughs-Fowler, [1916] 2 Ch. 251.

5944. —— Trustees' title indefeasible.]—By an ante-nuptial settlement property of the husband was settled upon trust to pay the income thereof to him during his life, or until he should be outlawed or be declared bkpt. or become an insolvent debtor, or should do or suffer something whereby the income or some part thereof might if absolutely belonging to him become vested in or payable to some other person or persons, & from & after the death of the husband or other the determination of the trust for his benefit in his lifetime to pay the income to the wife for life. The husband was adjudicated bkpt. in his wife's lifetime :—*Held :* upon the bkpcy. the husband's life interest vested indefeasibly in his trustee in bkpcy. & was no longer capable of being affected by any subsequent act of forfeiture by the husband, & the trustee in bkpcy. could make a good title to the income of the settled property during the remainder of the husband's life.—*Re* BURROUGHS-FOWLER, BURROUGHS-FOWLER'S TRUSTEE *v.* BURROUGHS-FOWLER, [1916] 2 Ch. 251 ; 85 L. J. Ch. 550 ; 114 L. T. 1204 ; 32 T. L. R. 493 ; 60 Sol. Jo. 538 ; [1916] H. B. R. 108.

5945. —— Only partly forfeited—Obligation by bankrupt's father to pay annual sum to be applied as income under settlement.]—By a marriage settlement the husband settled a reversionary interest, & his father settled certain stocks. These properties were called "the husband's trust fund." The income of the reversionary interest when it fell into possession was to be paid to the husband for life, & the income of the stocks was to be paid to him until alienation. The father covenanted to pay the annual sum of £120 to the trustees, to be applied in the same way as the income of the husband's trust fund if same had fallen into possession. The husband became bkpt. :—*Held :* the two funds must be valued as at the date of the bkpcy. & in each subsequent year & a proportionate part of the annual sum corresponding in value to the reversionary interest should from time to time be paid to the trustee in bkpcy., & the remainder be applied as upon the cesser of the husband's life interest.—*Re* WINWOOD'S SETTLEMENT, FISHER *v.* WINWOOD'S TRUSTEE (1916), 85 L. J. Ch. 799 ; 114 L. T. 1095 ; [1916] H. B. R. 158.

5946. —— Income on forfeiture to determine as if bankrupt "actually dead"—No acceleration of subsequent interests.]—A testator by will gave his estate other than pure personalty upon trust to pay one-third of the income to A. for life & after his decease as A. should by will appoint, & in default of appointment for the children of A. with subsequent gifts if A. should die without issue. The will contained separate trusts of the pure personalty. Testator declared that if A. should become bkpt. then the trust for payment of the income to A. should immediately thenceforth cease & determine "in the same manner as if he were then actually dead." A. became bkpt., was married & had no issue. The income having been accumulated by order of the ct. till it should appear who was entitled to it :—*Held :* (1) the words "actually dead" could not mean dead for all purposes, but merely that A. was to be no longer capable of himself taking any interest under the gift ; (2) the subsequent interests were not accelerated & the accumulations & income during the life of A. went as on an intestacy.—*Re* COOPER, TOWNEND *v.* TOWNEND (1917), 86 L. J. Ch. 507 ; 116 L. T. 760 ; 61 Sol. Jo. 444 ; [1917] H. B. R. 186.

5947. Lease—Landlord entitled to emblements.]—A lease of lands contained a condition, "that, if the lessee should commit an act of bkpcy. whereon a commission should issue, & he should be declared a bkpt., or if he should become insolvent, or incur any debt upon which any judgment should be signed, entered up, or given against him, & on which any writ of *fi. fa.*, or any other writ of execution, should issue, it should be lawful for the lessor to re-enter into the demised premises, & the same again to have, repossess, & enjoy, as in his former estate." The tenant gave a warrant of attorney, upon which judgment was entered up, & his goods taken in execution & sold, & a commission of bkpcy. afterwards issued against him. The lessor entered for the forfeiture :—*Held :* he was entitled to the emblements.—DAVIS *v.* EYTON (1830), 7 Bing. 154 ; 4 Moo. & P. 820 ; 9 L. J. O. S. C. P. 44 ; 131 E. R. 60.

Annotation :—**Mentd.** Bryan *v.* Child & Farmer (1850), 5 Exch. 368.

5948. —— Assignees entitled to time to remove fixtures.]—By a lease, the lessee covenanted to erect a steam-engine, machinery, & buildings proper for carrying on the business of a shipwright, on the land demised, & to leave same for the lessors at the expiration or other sooner determination of the term, "it being by the indenture declared that all steam & other engines, machinery, etc., set up upon the premises at any time during the term for the purpose of carrying on the trade of a shipwright, together with all fixtures, should not be removed therefrom, but should, upon the expiration or other sooner determination of the said term, belong to the landlords, & not to the tenant, without any payment being made to him for the same." The lease then went on to provide, "that the last-mentioned stipulation should not be construed to apply to any machinery or other articles which might be erected or set up on the demised premises by the lessee during the term, for any other purpose than that of carrying on the business of a shipwright ; but that it should be lawful for the lessee at any time during the term, or at the expiration thereof, to remove & take away all such last-mentioned machinery, etc., from the demised premises." The lease then contained a further proviso, that, in the event of the lessee becoming bkpt., it should be lawful for the lessors to re-enter," & upon such entry to take possession of, have, etc., as their own property, without paying anything for the same, all steam & other engines, etc., which should be found on the premises, & which should be used or employed in or about the business of a ship-builder thereon." The lessee having become bkpt., the lessors re-entered for the forfeiture :—*Held :* the assignees of the lessee were entitled to enter for the purpose of removing the fixtures other than those set up for the ship-building business, & to a reasonable time for that purpose.—STANSFELD *v.* PORTSMOUTH CORPN. (1858), 4 C. B. N. S. 120 ; 27 L. J. C. P. 124 ; 30 L. T. O. S. 317 ; 22 J. P. 355 ; 4 Jur. N. S. 440 ; 6 W. R. 296 ; 140 E. R. 1027.

Annotations :—**Distd.** Pugh *v.* Arton (1869), L. R. 8 Eq. 626. **Apld.** Cornish *v.* Stubbs (1870), L. R. 5 C. P. 334. **Consd** *Re* Latham, *Ex p.* Glegg (1881), 19 Ch. D. 7. **Mentd.** Sumner *v.* Bromilow (1865), 34 L. J. Q. B. 130 ; *Re* Lavies, *Ex p.* Stephens (1877), 37 L. T. 613, C. A.

5949. —— Landlord entitled to fixtures on premises at time of re-entry.]—A tenant forfeited his lease by an act of bkpcy., & the landlord re-entered :—*Held :* the landlord was absolutely entitled to all fixtures remaining upon the premises at the date of the re-entry.—PUGH *v.* ARTON (1869),

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L. R. 8 Eq. 626; 38 L. J. Ch. 619; 20 L. T. 865; 17 W. R. 984.

Annotation:—**Distd.** *Re* Glasdir Copper Works, English Electro Metallurgical Co. *v.* Glasdir Copper Works, [1904] 1 Ch. 89.

5950. —— Covenant to assign licence to landlord at end of term.]—A lease of a public-house, determinable on the bkpcy. of the lessee, contained a covenant by the lessee upon the determination of the term to assign the licences to the lessor. The lessee having become bkpt. before the expiration of the term:—*Held:* his trustee in bkpcy. took no interest in the licences, & the covenant was valid, entitling the lessor to have the licences, delivered up to him, though they were not assignable.—*Re* BRITNOR, *Ex p.* ROYLE (1877), 46 L. J. Bcy. 85; 25 W. R. 560.

5951. —— Effect on provision for termination of agricultural lease—Payment for hay & straw.]—A tenant held under a lease containing a covenant against subletting, & a clause giving the landlord a right to re-enter in case of breach of covenant, bkpcy., or liquidation on the part of the tenant. The tenant sublet without leave. Afterwards the under-tenant filed a liquidation petition, & the landlord then first heard of the subletting. The landlord then agreed with two of the under-tenant's creditors to accept a new tenant on the old terms if one could be found in thirty-one days, &, if no tenant was found, to give a reasonable time for the removal of the corn & other effects belonging to the estate of the under-tenant. No new tenant was found, & the landlord took possession. The lease contained covenants by the tenant to do certain things during the last year of the term & on delivering up the premises to leave thereon the hay & straw grown thereon during the last year on being paid for same. The under-tenant's trustee in bkpcy. sued the landlord to recover the value of the hay & straw:—*Held:* (1) the under-tenant was bound by the terms of the lease; (2) the lease having been determined by forfeiture in consequence of the under-tenant filing a liquidation petition, the clause giving a right to payment for the hay & straw did not apply.—SILCOCK *v.* FARMER (1882), 46 L. T. 404, C. A.

Annotations:—**Consd. & Distd.** *Re* Morrish, *Ex p.* Hart Dyke (1882), 22 Ch. D. 410, C. A. **Refd.** Lybbe *v.* Hart (1885), 29 Ch. D. 8, C. A.

5952. —— Trustee takes subject to right of landlord under agreement.]—A building agreement between a landowner & a builder contained a stipulation that the landowner, upon the default of the builder in fulfilling his part of the agreement, might re-enter upon the land & expel the builder, & that on such re-entry all the materials then in & about the premises should be forfeited to & become the property of the landowner "as & for liquidated damages":—*Held:* under such a stipulation, the interest of the builder in the materials being a defeasible one, the right of the landowner to seize is not defeated by the commission of an act of bkpcy. by the builder before the seizure is made. The trustee in bkpcy. of the builder takes subject to the right of the landowner under the agreement.—*Re* GARRUD, *Ex p.* NEWITT (1881), 16 Ch. D. 522; 51 L. J. Ch. 381; 44 L. T. 5; 29 W. R. 344, C. A.

Annotations:—**Consd.** Climpson *v.* Coles (1889), 23 Q. B. D. 465. **Refd.** Marshall *v.* Mackintosh (1898), 14 T. L. R. 458. **Mentd.** Reeves *v.* Barlow (1883), 11 Q. B. D. 610; Church *v.* Sage (1892), 67 L. T. 800.

5953. Building contract—What property passes.]—A builder contracted with the trustees of a certain co. to build for them an hotel, for a specified sum, & to provide all necessary materials (except iron work & papering), to the satisfaction of their superintendent; with a proviso, that, in the event of the contractor becoming bkpt., it should be lawful for the trustees to take possession of the work then already done by him, & put an end to the agreement for the future, paying him a fair proportion for the work actually done. Before the work was completed, the contractor (who had received several sums of money on account to an amount greater than the value of the work done) became bkpt., having in his workshop certain wooden sash frames destined for the hotel, & approved of by the superintendent for that purpose, into which certain pullies, the property of the trustees, had been inserted; which frames having been brought by the trustees to the hotel, a demand of the sash frames, without mentioning the pullies, was made by the assignees, to which the trustees returned a general refusal to give them up:—*Held:* by the true construction of the contract, a property passed to the trustees in such work only as was actually done, & affixed to the realty by bkpt. previous to his bkpcy.—TRIPP *v.* ARMITAGE (1839), 4 M. & W. 687; 1 Horn. & H. 442; 8 L. J. Ex. 107; 3 Jur. 249; 150 E. R. 1597.

Annotations:—**Consd.** Clarke *v.* Bulmer (1843), 1 Dow. & L. 367. **Apprvd.** Seath *v.* Moore (1886), 11 App. Cas. 350, H. L. **Refd.** Banbury & Cheltenham Direct Ry. Co. *v.* Daniel (1884), 54 L. J. Ch. 265. **Mentd.** Rouch *v.* G. W. Ry. Co. (1840), 1 Q. B. 51; Young *v.* Cooper (1851), 6 Exch. 259; Turley *v.* Bates (1863), 2 H. & C. 200.

5954. —— When user of builder's goods justified.]—A contract for the building of a ship provided that, if at any time the builder should cease working on the ship for fourteen days, or should allow the time for completion & delivery of the ship to expire for one month without the same having been completed & ready for delivery, or in the event of the bkpcy. or insolvency of the builder, it should be lawful then & thenceforth for the buyer to cause the ship to be completed by any person he might see fit to employ, or to contract with some other person for the completion of the work agreed to be done by the builder, & to employ such materials belonging to the builder as should be then on his premises, & which should either have been intended to be, or be considered fit & applicable for the purpose:—*Held:* this clause having been put in force by the buyer on the filing of a liquidation petition by the builder, the user of the builder's goods on the completion of the ship could not be justified on the ground of a subsequent cesser of work on the ship.—*Re* WALKER, *Ex p.* BARTER, *Ex p.* BLACK (1884), 26 Ch. D. 510; 53 L. J. Ch. 802; 51 L. T. 811; 32 W. R. 809, C. A.

Annotation:—**Mentd.** Merry *v.* Pownall, [1898] 1 Ch. 306.

5955. —— Title of trustees defeated.]—By a building contract between builders & a board, it was provided that all plant, etc. brought on to the ground by the builders for the purposes of the building should "be considered to be the property of the board," & that they should not be removed without the licence of the architect, but that the board should not be answerable for any loss which might happen to them; & if the builders should delay the performance of their contract, the board might give the builders notice to proceed with the work, & that in the event of their not doing so within seven days the plant, etc., should be forfeited to the board. The builders having become bkpt., the board subsequently to the commencement of the bkpcy. gave to the builders & to their trustee notice to proceed with

the work, & upon non-compliance with the notice the board claimed that the plant & materials upon the premises were forfeited, & that they were entitled to retain them as against the trustee :—*Held :* the board's right to issue the notice was unaffected by the bkpcy. ; & although the goods were the property of the debtors at the commencement of the bkpcy., the title of the trustee was determined by the forfeiture & the board were entitled to retain them.—*Re* KEEN & KEEN, *Ex p.* COLLINS, [1902] 1 K. B. 555 ; 71 L. J. K. B. 487 ; 9 Mans. 145 ; *sub nom. Re* KEEN, *Ex p.* BRISTOL SCHOOL BOARD, 86 L. T. 235 ; 50 W. R. 334 ; 46 Sol. Jo. 268, D. C.

Annotations :—**Distd.** Byford *v.* Russell & Morris (1907), 76 L. J. K. B. 744 ; Metropolitan Water Board *v.* Dick, Kerr, [1917] 2 K. B. 1. **Mentd.** Hart *v.* Porthgain Harbour Co., [1903] 1 Ch. 690.

5956. —— Trustee not entitled to recover plant & material.]—A building contract based on the theory that the employer is to be put in possession of completed works, & providing that all plant & materials brought on the ground by the contractor shall be considered the property of the employer until the completion of the contract has been duly certified, & that on default of the contractor, the employer may enter upon & take possession of the works, materials, & plant, & the expense incurred in completing the works shall be a debt due from the contractor, vests the plant & materials in the employer at law subject to a condition that upon the due completion of the contract the contractor shall be at liberty to remove them. Therefore, if the contractor makes default in performing his part of the contract, & the works are in consequence never completed, neither he nor his trustee in bkpcy. can recover the plant or materials from the employer.

The effect of such a contract is to provide not only machinery to enable the employer to secure the performance of the contract but also a security for the employer that the work shall be performed of which security the employer is entitled to avail himself if, by the default of the contractor, the work is not performed at all.—HART *v.* PORTHGAIN HARBOUR CO., LTD., [1903] 1 Ch. 690 ; 72 L. J. Ch. 426 ; 88 L. T. 341 ; 51 W. R. 461.

Annotation :—**Folld.** Metropolitan Water Board *v.* Dick, Kerr, [1917] 2 K. B. 1.

See, also, Nos. 5751, 5862, 5863, 5921, *ante.*

E. Other Cases.

5957. Right of indemnity.]—The trustee under a deed of assignment for the benefit of creditors incurred debts in carrying on the business, & goods belonging to the business were seized in execution under a judgment obtained against the trustee. Before the goods were sold by the sheriff the trustee became bkpt., & his trustee in bkpcy. claimed the goods :—*Held :* bkpt.'s right of indemnity against the trust property in respect of liabilities incurred by him as trustee passed to his trustee in bkpcy., & the trustee in bkpcy. was entitled to the goods as against the execution creditor.—JENNINGS *v.* MATHER, [1902] 1 K. B. 1 ; 70 L. J. K. B. 1032 ; 85 L. T. 396 ; 50 W. R. 52 ; 18 T. L. R. 6 ; 46 Sol. Jo. 27 ; 8 Mans. 329, C. A.

Annotation :—**Consd.** *Re* Jones, *Ex p.* Official Receiver (1910), 55 Sol. Jo. 30, D. C.

5958. —— Money recovered under.]—A lessee became trustee of leasehold premises for his wife by reason of the purchase by her of the beneficial interest therein, & the wife as such beneficial owner was liable to indemnify her husband against any claim by the landlord under the covenants in the lease. On the expiration of the lease the landlord obtained judgment against the lessee, for rent, & damages for breach of covenant, but before the amount of the lessee's liability was ascertained the lessee was adjudicated bkpt. The landlord obtained leave in the bkpcy. to commence an action in the joint names of the trustee & himself to recover the amount from the wife under the lessee's right of indemnity, but without prejudice to the question whether the money so recovered should be treated as assets in the bkpcy. or be retained by the landlord. The action was compromised by a payment by the wife :—*Held :* the trustee could only avail himself of the right of indemnity for the purpose of passing on the money to the principal creditor, & the landlord was entitled to retain the money on account of his debt.—*Re* RICHARDSON, *Ex p.* ST. THOMAS'S HOSPITAL (GOVERNORS), [1911] 2 K. B. 705 ; 80 L. J. K. B. 1232 ; 105 L. T. 226 ; 18 Mans. 327, C. A.

Annotations :—**Consd.** *Re* Beavan, Davies, Banks *v.* Beavan, [1913] 2 Ch. 595 ; *Re* Law Guarantee Trust & Accident Soc., Liverpool Mortgage Insce. Co.'s Case, [1913] 2 Ch. 604. **Mentd.** British Union & National Insce. *v.* Rawson, [1916] 2 Ch. 152.

5959. Policy of insurance.]—A policy of insurance effected by bkpt. upon his own life at an annual premium, passes to his assignees, however small the apparent value of it may be at the time of his bkpcy., & although there are considerable arrears of premium then due upon it, & if, instead of delivering it up as part of his effects, he secretly assigns it to another person, who pays the arrears of the premium, & upon the death of bkpt. receives the sum insured, this sum, deducting the amount of the arrears so paid, may be recovered by the assignees as money had & received to their use.—SCHONDLER *v.* WACE (1808), 1 Camp. 487, N. P.

Annotations :—**Refd.** West *v.* Reed (1843), 7 Jur. 147 ; Morgan *v.* Taylor (1859), 5 C. B. N. S. 653.

5960. —— Sum allowed by company ex gratiâ.]—A. effected an insurance on the life of B., & after

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PART XX. SECT. 4, SUB-SECT. 2.—E.

5957 i. *Right of indemnity.*]—The benefit of a covenent by a third person to indemnify the assignor against a mtge. made by him, does not pass to his assignee under an assignment for the general benefit of creditors, at all events not where there has been no breach of the covenant before the making of the assignment.—BALL *v.* TENNANT (1894), 21 A. R. 602.—**CAN.**

5957 ii. ——.]—Where a husband is nominally a partner with another person, but is in reality merely an agent for his wife in such partnership the husband is entitled to an indemnity from his wife against all partnership losses & debts, & the benefit of such indemnity passes on bkpcy. to the official assignee.—*Re* WILTSHIRE & SCOTT, *Ex p.* SCOTT (1904), 24 N. Z. L. R. 354.—**N.Z.**

5961 i. *Policy of insurance—Premiums not paid by bankrupt.*]—A policy of insurance was taken out by L. in the name of, & on the life of, J. L. paid the premium, & retained possession of the policy, & dealt with it as his own property, J. never making any claim thereto. J. afterwards was adjudicated a bkpt., & subsequently died :—*Held :* the policy money was payable to L., & not to J.'s assignees in bkpcy.—*Re* SLATTERY, [1917] 3 I. R. 633.—**IR.**

y. *Hotel licence.*]—Where a licensee of an hotel premises becomes bkpt. during the currency of the licence, the licence passes to the official assignee as "property of bkpt."—*Re* KEITH, *Ex p.* OFFICIAL ASSIGNEE ; JOSS (1896), 17 N. S. W. B. 1.—**AUS.**

a. *S.P. Re* COAK, *Ex p.* OFFICIAL ASSIGNEE, FLOOD RESPONDENT (1902), 2 S. R. N. S. W. 49.—**AUS.**

b. ——.]—A licence under the Liquor Licence Ordinance is not an asset available to creditors.—CLINTON *v.* SELLARS (1908), 7 W. L. R. 615 ; 1 Alta. L. R. 135.—**CAN.**

d. ——.]—Under a writ of *fi. fa.* against G., his interest in licensed premises were seized, & sold on Jan. 31, 1885, by the sheriff. No reference to the licence was made in the deed of assignment, which was dated Feb. 10, 1885, except that the premises were described as "licensed" & as occupied by G. as a licensed publican, & the deed did not purport to assign the licence. The licence was subsequently indorsed & delivered by G. to the purchaser. On Apr. 4, 1885, G. was adjudicated a bkpt. The purchaser obtained an

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an act of bkpcy. assigned the policy to C., who was aware of A.'s circumstances at the time. On the death of B. it was discovered that his life was not insurable. On a memorial presented by A. to the co., they ordered half the sum for which B.'s life was insurable to be paid as a gratuity, which C. received, & the policy was then cancelled, & remained in the hands of their officer. In an action of trover brought by the assignee of A. against C. to recover the value of the policy:—*Held:* he was only entitled to the parchment on which the policy was written, & not to the sum paid by the co. to C., as it was a mere gratuitous & voluntary payment.—WILLS *v.* WELLS (1818), 8 Taunt. 264; 2 Moore, C. P. 247; 129 E. R. 385.

Annotation:—**Mentd.** Bavins & Sims *v.* London & South Western Bank, [1900] 1 Q. B. 270, C. A.

5961. —— Premiums paid by bankrupt.]—A. having, in Oct. 1879, effected a policy of assurance on his own life, presented a petition in Dec. 1879 for the liquidation of his affairs by arrangement without disclosing the existence of the policy, upon which only one premium had been paid, & which had no surrender value. In Oct., 1880, the liquidation was closed. Subsequent premiums were paid by A., until his death in 1907. A.'s legal personal representative then claimed the policy money as against the official receiver, who represented the trustee in the liquidation proceedings:—*Held:* the trustee having been absolutely ignorant of the existence of the policy, & the payments for premiums in respect thereof having been made by debtor himself without the knowledge of the trustee, the official receiver was entitled to the policy money.—TAPSTER *v.* WARD (1909), 101 L. T. 503; 53 Sol. Jo. 503, C. A.

Annotations:—**Folld.** *Re* Phillips, [1914] 2 K. B. 689; *Re* Stokes, *Ex p.* Mellish, [1919] 2 K. B. 256; **Consd.** *Re* Thellusson, *Ex p.* Abdy, [1919] 2 K. B. 735, C. A.

5962. Marriage bond.]—Bond upon marriage to pay a sum of money to the husband, which upon certain contingencies, to be determined upon his death, was declared to be subject to the trusts of the settlement for his wife & children. Upon his bkpcy. payment was decreed to the assignees.—STUDDY *v.* TINGCOMBE (1800), 5 Ves. 695; 31 E. R. 810.

See, also, Part VII., Sect. 1, *ante.*

5963. Lien—On ship for unpaid instalment.]—A., a shipbuilder, contracted with B. to build a ship for him, & to complete her in Apr., 1819. The latter was to pay for her by four instalments, the first when the keel was laid, the second when at the light plank, & the third & fourth when the ship was launched. Before June 25, 1819, the ship was measured with the builder's privity, to the intent that B. might get her registered in his name. On June 25 the shipbuilder signed the usual certificate of her building, on the 26th the ship was registered in B.'s name, & on the same day the third instalment was paid. On June 30 A. committed an act of bkpcy., upon which a commission afterwards issued. On July 2, the ship not being then completed, or launched, deft., & a crew hired by him, took possession of her, & a rudder & cordage, the former of which was made by the shipbuilder, & the latter bought by him, for the express purpose of completing the ship:—*Held:* although the general property in the ship was vested in B., yet as A. had not parted with the possession, &, as he would have had a lien upon the ship for the amount of the fourth instalment, if he had completed it, the taking possession of the ship by B. without tendering the amount of the fourth instalment, or so much thereof as was due, provided anything was due, was wrongful & the assignees of A. were entitled to recover from B. the amount of the fourth instalment, provided the expense necessary for the completion of the ship did not amount to that sum, or so much thereof as would remain due after defraying such expense.—WOODS *v.* RUSSELL (1822), 5 B. & Ald. 942; 1 Dow. & Ry. K. B. 587; 106 E. R. 1436.

Annotations:—**Consd.** Bishop *v.* Crawshay (1824), 3 B. & C. 415. **Apld.** Carruthers *v.* Payne (1828), 2 Moo. & P. 429. **Consd.** Clarke *v.* Spence (1836), 4 Ad. & El. 448; Laidler *v.* Burlinson (1837), 2 M. & W. 602; Holderness *v.* Rankin (1860), 28 Beav. 180. **Mentd.** Atkinson *v.* Bell (1828), 8 B. & C. 227; Beale *v.* Mouls (1847), 10 Q. B. 976; Acraman *v.* Morrice (1849), 14 L. T. O. S. 292; Wood *v.* Bell (1856), 6 E. & B. 355, Ex. Ch.; Turley *v.* Bates (1863), 2 H. & C. 200; Anglo-Egyptian Navigation Co. *v.* Rennie (1875), L. R. 10 C. P. 271; *Re* Lindsay, *Ex p.* Lambton (1875), 10 Ch. App. 405, L. JJ.; Banbury & Cheltenham Direct Ry. Co. *v.* Daniel (1884), 54 L. J. Ch. 265; Clarke *v.* Millwall Dock Co. (1885), 53 L. T. 316; Seath *v.* Moore (1886), 11 App. Cas. 350, H. L.

5964. Money bond.]—A money bond, assigned by the obligee to creditors to secure a debt of larger amount, does not pass to assignees under a fiat against him, although the assignment is expressed to be "for further security" & contains a proviso to defeat it on payment of the debt.—DANGERFIELD *v.* THOMAS (1838), 9 Ad. & El. 292; 1 Per. & Dav. 287; 1 Will. Woll. & H. 693; 112 E. R. 1223.

Annotations:—**Refd.** Milnes *v.* Robertson (1854), 3 C. L. R. 232. **Mentd.** Bain *v.* Cooper (1841), 8 M. & W. 751; D'Arnay *v.* Chesneau (1845), 13 M. & W. 796; The Wasp (1867), L. R. 1 A. & E. 367.

5965. Damages.]—What debtor, against whom a receiving order has been made, recovers as pltf. in an action is his property both legally & equitably, although he must, when he recovers it, hand it over to the official receiver for the benefit of his creditors, if he does not pay or compound with them.

Notwithstanding a receiving order debtor is the only person who can sue for the recovery of what belongs to him (LINDLEY, L.J.).—RHODES *v.* DAWSON (1886), 16 Q. B. D. 548; 55 L. J. Q. B. 134; 34 W. R. 240; 2 T. L. R. 255, C. A.

Annotations:—**Folld.** Cook *v.* Whellock (1890), 24 Q. B. D. 658, C. A.; *Re* Smith, *Ex p.* Mason, [1893] 1 Q. B. 323; *Re* Berry, Duffield *v.* Williams, [1896] 1 Ch. 939; Blackett *v.* Blackett & Frail, [1902] P. 170, C. A. **Refd.** *Re* Sartoris's Estate, Sartoris *v.* Sartoris, [1892] 1 Ch. 11, C. A.; Paterson *v.* Gas Light & Coke Co. (1896), 74 L. T. 280; *Re* Teale, *Ex p.* Blackburn (1912), 106 L. T. 893.

ad interim transfer of the licence on Apr. 14, & an absolute transfer at the Oct. Sessions:—*Held:* the licence formed part of the estate & effects of G. in the bkpcy. matter.—*Re* GILMER (1885), 17 L. R. Ir. 1.—**IR.**

f. ——.]—The tenant of an hotel became bkpt., & after his sequestration obtained, with the concurrence of the trustee, a new certificate or licence. The trustee then sold the goodwill of the business:—*Held:* the licence was an accessory of the goodwill, & the trustee was entitled to delivery of it for behoof of the creditors.—SELKIRK (COUPLAND'S TRUSTEE) *v.* COUPLAND (1886), 23 Sc. L. R. 456.—**SCOT.**

g. Debt.]—Deft. made an assignment to H. for the benefit of creditors, including a debt due by C. & Co. At the time of the service of a summons under 5th R. S., c. 104, Ord. 46, r. 16, H. had no money of deft.'s in his hands, but two days afterwards C. & Co. paid the amount due by them. All deft.'s creditors, who had executed the assignment had previously been paid in full:—*Held:* the debt due by C. & Co. to deft. was in H.'s hands covered by the words "goods & credits of the absent or absconding person then in his possession or under his control."—ROBERTSON *v.* WILLIAMS (1885), 6 R. & G. 393.—**CAN.**

5965 i. *Damages.*]—B., an uncertificated bkpt. in New South Wales came to Queensland, & there entered into a contract with V. An action was brought on the contract, & B. recovered £1,692 19*s.* 1*d.*, which was paid into ct. to the credit of the action. The official assignee of his estate, under the New South Wales bkpcy., having commenced an action against B. to obtain the money:—*Held:* a stop order should be granted.—LLOYD *v.* BARBAT, [1903] S. R. Q. 86.—**AUS.**

5966. —— Paid to sheriff—& remaining in his hands.]—Damages & costs paid to the sheriff upon a *ca. sa.*, & continuing in the sheriff's hands, are not assignable by the comrs., on pltf. becoming bkpt. before the return of the writ.—BENSON *v.* FLOWER (1629), Cro. Car. 166, 176; W. Jo. 215; 79 E. R. 745, 754.

Annotation:—**Consd.** Beckham *v* Drake (1849), 2 H. L. Cas. 579, H. L.

5967. —— In action of tort.]—The assignees of bkpt. are not entitled to the damages recovered by bkpt. in an action of tort for personal injuries brought by him after adjudication.—*Re* JOB, *Ex p.* GRAHAM (1870), 21 L. T. 802.

5968. —— ——.]—Damages in an action for a personal tort recovered by an undischarged bkpt. do not pass to his trustee. Though, if bkpt. had accumulated the money & invested it in property, the trustee might be entitled to the property, yet he cannot intercept the damages or prevent bkpt. from expending them in the maintenance of himself & his family.—*Re* WILSON, *Ex p.* VINE (1878), 8 Ch. D. 364; 47 L. J. Bcy. 116; 38 L. T. 730; 26 W. R. 582, C. A.

Annotations:—**Consd.** Rose *v.* Buckett (1901), 70 L. J. K. B. 736, C. A. **Refd.** Affleck *v.* Hammond, [1912] 3 K. B. 162, C. A.; Wilson *v.* United Counties Bank (1919), 88 L. J. K. B. 1033, H. L.

What causes of action pass to trustee.]—*See*, Part XXI., Sect. 1, *post*.

5969. Costs.]—Costs due to a trustee who has become bkpt., whether incurred before or after bkpcy., are payable to the trustee in bkpcy., unless the solr. of the trustee obtains a charging order in his favour. If costs are payable out of a fund in ct., the taxing-master by his certificate will not make them payable to the trustee's solr., but to the trustee in bkpcy., unless the solr. obtains a charging order. They are not the solr.'s costs at all, but the trustee's costs & being an asset coming to him after bkpcy., must be paid to his trustee in bkpcy.—BAKER *v.* ABBOTT (1897), 41 Sol. Jo. 455.

5970. Interest—On overdue bank balance.]—If the balance of a banking account remain overdue after the bkpcy. of the banker, his assignees are entitled to recover interest on such balance, as well for the period which has elasped since the bkpcy., as for that which has elapsed before it.—POTT *v.* BEAVAN (1844), 7 Man. & G. 604; 8 Scott, N. R. 318; 13 L. J. C. P. 187; 3 L. T. O. S. 181; 8 Jur. 560; 135 E. R. 243.

5971. Proceeds of forfeited bond.]—The proceeds of a forfeited bond, given by debtor & a surety to obtain debtor's release from prison for failing to attend his examination, are to be paid to the senior registrar in bkpcy. who, as a general rule, will apply them for the benefit of bkpt.'s estate, subject to any order by the ct. in a special case. The bond should be given to the senior registrar in bkpcy. Form of bond agreed between the Treasury & the Board of Trade.—*Re* GORDON, *Re* SALMOND, [1903] 2 K. B. 164; 72 L. J. K. B. 587; 89 L. T. 25; 10 Mans. 253.

5972. Right to administer wife's estate.]—The right of a husband to administer to his wife's estate is not property which passes to the husband's trustee.—*In the goods of* TURNER (1886), 12 P. D. 18; 56 L. J. P. 41; 57 L. T. 372; 35 W. R. 384.

Annotations:—**Mentd.** *In the goods of* Conolly (1896), 74 L. T. 461; *In the goods of* Morgan (1896), 75 L. T. 190.

See, also, No. 1653, *ante*.

5973. Right of lessee to relief from forfeiture of lease.]—The right of a lessee to be relieved from the forfeiture of a lease is a chose in action, which vests in his trustee, & the trustee is entitled to sell such right & to assign it to a purchaser.—HOWARD *v.* FANSHAWE, [1895] 2 Ch. 581; 64 L. J. Ch. 666; 73 L. T. 77; 43 W. R. 645; 39 Sol. Jo. 623; 13 R. 663.

Annotations:—**Folld.** Humphreys *v.* Morten, [1905] 1 Ch. 739. **Refd.** Durell *v.* Gread (1914), 84 L. J. K. B. 130.

SUB-SECT. 3.—PROPERTY OF BANKRUPT'S WIFE.

See, now, Married Women's Property Acts, 1882 (c. 75), 1907 (c. 18), & 1914 Act, s. 36.

A. Real Property.

5974. Devise to married woman for life with remainder over—Life interest not liable in bankruptcy of husband.]—Devise of £800 to be invested in land for the benefit of the wife of S. for her life, & afterwards to her children, & the interest of the money to go as the profits of the lands, if bought. On S. becoming a bkpt.:—*Held:* the interest of the £800 was not liable to the bkpcy., this not being a trust created by bkpt., & being intended for the maintenance of the wife, & given by her relation.—VANDENANKER *v.* DESBROUGH (1689), 2 Vern. 96; 23 E. R. 671.

Annotation:—**Consd.** Wright *v.* Morley (1805), 11 Ves. 12.

5975. Devise to married woman for her separate use—No trustee appointed—Devised property not assets on bankruptcy of husband.]—One devises lands in fee to his daughter being a *feme covert* for her separate use, without appointing any trustees; the husband is a tradesman & becomes a bkpt., yet the devised premises not subject to the bkpcy.—BENNET *v.* DAVIS (1725), 2 P. Wms. 316; 24 E. R. 746.

Annotations:—**Mentd.** Lee *v.* Prieaux (1791), 3 Bro. C. C. 381; Morgan *v.* Morgan (1820) 5 Madd. 408; Thornton *v.* Bright (1836), 2 My. & Cr. 230, L. C.; Tullett *v.* Armstrong (1839), 4 My. & Cr. 390, L. C.; Hope *v.* Hope (1892), 40 W. R. 522.

5976. Devise to trustee for absolute use of married woman—Jurisdiction of court to order trustee to convey to assignees of husband.]—The ct. has not power to order a trustee, who refuses to submit to the jurisdiction, to convey an estate to the assignees, which was devised to the trustee for

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5967 i. —— *In libel action.*]—Insolvent recovered damages in an action for libel, & the damages were levied. The interim assignee applied for an order for payment of the damages into ct. for behoof of the creditors:—*Held:* the ct. had jurisdiction to make such order.—DOWLING *v.* BROWNE (1854), 4 I. C. L. R. 265; 7 Ir. Jur. 5. —**IR.**

h. *Share of stock—Partly paid up.*]—Deft., director of a co., subscribed for stock to the extent of $1,000, on which he paid $400. Subsequently deft. made an assignment under Insolvent Act, 1869:—*Held:* the property in the stock had not passed to the official assignee.—DENISON *v.* SMITH (1878), 43 U. C. R. 503.—**CAN.**

PART XX. SECT. 4, SUB-SECT. 3.—A.

j. *Land purchased by wife—out of money presents from relatives & savings from housekeeping allowance.*]—A married woman, having no separate estate, received sums of money as presents from her relatives, was allowed by her husband weekly money for house expenses, out of which she saved something, & also saved money out of payments to her from her husband's workmen, as boarders. Money, the proceeds of such presents & savings, & as between husband & wife called hers was laid out in land, which was mortgaged to a building society, the equity of redemption being reserved to the wife:—*Held:* the property was not protected from her husband's creditors.—SMITH *v.* SMITH (1877), 3 V. L. R. 2.—**AUS.**

k. —— *Out of her own money.*]—Property was purchased by Mrs. P. in her own name out of money at her own credit in a bank & by a mtge. on her property & out of sums drawn out of the husband's business by himself & his wife in repayment of capital put by her into the business. Pltf., P.'s assignee, sought to show that the purchase was a fraud on P.'s creditors:—*Held:* pltf.'s claim to the property failed.—ATTWOOD *v.* PETT (1907), 9 O. W. R. 173, 748.—**CAN.**

Sect. 4.—"The property of the bankrupt": Sub-sect. 3, A., B. & C.]

the absolute use of bkpt.'s wife.—*Re* SYKES, *Ex p.* ABBOTT (1835), 1 Deac. 338.

5977. Right of entry—Vested in husband & wife—In right of wife.]—A right of entry vested in husband & wife in right of the wife passes to the assignees of the husband, if he become bkpt.—MICHELL *v.* HUGHES (LADY) (1830), 6 Bing. 689; 130 E. R. 1446; *sub nom.* MITCHELL *v.* HUGHES (LADY), 4 Moo. & P. 577; 8 L. J. O. S. C. P. 249.

Annotations:—**Consd.** Wright *v.* Fairfield (1831), 2 B. & Ad. 727. **Expld.** Sherrington *v.* Yates (1844), 1 Dow. & L. 1032, Ex. Ch. **Refd.** Richbell *v.* Alexander (1861), 10 C. B. N. S. 324.

5978. Custody of title deeds of real estate of which wife tenant for life.]—The trustee in bkpcy. of a husband, whose wife is legal tenant for life of land (not to her separate use) has no absolute right to the custody of the title deeds of the land during the coverture, but the ct. has a discretion as to the custody.

In a case in which there was evidence that a bkpt.'s wife was about to apply to the Divorce Ct. for the dissolution of the marriage:—*Held:* the title deeds of land, of which she was legal tenant for life, ought not to be delivered to the trustee in the bkpcy., but ought to be retained in ct.—*Re* PYATT, *Ex p.* ROGERS (1884), 26 Ch. D. 31; 53 L. J. Ch. 936; 51 L. T. 177; 32 W. R. 737, C. A.

B. Personal Property.

See, generally, HUSBAND & WIFE.

5979. Jewels & chattels given to wife—After marriage.]—S. by will gave to his daughter A. then wife of B. his gold watch, jewels, china, & household goods to be at her disposal & to do therewith as she should think fit. B. became bkpt.:—*Held:* a devise to the separate use of the wife & not assignable by the comrs. of bkpt.—KIRK *v.* PAULIN (1733), 2 Eq. Cas. Abr. 115; 7 Vin. Abr. 95; 22 E. R. 98.

5980. —— Before marriage.]—Where a husband's personal estate is not sufficient to pay his debts, a wife cannot set up any claim to jewels, rings, pictures, dressing plate & other trinkets given her before her marriage.—RIDOUT *v.* PLYMOUTH (EARL) (1740), 2 Atk. 104; 26 E. R. 465, L. C.

Annotations:—**Refd.** Williams *v.* Mercier (1882), 51 L. J. Q. B. 594. **Mentd.** Masson, Templier *v.* De Fries (1909), 101 L. T. 476 C. A.

5981. —— Wedding presents.]—By an antenuptial settlement, by which £1,000 a year was settled upon the wife for her separate use, it was agreed that any leasehold property or other personal estate coming to her or to her husband in her right during the coverture should be vested in the trustees, except plate, trinkets, furniture, & jewels, which should be considered as property settled to the separate use of the wife, & over which she should have an absolute power of disposition. On the bkpcy. of the husband his trustee claimed the presents made to her before & on occasion of her marriage:—*Held:* the presents were the separate property of the wife, who was entitled to retain same as against the husband's trustee in bkpcy.—*Re* JAMIESON, *Ex p.* PANNELL (1889), 60 L. T. 159; 37 W. R. 464; 6 Morr. 24.

5982. Property of wife trading apart from husband.]—Goods of a married woman carrying on a separate trade in London were seized by the assignees of her husband. Her assignees sued the husband's assignees in trover:—*Held:* they were entitled to recover.—LA VIE *v.* PHILIPS (1765), 1 Wm. Bl. 570; 3 Burr. 1776; 96 E. R. 329.

Annotation:—**Refd.** Beard *v.* Webb (1800), 2 Bos. & P. 93, Ex. Ch.

5983. —— Settled on wife before marriage—Goods subsequently purchased by wife out of profits.]—By settlement before marriage, thirty-two cows & the increase & produce arising therefrom, the property of a woman, were assigned to trustees for her separate use, the husband covenanting to permit her to carry on the trade of a cowkeeper for her sole use. After the marriage, the wife, with the profits of her trade, purchased four more cows:—*Held:* the settlement was good against the creditors of the husband, & the cows purchased after the marriage were also protected by it.—HASLINGTON *v.* GILL (1784), 3 Doug. K. B. 415; 99 E. R. 725; *sub nom.* HASELINTON *v.* GILL, 3 Term Rep. 620, n.

Annotations:—**Consd.** Bird *v.* Peagrum (1853), 13 C. B. 639. **Refd.** Duncan *v.* Cashin (1875), L. R. 10 C. P. 554; Norman *v.* Villars (1877), 36 L. T. 663. **Mentd.** Phillips *v.* Barnett (1876), 24 W. R. 345.

5984. —— —— Separate trading a question of fact.]—A woman may before marriage, with the consent of her intended husband, convey all her stock-in-trade & furniture to trustees, to enable her to carry on her business separately, & if the husband do not intermeddle with them, & there be no fraud, such effects, though fluctuating, are not liable to his debts. But whether the trade be carried on solely by the wife, or jointly with the husband, is a question of fact for the jury; & if they determine the latter, the stock-in-trade is liable to the debts of the husband. But even in such a case the furniture is not, though removed to the husband's house. It is no objection to such a settlement that there is no inventory of the goods intended to be thus settled.—JARMAN *v.* WOOLLOTON (1790), 3 Term Rep. 618; 100 E. R. 765.

Annotations:—**Consd.** Bird *v.* Peagrum (1853), 13 C. B. 639; Duncan *v.* Cashin (1875), L. R. 10 C. P. 554. **Refd.** Shaftesbury *v.* Russell (1823), 1 B. & C. 666; *Re* Massey, *Ex p.* Massey (1835), 2 Mont. & A. 173; Norman *v.* Villars (1877), 36 L. T. 663. **Mentd.** Gordon *v.* East India Co. (1797), 7 Term Rep. 228; Lingham *v.* Biggs (1797), 1 Bos. & P. 82; Phillips *v.* Barnett (1876), 24 W. R. 345.

5985. Personalty subject to life interest—Death of tenant for life & wife after discharge.]—A man, whose wife was entitled to personalty, subject to a life interest in A., became bkpt., & afterwards obtained his certificate, then A. died, & afterwards the wife, & the husband took out administration to her:—*Held:* his assignees were entitled to the property.—RIPLEY *v.* WOODS (1828), 2 Sim. 165; 57 E. R. 751.

Annotations:—**Consd.** Johnson *v.* Smiley (1853), 17 Beav. 223. **Refd.** *Re* Tyler's Trusts (1856), 2 Jur. N. S. 927. **Mentd.** Walker *v.* Jefferys (1842), 11 L. J. Ch. 209; Hughes *v.* Young (1862), 32 L. J. Ch. 137.

5986. Furniture part of wife's separate estate.]—Furniture, the separate property of the wife, does

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PART XX. SECT. 4, SUB-SECT. 3.—B.

5982 i. *Property of wife trading apart from husband.*]—35 Vict. c. 16 (O), s. 2, exempting from the husband's debts all proceeds or profits of any occupation or trade carried on by the wife separately from the husband, applies to all married women, whether married before or after the passing of the Act, but does not apply to any occupation or trade, in which the husband is held out to the world as the person conducting it, or which she cannot carry on without his active co-operation or agency. The husband need not be physically absent in order to make it her separate trade or occupation, but she cannot be properly held to carry it on separately from him, so long as he does all that is essential to its success.—HARRISON *v.* DOUGLAS (1877), 40 U. C. R. 410.—CAN.

5986 i. *Goods part of wife's separate estate.*]—Where two spouses, not domiciled in the Cape Colony, have married in another country without community of goods, the wife is entitled, upon the insolvency of her husband in the Cape Colony, to claim goods, which can clearly be proved to be her separate

not pass to the assignees under a fiat against the husband.—*Re* BLOXHAM, *Ex p.* ELLISTON (1835), 2 Mont. & A. 365 ; 5 L. J. Bcy. 3, Ct. of R.

5987. ——.]—By an ante-nuptial settlement it was agreed that all personal estate to which the wife might become entitled by gift, settlement, succession, transmission, or otherwise should be settled, except furniture, which should be considered as settled to her separate use. After marriage the wife sometimes with, & at others without her husband, ordered furniture to be sent to their house &, on her husband failing to pay for same, paid into the bank, out of her separate allowance, a sum sufficient to recoup the bank paying for the furniture. On the husband becoming bkpt. his trustee claimed the furniture which had been bought by the wife :—*Held :* the furniture was the separate property of the wife, who was entitled to retain it as against the husband's trustee in bkpcy. —*Re* JAMIESON, *Ex p.* PANNELL (1889), 60 L. T. 159 ; 37 W. R. 464 ; 6 Morr. 24.

5988. Part of wife's estate settled—Balance held for her absolutely.]—By a marriage settlement a part of the wife's personal estate was settled in the usual way, & as to the balance it was declared that same should not be subject to the trusts of the settlement, but should be held only for the wife, her exors., administrators & assigns :—*Held :* as against the husband's creditors the fund was not settled.—SPIRETT *v.* WILLOWS (1864), 5 Giff. 49 ; 10 L. T. 450 ; 12 W. R. 734 ; 66 E. R. 918 ; *affd.* (1865), 3 De G. J. & Sm. 293, L. C.

Annotations :—**Consd.** Freeman *v.* Pope (1870), 5 Ch. App. 538, L. C. & L. J. **Refd.** Smith *v.* Cherrill (1867), L. R. 4 Eq. 390 ; Denison *v.* Tattersall (1868), 18 L. T. 303 ; *Re* Lane-Fox, *Ex p.* Gimblett, [1900] 2 Q. B. 508 ; Glegg *v.* Bromley & Glegg (1911), 81 L. J. K. B. 334. **Mentd.** *Re* Bamford, *Ex p.* Games (1879), 12 Ch. D. 314, C. A. ; *Re* Johnson, Golden *v.* Gillam (1881), 20 Ch. D. 389.

5989. Money obtained by mortgage of wife's separate estate—Paid into husband's banking account—Gift to husband.]—Money raised by the wife by mtge. of her separate estate, & paid into the bank to the credit of her husband, who drew cheques upon it for various purposes as occasion required, is equivalent to a gift to him from the wife, & passes to the trustee.—*Re* GRAINGER, *Ex p.* GRAINGER (1871), 24 L. T. 334.

5990. Money part of wife's separate estate—Effect of agreement at marriage.]—On a marriage it was verbally agreed between the husband & the wife that a sum of money, standing to the credit of the wife on deposit at a bank in her maiden name, should be her separate property. Nothing further was done, but after the marriage the money, with the husband's consent, remained at the bank in the wife's maiden name, & she received the interest on it for two years after the marriage when she drew the money out of the bank. The trustee in the subsequent liquidation of the husband having claimed payment of the money from the wife as part of her husband's property :—*Held :* there had been a gift of the money by the husband to the wife after the marriage, & he had become a trustee of it for her as her separate property, & it did not pass to his trustee.—*Re* WHITEHEAD, *Ex p.* WHITEHEAD (1885), 14 Q. B. D. 419 ; 52 L. T. 597 ; 49 J. P. 405 ; *sub nom. Re* WHITEHEAD, *Ex p.* ROUTH, 54 L. J. Q. B. 240 ; 33 W. R. 471, C. A.

5991. Separate property acquired under marriage contract entered into in foreign country.]—The rule that a husband is a trustee for his wife of her separate property, when no other trustee has been appointed, applies to that which becomes her separate property by virtue of a marriage contract entered into in a foreign country, & when such property is in the possession of a husband at the commencement of his bkpcy. it does not pass to his trustee.—*Re* SIBETH, *Ex p.* SIBETH (1885), 14 Q. B. D. 417 ; 54 L. J. Q. B. 322 ; 33 W. R. 556, C. A.

C. Choses in Action.

5992. Debts—Due to wife before marriage.]—Debts due to the wife, *dum sola*, though unrecovered, are assignable by the comrs. on the husband's bkpcy.—MILES *v.* WILLIAMS (1714), 1 P. Wms. 249 ; 10 Mod. Rep. 243 ; 24 E. R. 375 ; *sub nom.* MYLES *v.* WILLIAMS, Gilb. 318.

Annotations :—**Folld.** Bosvil *v.* Brander (1718), 1 P. Wms. 458. **Apld.** Gayner *v.* Wilkinson (1773), Dick. 491. **Consd.** Mitford *v.* Mitford (1803), 9 Ves. 87. **Apld.** Michell *v.* Hughes (1830), 6 Bing. 689. **Consd.** Sherrington *v.* Yates (1844), 12 M. & W. 855, Ex. Ch. **Refd.** Ineson *v.* Moulston, Vobe's Case (1742), 9 Mod. Rep. 373 ; Yates *v.* Sherrington (1843), 11 M. & W. 42. **Mentd.** Stafford *v.* Buckley (1750), 2 Ves. Sen. 170 ; *Ex p.* Coysegame (1753), 1 Atk. 192 ; Sparkes *v.* Bell (1828), 6 L. J. O. S. K. B. 206 ; Sheen *v.* Garrett (1830), 6 Bing. 606 ; Lockwood *v.* Salter (1833), 5 B. & Ad. 303 ; *Re* Butler (1863), 1 New Rep. 538 ; Chubb *v.* Stretch (1870), L. R. 9 Eq. 555.

5993. —— —— **As executrix.**]—A bond debt due to a wife, in the character of extrix. of her former husband, cannot be assigned under a commission of bkpcy. against her second husband.—LUDLOW *v.* BROWNING (1707), 11 Mod. Rep. 138 ; 88 E. R. 950.

5994. —— —— **Mortgage debt—What necessary to protect.**]—If a *feme sole* mtgee. in fee marries, & the husband becomes bkpt. & dies, the assignees of bkpt., & not the wife, are entitled to the mtge. ; *secus* if by articles before marriage it was agreed that this should continue to the wife.

If there had been any articles before the marriage, purporting that this mtge. money should continue in the wife as her provision, or should be assigned in trust for her, they would have been a specific

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property, although no instrument in the nature of an ante-nuptial contract has been registered there.—BERNSTEIN *v.* BERNSTEIN'S TRUSTEE (1897), 14 S. C. 161.—**S. AF.**

o. *Savings out of housekeeping allowance.*]—Savings by a wife out of her housekeeping allowance, without the knowledge or consent of her husband, are the property of the husband.—*Re* HERMAN, *Ex p.* OFFICIAL ASSIGNEE (1916), 16 S. R. N. S. W. 264.—**AUS.**

p. ——.]—L. & his wife were married out of community of property in Sept., 1911. L. gave his wife £25 to £30 per month with which to defray household expenses, & for a period of twelve months the wife kept a boarder in her husband's house who paid her £5 10s. per month. In July, 1913, the wife retained an unspent balance of such money of £110. In Oct., 1913, L.'s estate was sequestrated. In an action brought by the trustee in L.'s insolvent estate against the wife for the recovery of the £110 :—*Held :* in the absence of any evidence to enable the ct. to judge whether the amount saved by the wife was, having regard to L.'s income & occupation, a moderate amount, the £110 remained part of L.'s estate.—LINDE *v.* COHEN (1914), T. P. D. 369.—**S. AF.**

See, generally, HUSBAND & WIFE.

PART XX. SECT. 4, SUB-SECT. 3.—C

r. *Accommodation acceptance—Handed to debtor's wife—Valueless at date of sequestration.*]—In Mar., 1885, P. gave his four accommodation acceptances for £500 each to M. Three were torn up & the fourth returned in May. P. gave the fourth to M.'s wife, saying "This is your property." Mrs. M. handed the acceptance back. P., according to M.'s evidence, said, "Keep it for yourself & children : you do not know when you may require it." Mrs. M.'s evidence was, "I was to make use of it for the benefit of myself & for my children." In June M. voluntarily sequestrated his estate & neither scheduled the acceptance nor handed it to his official assignee. On July 4 the acceptance fell due & there was no demand of payment. On July 15 P. died having appointed deft. as his extrix. & leaving the bill unpaid, in the hands of M's wife :—*Held :* the acceptance was simply a chose in action in the wife of M., which might or might not become valuable to M. as P. might or might not be willing to pay it, & being valueless at the time of the sequestration of M.'s estate it did not pass to his official assignee.—CLOUGH *v.* GRAY (1862), 1 W. & W. 225.—**AUS.**

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lien upon the mtge. & have preserved it from the bkpcy. (JEKYLL, M.R.).—BOSVIL *v.* BRANDER (1718), 1 P. Wms. 458; 24 E. R. 470.

Annotations:—**Consd.** Mitford *v.* Mitford (1803), 9 Ves. 87. **Refd.** Ineson *v.* Moulston, Vobe's Case (1742), 9 Mod. Rep. 373; Gayner *v.* Wilkinson (1773), Dick. 491; Pierce *v.* Thornely (1828), 2 Sim. 167; Sturgis *v.* Champneys (1839), 5 My. & Cr. 97, L. C. **Mentd.** Like *v.* Beresford (1797), 3 Ves. 506; *Re* Brown, *Ex p.* Turpin (1832), 1 Deac. & Ch. 120, Ct. of R.; Barnes *v.* Robinson (1862), 7 L. T. 617.

5995. —— —— Settled by marriage settlement—Action by husband & wife.]—*Assumpsit* by husband & wife for money lent to deft. by the wife whilst she was sole & unmarried. Plea, that B., the husband, became bkpt., & that his assignees were duly appointed, & accepted the appointment before the commencement of the suit, by reason whereof the assignees became entitled to the supposed debts & causes of action in the declaration mentioned. Replication, that before the intermarriage of pltfs., & whilst C., the wife, was sole & unmarried, to wit, on etc., by an indenture then made between B. of the first part, C. of the second part, & H. & J. of the third part (being a settlement entered into before the intermarriage of pltfs.), the sums of money in the declaration mentioned were assigned to H. & J., to have, receive, & recover, & to hold same to them, upon certain trusts in the indenture mentioned, in favour of C., & for her sole & separate use during her life, & for the children of the intended marriage. The replication then stated, that pltfs. appointed H. & J. as their attorneys to recover the sums from deft., for the purpose of holding same upon the trusts aforesaid, & that the action was commenced & prosecuted in the names of pltfs. at the instance & by direction of H. & J., by virtue of the power given to them, & for the purpose of recovering, receiving, & holding the sums of money as the trustees named in the indenture, & upon the trusts in favour of C., & of the children of the marriage & not for the use or benefit of pltf. B., or of his creditors under the fiat:—*Held:* the replication was good, & the debt did not pass to the assignees under the bkpcy. of the husband, but might be sued for by the husband & wife.—PARNHAM *v.* HURST (1841), 8 M. & W. 743; 10 L. J. Ex. 435; 151 E. R. 1239.

Annotations:—**Mentd.** D'Arnay *v.* Chesneau (1845), 13 M. & W. 796; Smith *v.* Keating (1848), 6 C. B. 136, Ex. Ch.; St. Thomas' Hospital Governors *v.* Richardson (1909), 79 L. J. K. B. 488, C. A.

5996. Legacies—Share devolving on married woman on intestacy of father—Settled by husband to her separate use.]—A husband in poor circumstances, & his wife being wholly unprovided for, settled her orphanage part acquired after marriage in trust, for her sole & separate use:—*Held:* his creditors prior to the assignment could not set it aside, or have the interest of the money during his life, for it was a reasonable settlement, & such as the ct. would have obliged the husband to make, if he had sued for her orphanage part.—HINTON *v.* SCOTT (1730), Mos. 336; 25 E. R. 426.

5997. —— Legacy to wife when unmarried—Legacy vested before marriage.]—The husband of a woman who had a vested interest in possession in a legacy at the date of the marriage became bkpt.; his assignee filed a bill against testator's exors. to compel payment of the legacy, & soon afterwards the husband died:—*Held:* the widow, & not the assignee, was entitled to the legacy.—PIERCE *v.* THORNELY (1828), 2 Sim. 167; 57 E. R. 752.

Annotations:—**Refd.** Drew *v.* Long (1853), 22 L. J. Ch. 717. **Mentd.** Sherrington *v.* Yates (1844), 12 M. & W. 855. Ex. Ch.; Richbell *v.* Alexander (1861), 30 L. J. C. P. 268.

5998. —— —— No intention to exclude marital control in will.]—A testatrix gave the interest of her residuary property to her two granddaughters who were both unmarried at the date of the will; & she directed that the interest should be for & under their sole control, the principal to be equally divided for the use of their surviving issue, & that M., their mother, should have no control whatever over it. One of the granddaughters, E., married after the death of testatrix, & her husband became insolvent:—*Held:* as the words of the will did not indicate an intention to exclude the marital control, the legacy to E. passed to her insolvent husband's assignee. *Semble:* if the words had indicated an intention to give the interest of the property to the separate use of the granddaughters, the legacy would still have passed to the assignee of the insolvent husband.—MASSEY *v.* PARKER (1834), 2 My. & K. 174; 4 L. J. Ch. 47; 39 E. R. 910.

Annotations:—**Refd.** Bradley *v.* Hughes (1836), 8 Sim. 149; Davies *v.* Thornycroft (1836), 6 Sim. 420. **Mentd.** Malcolm *v.* O'Callaghan (1835), 5 L. J. Ch. 137; Johnson *v.* Johnson (1837), 1 Keen, 648; Nedby *v.* Nedby (1839), 4 My. & Cr. 367, L. C.; Tullett *v.* Armstrong (1839), 4 My. & Cr. 390, L. C.; Blacklow *v.* Laws (1842), 2 Hare, 40; *Re* Tarsey's Trust (1866), L. R. 1 Eq. 561; Bland *v.* Dawes (1881), 17 Ch. D. 794.

5999. —— —— For her own sole use & benefit.]—A testator devised two freehold houses to his daughter her heirs & assigns, with all the furniture in one of the houses "for her own sole use & benefit":—*Held:* these words applied to the furniture, as well as to the house, & the daughter having after testator's death, married K. who afterwards became a bkpt., she was entitled as against the assignees to the whole of the furniture for her separate use, no case of order & disposition arising.—*Re* KILLICK, *Ex p.* KILLICK (1844), 3 Mont. D. & De G. 480; 13 L. J. Bcy. 6; 8 Jur. 67.

Annotation:—**Consd.** Massy *v.* Rowen (1869), L. R. 4 H. L. 288.

5996 i. *Legacies—Share devolving on married woman on intestacy of father—Assignment to husband's creditor.*]—J. died possessed of a fund, which he devised to trustees upon certain trusts. The devises having failed, a rule was passed in the Equity Ct., by which it was ordered that a portion of the fund should be paid by the trustees in certain proportions among the next of kin. M. being entitled as one of the next of kin, with W., her husband, executed a power of attorney to S., empowering him to receive the money coming to her by virtue of the will, & S. received $1,927, which, on the same day, was attached in his hands by E. on process issued against W., who had been adjudicated a bkpt. in England, M. having claimed the fund in his own right, by a suit in Equity:—*Held:* the creditors' assignee was not entitled to the fund without making provision for the wife, & the latter, being entitled to the fund as a chose in action was justified in coming into equity for her protection.—ROPER *v.* SHANNON (1871), 8 N. S. R. 146. —**CAN.**

t. —— *Legacy to wife & children—Use thereof in business by bankrupt—Acquiescence of wife.*]—Testator bequeathed to his daughter, M. £2,000, "for herself & her children, issue of her marriage, now or hereafter living, to be exempt from any debts or liabilities of her husband, D., should he from accident or misfortune hereafter become embarrassed, with power in his exors. to invest same at her desire in good securities with interest for her & her children's benefit," subject to a deduction of £870 due to testator by D. Pltf. & others were appointed exors. Testator died in 1861, but the estate was not settled until Sept., 1871, when D. deposited in a bank $6,000, being the balance of the bequest due to his wife after deducting the amount due by him to the estate, with interest to the date of the deposit. In the same month he made an assignment under Insolvent Act of 1869. During the ten intervening years the amount had been used by him in his business, & for his family, though without the knowledge or sanction of his wife, & entries were made by him from time to time in accounts rendered to the widow, who with himself chiefly managed the business of the estate, of sums received as interest on his wife's legacy, amounting in all to the whole interest that would be due thereon. That was not authorised by his wife, but she did not object to it, or apply for the interest herself:—*Held:* as there was no evidence that M. had sanctioned the use of the money by her husband, pltf.

6000. —— —— Stock transferred—Cash paid to husband & similarly invested.]—A married woman being entitled under a will to stock & to cash, her husband wrote to one of the exors., that the stock should be transferred into the names of trustees for the wife's separate use, & that the cash should be paid to himself. These requests were complied with. The husband employed part of the cash in increasing the amount of the stock. He afterwards became bkpt. & died:—*Held:* the stock transferred by the exors. was not reduced into possession by the husband, & therefore belonged to the wife by survivorship; but the assignees under the bkpcy. were entitled to the increase made by the husband.—RYLAND *v.* SMITH (1836), 1 My. & Cr. 53; 5 L. J. Ch. 186; 40 E. R. 296.

Annotations:—**Mentd.** Hansen *v.* Miller (1844), 14 Sim. 22; Burnham *v.* Bennett (1845), 2 Coll. 254.

6001. —— —— Paid by husband & wife into separate account of wife.]—Exors. of a will, under which a married woman was entitled to a legacy, paid it by a cheque, drawn to the order of the husband & wife. They went to the husband's bankers with the cheque duly indorsed, & the wife instructed the manager, in the husband's presence & with his assent, to open an account in her own sole name, & to place part of the proceeds of the cheque to the credit of such account, & the remainder to the husband's current account. These instructions were carried into effect, & the wife drew cheques in her own name. The bankers invested a part of the sum in the purchase of certain bonds, & they sent her a memorandum by which they stated that they held the bonds as her property. The wife afterwards declined to charge her moneys & securities with the payment of the overdrawn balance of his account with the bankers, & the husband went into liquidation:—*Held:* the husband had not reduced the legacy into possession. *Semble:* if it had been held that the husband had reduced the legacy into possession, it would have been held that there had been a valid gift of the amount by the husband to the wife.—PARKER *v.* LECHMERE (1879), 12 Ch. D. 256; 41 L. T. 152; 28 W. R. 48.

6002. Reversionary interest—Husband bankrupt before interest vests in possession—Death of husband—Title of wife to the fund.]—A husband became bkpt. & died: a contingent legacy to the wife vested but was not reduced into possession before his death:—*Held:* it did not vest in his assignees.—GAYNER *v.* WILKINSON (1773), Dick. 491; 21 E. R. 360; *sub nom.* GAYER *v.* WILKINSON, 1 Bro. C. C. 50, n.

Annotations:—**Consd.** Mitford *v.* Mitford (1803), 9 Ves. 87; Pierce *v.* Thornely (1828), 2 Sim. 167. **Reld.** Saddington *v.* Kinsman (1779), 1 Bro. C. C. 44. **Mentd.** Purdew *v.* Jackson (1824), 1 Russ. 1; Honner *v.* Morton (1828), 3 Russ. 65.

6003. —— —— —— ——.]—The general assignment in bkpcy. has not the effect of reducing into possession a legacy of stock in trust for bkpt.'s wife.

A testatrix bequeathed £3,000 to trustees on trust to pay the income to C. for life or until her marriage; after the marriage or death of C., she gave a share in the sum to S., the wife of R. Testatrix died in 1783; R. became bkpt. in 1784; C. married in 1789, & R. died in 1790:—*Held:* S., having survived her husband, was entitled to the share in the £3,000, with dividends from the date of her husband's death.—MITFORD *v.* MITFORD (1803), 9 Ves. 87; 32 E. R. 534.

Annotations:—**Folld.** Hornsby *v.* Lee (1816), 2 Madd. 16. **Consd.** Pierce *v.* Thornely (1828), 2 Sim. 167; *Re* Brown, *Ex p.* Turpin (1832), 1 Deac. & Ch. 120. **Reld.** Wright *v.* Morley (1805), 11 Ves. 12; Stanton *v.* Hall (1831), 2 Russ. & M. 175, L. C.; *Re* Courtney, *Ex p.* Pollard (1837), 2 Deac. 367, Ct. of R.; Sherrington *v.* Yates (1844), 12 M. & W. 855, Ex. Ch.; Drew *v.* Long (1853), 22 L. J. Ch. 717; *Re* Barr's Trusts (1858), 4 K. & J. 219. **Mentd.** Purdew *v.* Jackson (1824), 1 Russ. 1; Honner *v.* Morton (1828), 3 Russ. 65; *Re* Severn, *Ex p.* King (1835), 1 Deac. 143; Sturgis *v.* Champneys (1839), 5 My. & Cr. 97, L. C.; Corsbie *v.* Free (1840), Cr. & Ph. 64; Greedy *v.* Lavender (1850), 13 Beav. 62; *Re* Jackson, *Ex p.* Union Bank of Manchester (1871), L. R. 12 Eq. 354.

6004. —— —— —— ——.]—A husband & wife assigned a reversionary interest of the wife in certain trust stock as security for the payment of an annuity granted by the husband. The husband afterwards took the benefit of Insolvent Debtors Act, & a general assignment was made of his property. The person on whose death the wife was to take died, & then the husband died, without having done any other act to reduce the stock into possession:—*Held:* the wife was entitled by survivorship to the stock, against both the particular & the general assignee.—HORNSBY *v.* LEE (1816), 2 Madd. 16; 56 E. R. 240.

Annotations:—**Consd.** Purdew *v.* Jackson (1824), 1 Russ. 1. **Mentd.** Horner *v.* Morton (1828), 3 Russ. 65.

6005. —— —— Covenant by husband on marriage to pay reversion to wife on his death—Wife has no claim against purchaser under commission.]—A husband covenanted upon marriage, that his heirs, exors., etc., should, within six months after his death, pay to the wife, if she should survive him, the fortune he received, with the addition of 50 per cent.; &, in case he should receive any other part of her fortune, to which she was entitled in reversion under a will, to pay that in the same manner, & with the same profit. On the husband becoming bkpt.:—*Held:* the wife had no claim upon the reversionary fund, against a purchaser under the commission.—BASEVI *v.* SERRA (1807), 14 Ves. 313; 3 Mer. 674; 33 E. R. 542.

Annotations:—**Expld.** Corsbie *v.* Free (1840), Cr. & Ph. 64, L. C. **Mentd.** Shuttleworth *v.* Howarth (1841), Cr. & Ph. 228, L. C.

6006. —— —— —— Liability of husband's trustee to perform covenant.]—By a marriage settlement, after reciting that the intended wife was possessed of £1,500 which the husband was to have for his own use as soon as the marriage should take effect, & that she had also a vested interest in the real & residuary personal estate of testator, amounting to £32,000 & upwards, which would be equally divided amongst eight children, of whom

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as trustee for her & her children, was entitled to an amount equal to the balance of the legacy, after deducting the debt due by D.; but the assignee was entitled to the amount deposited for interest thereon, as the ct. must presume the acquiescence of the wife in the husband's receipt of the interest from year to year, in the absence of very clear evidence to the contrary.—HUNTER *v.* PEOPLE'S BANK OF HALIFAX, R. E. D. 91.—**CAN.**

v. —— *Legacy to wife—Interest not to be paid to any other person—Marriage in community of property.*]—A. executed a will bequeathing her property to her sister B. subject to a *fidei commissum* in favour of B.'s children. The will directed that after B.'s death "the entire inheritance shall devolve free & unincumbered in full & free property upon B.'s children," of whom pltf. was one. Subsequently A. executed a codicil directing that "the inheritance devolving upon her niece, pltf., married to C. shall be burthened with entail of *fidei commissum* in such manner that the usufruct or interest of the inheritance shall not be paid by the exor. to any other person" than pltf.

C. was married to pltf. in community of property, & at the time of execution of the codicil was an uncertificated insolvent. He was rehabilitated, but subsequently became again insolvent:—*Held:* the trustee in this latter insolvency could not attach the interest accruing to C. under the will & codicil.—BOSMAN *v.* RICHTER (1854), 2 S. 78.—**S. AF.**

6002 i. *Reversionary interest—Husband bankrupt before interest vests in possession.*]—Where the wife of bkpt. in Lower Canada had a remainder in lands in Upper Canada, expectant on the death of her mother:—*Held:* there was no interest which could vest in the assignee.—PHILLIPS *v.* MASSON (1852), 9 U. C. R. 20.—**CAN.**

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she was one, on the death of a tenant for life, it was witnessed that, in consideration of the intended marriage, & of the £1,500 then in the possession of the intended wife, & also of the vested interest of the value of £4,000 & upwards, the husband covenanted that his heirs, exors., & administrators should, immediately after his decease, pay to the trustees of the settlement £4,000, to be held upon certain trusts for the wife & the children of the marriage, but the deed contained a proviso that the heirs, exors., or administrators of the husband should pay all other debts which the husband should owe at his death in preference to the £4,000, & that they should not be bound to pay the £4,000 unless the assets of the husband should be more than sufficient to pay all his other debts. The husband became bkpt. before the death of the tenant for life, but he survived the tenant for life, & afterwards died before the wife's share was actually paid:—*Held:* the husband's assignees were not entitled to receive the share without performing the covenant.—CORSBIE *v.* FREE (1840), Cr. & Ph. 64; 5 Jur. 790; 41 E. R. 413.

See, generally, Part VII., Sect. 1, *ante.*

6007. ——— Death of wife—Title of assignees in bankruptcy of husband.]—A testator directed his trustees to set apart a sufficient fund to secure an annuity to L.; & after her decease bequeathed one-third of the capital in the fund to A., a married woman. In 1835, long after the decease of testator, A.'s husband took the benefit of Insolvent Debtors Acts, & assigned all his property, present & future, to his assignee. In 1851 A. died, & the husband took out administration to her estate. In 1852 the husband became an inmate of the G. County Lunatic Asylum. In 1854 the annuitant died, & the fund became divisible:—*Held:* as between the assignee in insolvency of the husband & the overseers of the parish to which his maintenance was chargeable, who had, as to lunatics, a preferential claim to all other debtors, the assignee in insolvency was entitled to the share of the deceased wife *jure mariti.*—*Re* TYLER'S TRUSTS (1856), 27 L. T. O. S. 119; 2 Jur. N. S. 927; 4 W. R. 524.

6008. Reversionary joint interest—Bankruptcy of husband & death of wife before interest vests in possession—Surviving joint tenant preferred to assignees of husband.]—One of four joint tenants of a sum of £2,000, subject to a life estate in B., married L. Afterwards L. became bkpt.; then the wife died; then B. died:—*Held:* the surviving joint tenants were entitled, in preference to the assignees in bkpcy. of L.—*Re* BARTON'S WILL TRUSTS (1852), 10 Hare, 12; 19 L. T. O. S. 362; 16 Jur. 631; 68 E. R. 818.

Annotations:—**Mentd.** Baillie *v.* Treharne (1881), 17 Ch. D. 388; *Re* Bellamy, Elder *v.* Pearson (1883), 25 Ch. D. 620; *Re* Butler's Trusts, Hughes *v.* Anderson (1888), 38 Ch. D. 286, C. A.

6009. Contingent interest.] — Testator bequeathed to S. the residue of a term in a house, in case he should so long live & inhabit the house, & after his decease, or giving up possession of the house, or in case he should mortgage same, then to M. the wife of S., to hold the premises unto her for the remainder of the term, in case she should so long live therein, & continue the widow of S., & unmarried. S. resided on the premises till he & his wife were turned out of possession, a commission of bkpcy. having issued against him, under which the assignees sold the property. S. died, & the widow brought ejectment for the premises:—*Held:* the interest which the wife took under the will, being contingent upon events of which some might have happened during the husband's lifetime, was an interest which the husband might assign at law; & the wife had not an equitable interest sufficiently clear to enable the ct. to say that the assignees did not become entitled to the premises under the bkpcy.—DOE d. SHAW *v.* STEWARD (1834), 1 Ad. & El. 300; 3 Nev. & M. K. B. 372; 3 L. J. K. B. 141; 110 E. R. 1220.

Annotation:—**Consd.** Duberley *v.* Day (1852), 16 Beav. 33.

6010. Policy of assurance—On life of husband—Premiums paid out of wife's separate estate.]—A husband who, before the passing of Married Women's Property Act, 1870 (c. 93), had insured his life, & had paid one premium on the insurance, after the passing of the Act gave up the policy & received instead a policy at the same premium for a sum payable to the separate use of his wife if she survived him, & to him if he survived her. He was at the time in embarrassed circumstances, & soon afterwards came under liquidation by arrangement, & then died. His wife had separate income subject to a restraint on anticipation:—*Held:* the insurance must be taken as effected after the passing of the Act, & whether the subsequent premiums were paid by the husband out of his own money or out of the income of the wife's separate estate, the money payable on the insurance did not go to the trustee under the bkpcy., but went to the widow by virtue of the Act, which modified 1869 Act, s. 91.—HOLT *v.* EVERALL (1876), 2 Ch. D. 266; 45 L. J. Ch. 433; 34 L. T. 599; 24 W. R. 471, C. A.

6011. ——— ——— ———.]—A policy of insurance on the life of a husband for the benefit of his wife, was effected with an insurance co. The application for the policy was made by him on behalf of his wife. By the policy the co. promised to pay the amount assured to the wife "for her sole use, if living," &, if she were not living, to the children of the husband; or if there should be no such children, to the exors. or assigns of the husband. The policy also provided that, on the completion of a period of ten years from its issue, provided it should not have been previously terminated by lapse or death, the legal owners should have the option of withdrawing the accumulated reserve & surplus appropriated by the co. to the policy. The husband paid the premiums until July, 1883, when he filed a petition. In 1884 he obtained his discharge. After 1883 the wife paid the premiums out of her separate estate. In 1886 the wife exercised the right of withdrawal, & the co. paid £2,959 in respect of the policy:—*Held:* even if the sum thus paid did not by virtue of the policy belong to the wife for her separate use, the husband's contingent interest in it at the time when he obtained his discharge was a mere possibility, & did not pass to the trustee in the liquidation.—*Re* SUSE & SIBETH, *Ex p.* DEVER (1887), 18 Q. B. D. 660; 56 L. J. Q. B. 552; 3 T. L. R. 400, C. A.

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y. *Costs—On judgment for husband & wife—Husband joined for conformity—Assignment by husband & wife.*]—In an action on a foreign judgment, it appeared that the judgment was on a bill on complaint brought in the State of New York, against A., & his wife, by B., to set aside a conveyance made to the wife as fraudulent, & that such bill was dismissed with costs to be paid by B. The suit was substantially against the wife, her husband having been joined for conformity only. An assignment of the judgment was produced from A. & his wife to pltf., & a previous assignment, during the pendency of the foreign suit, of all costs accrued or that might accrue. At the execution of the assignment A. was an insolvent under 1869 Act:—*Held:* the costs for which the judgment was recovered were incurred & recovered by the wife, & did not pass to the assignee of her husband.—HUGHITT *v.* SAXTON (1877), 42 U. C. R. 49.—CAN.

Annotation :—**Mentd.** Crossland *v.* Wrigley (1895), 73 L. T. 60.

6012. —— —— Taken in name of wife—Terms on which trustee entitled to policy.]—A policy of insurance on his life had been taken out by bkpt. in his wife's name. Bkpt. had paid the premiums in consideration of his wife's help in his business. The trustee claimed the policy subject to the wife's right of survivorship :—*Held :* the trustee, on giving an undertaking to pay the premiums, & to make no claim for repayment if the wife survived bkpt., might keep the policy.—*Re* WATSON, *Ex p.* MERRETT (1890), 7 Morr. 65.

D. Wife's Equity to Settlement.

6013. Right to a settlement.]—A husband before he hath received the wife's fortune becomes a bkpt.; the assignees shall not receive it without making some provision for the wife.—JACOBSON *v.* WILLIAMS (1717), 1 P. Wms. 382 ; 1 Eq. Cas. Abr. 54 ; 24 E. R. 435, L. C.

Annotations :—**Consd.** Higden *v.* Williamson (1731), 3 P. Wms. 132 ; Ineson *v.* Moulston, Vobe's Case (1742), 9 Mod. Rep. 373. **Mentd.** Kitchen *v.* Bartsch (1805), 7 East, 53.

6014. ——.]—A wife has an equity to a settlement against assignees under a commission of bkpcy. : where they take the benefit of a wife's fortune under a general assignment of the comrs., they are bound by this equity, & if they come into this ct. they must allow a provision for the wife, because they take only just the same estate & interest as the husband did (LORD HARDWICKE, C.). —INESON *v.* MOULSTON, VOBE'S CASE (1742), 9 Mod. Rep. 373 ; 88 E. R. 515 ; *sub nom.* JEWSON *v.* MOULSON, 2 Atk. 417, L. C.

Annotations :—**Distd.** Price *v.* Rutter (1769), 2 Coop. *temp.* Cott. 230, L. C. **Consd.** Like *v.* Beresford (1797), 3 Ves. 506. **Refd.** Fitzer *v.* Fitzer (1742), 2 Atk. 511 ; Hearle *v.* Greenbank (1749), 3 Atk. 695 ; Wheeler *v.* Caryl (1751), Amb. 121 ; Mitford *v.* Mitford (1803), 9 Ves. 87 ; Lloyd *v.* Williams (1816), 1 Madd. 450 ; Sturgis *v.* Champneys (1839), 9 L. J. Ch. 10 ; *Re* Barr's Trusts (1858), 27 L. J. Ch. 548. **Mentd.** Worrall *v.* Marlar (1784), 1 Cox, Eq. Cas. 153, L. C. ; Hanson *v.* Keating (1844), 4 Hare, 1.

6015. ——.]—Assignees of a bkpt., defts. in respect of an interest in his wife, cannot take it without making a provision for her.—FREEMAN *v.* PARSLEY (1797), 3 Ves. 421 ; 30 E. R. 1085.

Annotations :—**Consd.** Sturgis *v.* Champneys (1839), 5 My. & Cr. 97. **Refd.** Beresford *v.* Hobson (1816), 1 Madd. 362. **Mentd.** Hampson *v.* Brandwood (1816), 1 Madd. 381.

6016. ——.]—Assignees of a bkpt. claiming property in right of his wife must make a provision for her.—LUMB *v.* MILNES (1800), 5 Ves. 517 ; 31 E. R. 712.

Annotations :—**Refd.** Wright *v.* Morley (1805), 11 Ves. 12 ; Beresford *v.* Hobson (1816), 1 Madd. 362 ; Taunton *v.* Morris (1878), 26 W. R. 674. **Mentd.** Adamson *v.* Armitage (1815), Coop. G. 283 ; Tyler *v.* Lake (1831), 2 Russ. & M. 183 ; Gilbert *v.* Lewis (1862), 7 L. T. 541, L. C.

6017. Out of what funds—Proceeds of sale of equity of redemption.]—A testator devised lands in mtge., to be sold & the surplus to be paid to his daughter ; the daughter married a man who became a bkpt., & the comrs. assigned such interest of the wife's ; the husband died, & the assignees brought a bill against the wife & trustees to have the land sold, & the surplus of the money paid to them :—*Held :* the ct. would not assist in stripping the wife, who was wholly unprovided for, of the interest.—PARKER *v.* DYKES (1698), 1 Eq. Cas. Abr. 54 ; 21 E. R. 869.

Annotation :—**Refd.** Lockyer *v.* Savage (1733), 2 Stra. 947.

6018. —— Equity of redemption—Surplus rents paid to wife with consent of mortgagee.]—A husband & wife, by deed acknowledged, demised freeholds of the wife to a mtgee. by way of trust, the trusts being to apply the rents & profits in payment of certain premiums on insurance, & of the interest on the mtge. debt, & then in reduction of the principal until it should be paid off. The husband took the benefit of Insolvent Act. In a suit for redemption instituted by the assignee in insolvency against the mtgee. :—*Held :* the latter was chargeable with the surplus rents which he permitted to be received by the insolvent's wife for her maintenance ; but there being ground for supposing that the ct. would have made such a provision for the wife, the ct., although the balance was found against the mtgee., decreed payment without costs.—CLARK *v.* COOK (1849), 3 De G. & Sm. 333 ; 64 E. R. 503.

Annotation :—**Consd.** Briggs *v.* Chamberlain (1853), 18 Jur. 56.

6019. —— Life interest in equity of redemption.]—The assignee of a debtor, whose wife was entitled for life to real property, being obliged to come into equity to enforce his title to the rents during the joint lives of the husband & wife in consequence of the legal estate being vested in mtgees. :—*Held :* bound to make a provision for the wife.—STURGIS *v.* CHAMPNEYS (1839), 5 My. & Cr. 97 ; 9 L. J. Ch. 10 ; 3 Jur. 1096 ; 41 E. R. 308.

Annotations :—**Expld.** Plowden *v.* Thorpe (1840), 7 Cl. & Fin. 137, H. L. **Consd. & Foll.** Hanson *v.* Keating (1844), 4 Hare, 1. **Apld.** Freeman *v.* Fairlie (1847), 11 Jur. 447. **Consd. & Foll.** Wortham *v.* Pemberton, Newenham *v.* Pemberton (1847), 1 De G. & Sm. 644. **Consd.** Clark *v.* Cook (1849), 3 De G. & Sm. 333. **Expld. & Distd.** Tidd *v.* Lister, Bassil *v.* Lister (1854), 18 Jur. 543. The principle of *Sturgis* v. *Champneys* will not carry you through the cases where the wife herself is applying, & not the assignee (LORD CRANWORTH, C.). **Distd.** *Re* Cumming (1860), 2 De G. F. & J. 376, L. JJ. **Consd.** *Re* Duffy's Trust (1860), 28 Beav. 386 ; Duncombe *v.* Greenacre (1860), 2 De G. F. & J. 509, L. C. ; Gleaves *v.* Paine (1863), 1 De G. J. & Sm. 87, L. C. **Refd.** Hill *v.* Edmonds (1852), 16 Jur. 1133 ; Barnes *v.* Robinson (1863), 7 L. T. 617 ; Durham *v.* Crackles (1862), 1 New Rep. 165 ; Wilkinson *v.* Castle (1868), 37 L. J. Ch. 467 ; Ward *v.* Ward (1880), 14 Ch. D. 506. **Mentd.** Clark *v.* Burgh (1845), 2 Coll. 221 ; Gibson *v.* Goldsmid (1854), 1 Jur. N. S. 1, C. A.

6020. —— Life interest.]—If the husband of a *feme covert* entitled to the interest of funds for life makes a general assignment of his estate for the benefit of creditors, the assignees shall not take the dividends without making a provision for the wife.—PRYOR *v.* HILL (1792), 4 Bro. C. C. 139 ; 29 E. R. 818.

Annotations :—**Consd.** Wright *v.* Morley (1805), 11 Ves. 12. **Refd.** Beresford *v.* Hobson (1816), 1 Madd. 362 ; Stanton *v.* Hall (1831), 9 L. J. O. S. Ch. 111 ; Sturgis *v.* Champneys (1839), 5 My. & Cr. 97, L. C. ; Taunton *v.* Morris (1878), 8 Ch. D. 453. **Mentd.** Wilkinson *v.* Charlesworth, Marsack *v.* Lyster (1847), 10 Beav. 324 ; Tidd *v.* Lister, Bassil *v.* Lister (1854), 18 Jur. 543.

6021. —— ——.]—Devise to the use of A. & her issue in strict settlement, subject to a trust for debts & legacies & to pay annuities out of rents & profits with power to sell. Upon the bill of creditors & legatees, one of the annuitants being living : —*Held :* defts., the assignees of A.'s husband, a bkpt., should make proposals for a provision for the wife.—OSWELL *v.* PROBERT (1795), 2 Ves. 680 ; 30 E. R. 839.

Annotations :—**Consd.** Sturgis *v.* Champneys (1839), 5 My. & Cr. 97. **Refd.** Wright *v.* Morley (1805), 11 Ves. 12 ;

PART XX. SECT. 4, SUB-SECT. 3.—D.

6013 i. *Right to a settlement.*]—Where a trader, in consideration of his wife's fortune, by a settlement on marriage conveys his property to trustees, but the settlement does not secure the wife's fortune in the event of his bkpcy., the intention appearing to be so, it will be amended.—HIGGINSON *v.* KELLY (1810), 1 Rose, 368 ; 1 Ball & B. 252.—IR.

6020 i. *Out of what fund—Life interest.*]—Bequest of the dividends of a fund " to J., & S., his wife, & the survivor of them, for the term of their natural lives, & after their decease to pay the fund, & all interest due thereon to the children of J., & S., his wife, share & share alike." J. became insolvent :—*Held :* the wife was not entitled to any equity to a settlement, but only to have the fund kept in ct. to secure her title to the dividends by survivorship.—IRWIN *v.* BAKER (1855), 7 Ir. Jur. 305.—IR.

Sect. 4.—"The property of the bankrupt": Sub-sect. 3, D.]

Beresford *v.* Hobson (1816), 1 Madd. 362. **Mentd.** Taunton *v.* Morris (1878), 26 W. R. 674.

6022. —— ——.]—A married woman was entitled to a legacy of £9,000 3 per cents. during her life with a bequest over. The husband & wife joined in a sale of his life interest, & the husband became bkpt. On a bill, filed by the wife against the purchaser insisting on a provision: —*Held:* though the ct. could have compelled a provision by the husband on his bkpcy., a purchaser was not compellable to make such provision.

If the husband becomes bkpt., or takes the benefit of an Insolvent Debtors Act, this ct. will fasten the same obligation of maintaining the wife out of the property of this description which devolves, by act of law, upon the general assignee; for when the title of such assignee vests, the incapacity of the husband to maintain the wife has already raised this equity for the wife (LEACH, V.-C.).—ELLIOTT *v.* CORDELL (1820), 5 Madd. 149; 56 E. R. 852.

Annotations:—**Consd.** Stanton *v.* Hall (1831), 2 Russ. & M. 175, L. C. **Distd.** Bradley *v.* Hughes (1836), Donnelly, 116. **Consd.** Sturgis *v.* Champneys (1839), 5 My. & Cr. 97, L. C. **Distd.** Greedy *v.* Lavender (1850), 13 Beav. 62. **Consd.** Scott *v.* Spashett (1851), 21 L. J. Ch. 349, L. C.; Tidd *v.* Lister (1854), 23 L. T. O. S. 101, L. C. **Refd.** Tidd *v.* Lister, Bassil *v.* Lister (1852), 10 Hare, 140.

6023. —— ——.]—A married woman has the same equity to a settlement as against her husband's general assignee, out of property in which she has only a life interest as out of property in which she has an absolute interest; & the ct. will make no distinction between the two cases as regards the amount to be settled.—TAUNTON *v.* MORRIS (1879), 11 Ch. D. 779; 48 L. J. Ch. 408; 41 L. T. 259; 27 W. R. 718, C. A.

Annotation:—**Distd.** *Re* Bryan, Godfrey *v.* Bryan (1880), 14 Ch. D. 516.

6024. —— Property obtainable in equity only.]—The assignees of a bkpt. must make a provision for his wife out of all her property which can be obtained in equity only.—BURDON *v.* DEAN (1795), 2 Ves. 607; 30 E. R. 801.

Annotations:—**Consd.** Sturgis *v.* Champneys (1839), 5 My. & Cr. 97, L. C. **Refd.** Wright *v.* Morley (1805), 11 Ves. 12; Beresford *v.* Hobson (1816), 1 Madd. 362; Hanson *v.* Keating (1844), 4 Hare, 1; Barrow *v.* Barrow (1854), 18 Beav. 529. **Mentd.** Spirett *v.* Willows (1865), 3 De G. J. & Sm. 293, L. C.; Taunton *v.* Morris (1878), 47 L. J. Ch. 721.

6025. —— Fund in court.]—Assignees of bkpt. taking his wife's fortune out of the ct. must make provision for her.—BROWN *v.* CLARK, HOFFMAN *v.* CLARK (1796), 3 Ves. 166; 30 E. R. 950.

Annotations:—**Consd.** Sturgis *v.* Champneys (1839), 5 My. & Cr. 97, L. C. **Refd.** Wright *v.* Morley (1805), 11 Ves. 12; Beresford *v.* Hobson (1816), 1 Madd. 362; Taunton *v.* Morris (1878), 26 W. R. 674.

6026. —— Property subject to post-nuptial settlement—Set aside in bankruptcy.]—A settlement after marriage of stock standing in the name of the wife, the husband being insolvent, & soon after a bkpt., was set aside upon the bill of the assignees after the death of the husband; the stock did not survive, but was decreed to the assignees, subject to a provision for the widow.—PRINGLE *v.* HODGSON (1798), 3 Ves. 617; 30 E. R. 1184.

Annotations:—**Consd.** Mitford *v.* Mitford (1803), 9 Ves. 87; Pierce *v.* Thornely (1828), 2 Sim. 167. **Mentd.** Wildman *v.* Wildman (1803), 9 Ves. 174.

6027. —— Real or personal estate.]—The ct. has jurisdiction to order assignees to make a reasonable provision for the wife of a bkpt. out of the property she brought to her husband on her marriage, whether the property consisted of real or personal estate.—*Re* WYATT, *Ex p.* THOMPSON, *Ex p.* CATER (1836), 1 Deac. 90; 2 Mont. & A. 505; 4 L. J. Bcy. 75, Ct. of R.

Annotation:—**Distd.** *Re* Smallpeice, *Ex p.* Smallpeice (1857), 30 L. T. O. S. 262.

6028. —— ——.]—A wife, suing *in formâ pauperis*, without a next friend:—*Held:* entitled as against the assignees in insolvency of her husband to a settlement for her separate use for life of the rents of real property, the legal estate in which was vested in trustees for her benefit for life.

In all cases of personal property the wife may assert her right to a settlement, & the same principle must be applied to real estate (STUART, V.-C.).—BARNES *v.* ROBINSON (1863), 1 New Rep. 257; 32 L. J. Ch. 143; 7 L. T. 617; 9 Jur. N. S. 215; 11 W. R. 276.

6029. —— Reversionary interest.]—A wife was not entitled to her equity to a settlement as against her husband's assignees, in respect of a reversionary interest. Her right arose when the remainder or reversion fell into possession.—OSBORN *v.* MORGAN (1852), 8 Hare, 432; 21 L. J. Ch. 318; 18 L. T. O. S. 284; 16 Jur. 52; 68 E. R. 578.

Annotations:—**Folld.** Adams *v.* Bennett (1854), 2 Eq. Rep. 1259. **Consd.** Wallace *v.* Auldjo (1863), 2 Drew. & Sm. 216. **Folld.** Knight *v.* Knight (1874), L. R. 18 Eq. 487. **Refd.** *Re* Briant, Poulter *v.* Shackel (1888), 39 Ch. D. 471; *Re* Holland, Cregg *v.* Holland, [1901] 2 Ch. 145.

6030. To whom equity extends—Children—When provision contracted for.]—Where a legacy is left to a *feme covert*, & the assignees of the husband agree with the exors., on a claim made for a settlement, to take only a part of the legacy, & the *feme covert* dies, leaving a child, such child is entitled to the residue of the legacy, under the contract.

The child of a *feme covert*, a legatee, has no equity to insist on a settlement, after the death of the mother, unless there is a contract, or a decree for a settlement in the lifetime of the mother.—LLOYD *v.* WILLIAMS (1816), 1 Madd. 450; 56 E. R. 166.

Annotations:—**Consd.** Wallace *v.* Auldjo (1863), 2 Drew. & Sm. 216. **Refd.** Baker *v.* Bayldon (1848), 8 Hare, 210. **Mentd.** Fenner *v.* Taylor (1831), 2 Russ. & M. 190; Groves *v.* Clarke (1836), Donnelly, 59; De La Garde *v.* Lempriere (1843), 6 Beav. 344.

6031. —— —— When provision actually made.]—The provision made for a wife enures for the benefit of her children, & passes to them on her death.—STEINMETZ *v.* HALTHIN (1820), 1 Gl. & J. 64.

Annotations:—**Expld.** Pierce *v.* Thornely (1828), 2 Sim. 167. **Consd.** Groves *v.* Clarke (1836), 1 Keen, 132; De La Garde *v.* Lempriere (1843), 6 Beav. 344; Baker *v.* Bayldon (1848), 8 Hare, 210; Wallace *v.* Auldjo (1863), 2 Drew. & Sm. 216. **Refd.** Lloyd *v.* Mason (1845), 5 L. T. O. S. 454.

6032. —— —— ——.]—If the wife insists upon her equity as against the assignees in bkpcy. of her husband, it attaches for the benefit of her children.—BARKER *v.* LEA (1822), 6 Madd. 330; 56 E. R. 1117.

Annotation:—**Refd.** Whittem *v.* Sawyer (1839), 1 Beav. 593.

6033. —— —— When wife has claimed her equity.]—A married woman entitled to a legacy, appeared by her counsel at the hearing of the cause, & claimed her equity to a settlement out of the fund. The legacy was directed to be carried to the separate account of the husband & wife. The husband was a bkpt., & his assignee sold his interest in the legacy. The solrs. for the pur-

6033 i. *To whom equity extends—Children—When mother has not exercised power of appointment.*]—When a mother, whose husband is then insolvent, dies without appointing a sum of money, her own property, & a suit for a settlement thereof on the children has not been commenced before her death, the money becomes the property of her husband's creditors, & the ct. will not make thereout a provision for the infant children.—*Re* THOMAS (1868), 2 I. L. T. Jo. 62.—IR.

chaser & for the wife agreed to refer the claim of the wife to their counsel; & the counsel determined that she was entitled to a settlement of the money, subject to the costs. Before any further steps were taken the wife died, leaving children:—*Held:* the husband & those claiming under him being bound by the steps which had been taken, to allow a settlement of part of the fund upon the wife & children, upon the death of the wife, the children were entitled to the portion which would have been settled.—LLOYD *v.* MASON (1845), 5 Hare, 149; 5 L. T. O. S. 454; 9 Jur. 724; 67 E. R. 864.

Annotation:—**Refd.** Wallace *v.* Auldjo (1863), 2 New Rep. 259.

6034. —— —— **Where wife has established her equity—Although children have further fortune.**]—Where a married woman has established her equity to a settlement against a bkpt. husband, the equity extends to children irrespective of any fortune they may have.—CONINGTON *v.* GILLIAT (1876), 46 L. J. Ch. 61; 35 L. T. 736; 25 W. R. 69.

6035. —— —— —— **Children by former marriage.**]—Where a married woman has established her equity to a settlement against a bkpt. husband, children by a former marriage are within the equity.—CONINGTON *v.* GILLIAT (1876), 46 L. J. Ch. 61; 35 L. T. 736; 25 W. R. 69.

6036. What amount settled.]—When the husband becomes a bkpt., & consequently incapable of maintaining his wife, it is not held that she is entitled to the whole of the dividends of her fortune, or of any life-interest that she may have any more than she is entitled to the whole of her fortune, consisting of a capital sum (GRANT, M.R.).—WRIGHT *v.* MORLEY (1805), 11 Ves. 12; 32 E. R. 992.

Annotations:—**Refd.** *Re* Wyatt, *Ex p.* Thompson (1836), 1 Deac. 90; Coster *v.* Coster (1839), 9 Sim. 597; Tidd *v.* Lister (1854), 23 L. T. O. S. 101, L. C.; Taunton *v.* Morris (1878), 8 Ch. D. 453. **Mentd.** Duncan *v.* Duncan (1815), 19 Ves. 394; Beresford *v.* Hobson (1816), 1 Madd. 362; Copis *v.* Middleton (1823), Turn. & R. 224; Purdew *v.* Jackson (1824), 1 Russ. 1; Stanton *v.* Hall (1831), 2 Russ. & M. 175, L. C.; Hodgson *v.* Shaw (1834), 3 My. & K. 183; Sturgis *v.* Champneys (1839), 9 L. J. Ch. 10; Wilkinson *v.* Charlesworth, Marsack *v.* Lyster (1847), 10 Beav. 324; Scott *v.* Spashett (1851), 3 Mac. & G. 599, L. C.; Tidd *v.* Lister, Bassil *v.* Lister (1852), 10 Hare, 140; Newton *v.* Chorlton (1853), 2 Drew. 333; Barrow *v.* Barrow (1854), 18 Beav. 529; City Bank *v.* Luckie (1869), 5 Ch. App. 774, n.; Stringer *v.* English & Scottish Marine Insce. Co. (1870), 10 B. & S. 770, Ex. Ch.; *Re* Walker, Sheffield Banking Co. *v.* Clayton, [1892] 1 Ch. 621; *Re* Parker, Morgan *v.* Hill, [1894] 3 Ch. 400, C. A.

6037. —— **Discretion of court.**]—The amount to be settled on a married woman under her equity to a settlement is discretionary with the ct. & depends on the particular circumstances of each case.—SCOTT *v.* SPASHETT (1851), 3 Mac. & G. 599; 21 L. J. Ch. 349; 19 L. T. O. S. 37; 16 Jur. 157; 42 E. R. 391, L. C.

Annotations:—**Refd.** Dunkley *v.* Dunkley (1852), 2 De G. M. & G. 390, L. C.; *Re* Kincaid's Trust (1853), 22 L. J. Ch. 395; *Re* Erskine's Trust (1855), 1 K. & J. 302; Aubrey *v.* Brown (1856), 25 L. J. Ch. 446. **Mentd.** Taunton *v.* Morris (1878), 8 Ch. D. 453.

6038. —— ——.]—In every case where a wife claims an equity to a settlement against her husband's assignee the ct. will exercise its judicial discretion as to the amount to be settled having regard to all the circumstances.—TAUNTON *v.* MORRIS (1879), 11 Ch. D. 779; 48 L. J. Ch. 408; 41 L. T. 259; 27 W. R. 718, C. A.

Annotation:—**Refd.** *Re* Bryan, Godfrey *v.* Bryan (1880), 14 Ch. D. 516.

6039. —— —— **Not limited to one-half.**]—There is no rule limiting the amount to be settled to half the fund; but each case must be governed by its own special circumstances.—CONINGTON *v.* GILLIAT (1876), 35 L. T. 736; 25 W. R. 69.

6040. —— —— **Review of decision directing settlement of whole.**]—On a bill filed by the assignees of a bkpt., to recover money to which bkpt. was entitled in right of his wife, the usual reference was made to consider proposals for a settlement on the wife & children. The master having approved a settlement of the whole property on his wife & children, on exceptions being taken, he was directed to review his report.—BERESFORD *v.* HOBSON (1816), 1 Madd. 362; 56 E. R. 134.

Annotations:—**Dbtd.** Brett *v.* Greenwell (1838), 3 Y. & C. Ex. 230. **Consd.** Coster *v.* Coster (1839), 9 Sim. 597; Spirett *v.* Willows (1864), 5 Giff. 49. **Refd.** Barrow *v.* Barrow (1854), 18 Beav. 529, L. JJ.; Smith *v.* Smith (1861), 3 Giff. 121.

6041. —— —— ——.]—A bkpt. was entitled in right of his wife to personal property vested in trustees, of the value of £89 per annum & to realty of the annual value of £158, the total net income being £225. The wife was without means of supporting her family. The registrar having ordered all the property to be settled to her separate use without power of anticipation, the Ct. of Review reduced the amount to £175 per annum.—*Re* WYATT, *Ex p.* THOMPSON, *Ex p.* CATER (1836), 1 Deac. 90; 2 Mont. & A. 505; 4 L. J. Bcy. 75, Ct. of R.

Annotation:—**Consd.** *Re* Smallpeice, *Ex p.* Smallpeice (1857), 30 L. T. O. S. 262.

6042. —— **Part only settled—Husband divorced.**]—A married woman, having a vested reversionary interest in a legacy, who, after the bkpcy. of the husband, institutes proceedings against him in the Ecclesiastical Ct. for adultery & ill usage prior to the bkpcy., & there obtains a sentence of divorce, cannot, when the legacy comes into possession, claim to have the whole of it paid to her as against the assignees of the husband's estate.—GREEN *v.* OTTE (1823), 1 Sim. & St. 250; 1 L. J. O. S. Ch. 87; 57 E. R. 100; *subsequent proceedings*, 1 L. J. O. S. Ch. 195.

Annotations:—**Mentd.** Dunkley *v.* Dunkley (1852), 2 De G. M. & G. 390, L. C.; *Re* Erskine's Trust (1855), 1 K. & J. 302.

6043. —— **One half settled—Ordered without reference.**]—Half of the dividends upon a proof of £500 in respect of a legacy to the wife of a bkpt., who was exor. under the will by which the legacy was given & had received sufficient assets for payment of the legacy, ordered to be paid to her without a reference.—*Re* NEWHAM, *Ex p.* NEWHAM (1821), 1 Gl. & J. 40.

6044. —— —— **Husband having received no part of wife's funds.**]—A husband had become a bkpt. The wife became entitled to £1,000. She was in indigent circumstances, had no settled means of subsistence, & her husband was unable to maintain her in a respectable position. There was no settlement, the husband had not received any property in right of his wife, & there was no issue of the marriage:—*Held:* the rule to give one half to the creditors & to settle the other half upon the wife applied.—BAGSHAW *v.* WINTER (1852), 5 De G. & Sm. 466; 16 Jur. 561; 64 E. R. 1201.

Annotation:—**Folld.** Spirett *v.* Willows (1865), 6 New Rep. 364.

6045. —— **When more than one-half settled.**]—As between the husband's creditors & the wife, in respect of the wife's equity for a settlement, the ct. will, in circumstances, give the wife more than one-half.

A wife who had been at the time of the marriage & long afterwards in circumstances of comfort, was reduced to distress by the husband's embarrassments. Out of a fund of £681:—*Held:* the costs of petitioner & of the husband's assignees should be paid out of the fund, £400 to the wife,

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& the remainder to petitioner; the wife's costs out of her own fund.—*Re* WAITE'S WILL TRUSTS, *Ex p.* PUGH (1852), 1 Drew. 202; 20 L. T. O. S. 31; 16 Jur. 652; 61 E. R. 428.

6046. —— Two-thirds settled—Husband deserting wife—After receiving her funds.]—The dividends of stock standing in the Accountant General's name to which a woman was entitled for life at the time of her marriage were ordered to be paid to her husband during her life or until further order. The husband deserted his wife & became bkpt., having possessed himself of £2,000 to which she was absolutely entitled:—*Held:* two-thirds of the dividends should be paid to the wife, & the other third to the husband's assignees.—VAUGHAN *v.* BUCK (1851), 1 Sim. N. S. 284; 20 L. J. Ch. 335; 18 L. T. O. S. 51; 15 Jur. 348; 61 E. R. 110.

Annotations:—**Consd.** Dunkley *v.* Dunkley (1852), 2 De G. M. & G. 390, L. C. **Reid.** *Re* Kincaid's Trusts (1852), 17 Jur. 106; Tidd *v.* Lister (1852), 10 Hare, 140.

6047. —— —— Husband contributing something to wife's support.]—A married woman whose husband was an undischarged bkpt. but was living with his wife, & contributed something out of his earnings to her support, claimed her equity to a settlement:—*Held:* two-thirds only of the wife's fund should be settled upon her.—CALLOW *v.* CALLOW (1886), 55 L. T. 154.

6048. —— Three-quarters settled—Post-nuptial settlement set aside.]—E., on her marriage, was entitled to £4,000, & £2,000 of this was settled on her for her separate use on the usual trusts. A post-nuptial settlement of the other £2,000 having been set aside as fraudulent at the suit of the husband's assignee in bkpcy.:—*Held:* £1,500 of this £2,000 should be settled on the wife, subject to payment of costs, & children with an ultimate limitation to the husband.—SPIRETT *v.* WILLOWS (1866), 1 Ch. App. 520; 35 L. J. Ch. 755; 14 L. T. 720; 12 Jur. N. S. 538; 14 W. R. 941, L. C.; *subsequent proceedings* (1869), 4 Ch. App. 407, L. JJ.

Annotations:—**Consd.** Croxton *v.* May (1870), L. R. 9 Eq. 404. **Folld.** Walsh *v.* Wason (1873), 8 Ch. App. 482, L. C. & L. J. **Consd.** Conington *v.* Gilliat (1876), 35 L. T. 736. **Mentd.** Denison *v.* Tattersall, Denison *v.* Cropper (1868), 18 L. T. 303; Barnard *v.* Ford, Carrick *v.* Ford (1869), 4 Ch. App. 247, L. JJ.

6049. —— Whole fund—Where husband has had part of wife's fortune—& wife has no other means.]—A bond was given to A. in trust to secure the payment of an annuity of £40 during the joint lives of S., & petitioner, bkpt.'s wife; bkpt. delivered up the bond upon his last examination; the wife applied to the ct., & prayed the assignees might deliver the bond to her trustee, & that the arrears of the annuity & all future payments may be made to her. She brought a portion of £500 to bkpt. on marriage & had no other means than the annuity:—*Held:* the creditors must be considered as standing in the place of the husband, & were not entitled any more than he would have been, in case he was no bkpt., to the annuity, without making a provision for her, & the wife's application should be granted.—*Ex p.* COYSEGAME (1753), 1 Atk. 192; 1 Cooke's Bankrupt Laws, 7th ed., p. 280; 26 E. R. 125.

Annotations:—**Consd.** Wright *v.* Morley (1805), 11 Ves. 12. **Mentd.** Sherrington *v.* Yates (1844), 12 M. & W. 855, Ex. Ch.

6050. —— —— —— ——.]—A husband had large advances made to him by his wife's father, & had the benefit of a provision made for his wife by her father's will, & afterwards became bkpt.:—*Held:* his wife, who had no provision except the income of a fund under her uncle's will, was entitled to have the whole of that income settled on her for life, for her separate use, without power of anticipation.—GARDNER *v.* MARSHALL (1845), 14 Sim. 575; 5 L. T. O. S. 233; 9 Jur. 958; 60 E. R. 481.

Annotations:—**Consd.** Dunkley *v.* Dunkley (1852), 2 De G. M. & G. 390, L. C.; *Re* Kincaid's Trust (1853), 22 L. J. Ch. 395; Aubrey *v.* Brown (1856), 25 L. J. Ch. 446. **Reid.** Scott *v.* Spashett (1851), 3 Mac. & G. 599.

6051. —— —— —— ——.]—A married woman entitled under a will to a fund on which an annuity was charged, joined her husband in assigning her interest to a purchaser for valuable consideration: the purchaser obtained a stop order on the fund. On the death of the annuitant the wife presented a petition for a settlement in a suit instituted for administering the estate of which the fund formed a part. There had never been any settlement & the husband was insolvent; he had also received out of ct., with the consent of his wife, moneys belonging to her & part of the same estate to double the amount of the fund which formed the subject of the petition:—*Held:* she was, in the circumstances of the case, entitled to a settlement of the whole fund.—SCOTT *v.* SPASHETT (1851), 3 Mac. & G. 599; 21 L. J. Ch. 349; 19 L. T. O. S. 37; 16 Jur. 157; 42 E. R. 391, L. C.

Annotations:—**Consd.** Dunkley *v.* Dunkley (1852), 2 De G. M. & G. 390, L. C. **Distd.** *Re* Erskine's Trust (1885), 1 K. & J. 302. **Consd.** Aubrey *v.* Brown (1856), 25 L. J. Ch. 446. **Reid.** *Re* Kincaid's Trust (1853), 22 L. J. Ch. 395; Taunton *v.* Morris (1878), 8 Ch. D. 453.

6052. —— —— —— & wife has very small provision.]—Where there had been no settlement on marriage, but on the marriage the husband had received £1,000 from the wife's father, & further advances subsequently, & the husband, an uncertified bkpt., became, in right of his wife, entitled to a share of residuary personal estate amounting to upwards of £13,000:—*Held:* the whole of the fund should be settled upon the wife & children, there being no other provision for them except a sum of £150 under the marriage settlement of the wife's parents.—SMITH *v.* SMITH (1861), 3 Giff. 121; 30 L. J. Ch. 637; 9 W. R. 651; 66 E. R. 349.

Annotations:—**Apld.** Taunton *v.* Morris (1878), 8 Ch. D. 453. **Reid.** Taunton *v.* Morris (1879), 11 Ch. D. 779, C. A.

6053. —— —— —— Although wife had other means of her own.]—A married woman became entitled under a will to a considerable share of residue. No settlement had been made on her marriage. The husband became bkpt. The wife had £700 a year of her own from other sources, on which she had been supporting herself & four children. The husband had reduced into possession a portion of the share of residue:—*Held:* the whole remainder of the share of residue must be settled by the ct. on the wife & her children.—NICHOLSON *v.* CARLINE (1874), 22 W. R. 819.

6054. —— —— —— & has been divorced by the wife.]—A wife had joined with her husband in mortgaging her real estate for the husband's benefit, & had afterwards obtained a divorce from him:—*Held:* the whole of a trust fund, claimed by the assignees in bkpcy. of the husband in right of his wife, should be settled for the benefit of the wife & children.—DUNKLEY *v.* DUNKLEY (1852), 2 De G. M. & G. 390; 19 L. T. O. S. 357; 16 Jur. 767; 42 E. R. 923, L. C.

Annotations:—**Consd.** *Re* Kincaid's Trust (1853), 22 L. J. Ch. 395. **Distd.** *Re* Erskine's Trust (1855), 1 K. & J. 302. **Reid.** Aubrey *v.* Brown (1856), 25 L. J. Ch. 446.

6055. —— —— —— & is living apart from wife.]—Where the husband was insolvent & had received £3,000 out of £12,000 to which his wife, who was living apart from him, had become entitled at various times, the whole of a fund of

£3,094 19*s.* 2*d.* was settled on her & her children.—CONINGTON *v.* GILLIAT (1876), 46 L. J. Ch. 61; 35 L. T. 736; 25 W. R. 69.

6056. —— —— **Wife married after bankruptcy & abandoned by husband—Rights of husband's assignees reserved in certain events.**]—The husband, while an uncertificated bkpt., had married an infant, & afterwards abandoned her. On the wife becoming entitled to a share in the estate of an intestate:—*Held:* the whole should be settled upon her & her children, with a provision that, if there should be no children, & the husband should survive the wife, the assignees of the husband should take the fund.—GENT *v.* HARRIS (1853), 10 Hare, 383; 68 E. R. 976.

6057. —— —— **Where the fund is very small—& wife has no other means.**]—A married woman has an equity for a settlement, however small the sum.

Where a married woman was entitled to a fund of £153, her husband bkpt., & unable to maintain her:—*Held:* as between her & her husband's assignees, the whole should be settled on her.—*Re* KINCAID'S TRUSTS (1853), 1 Drew. 326; 22 L. J. Ch. 395; 20 L. T. O. S. 243; 17 Jur. 106; 1 W. R. 120; 61 E. R. 477.

Annotation:—**Folld.** *Re* Merriman's Trust (1862), 31 L. J. Ch. 367.

6058. —— —— **Bankrupt's means precarious.**]—Where there were nine children who were incapable of earning a subsistence & the husband's means were precarious:—*Held:* the wife was entitled, as against the assignees of his estate, to a settlement of the whole of a fund bequeathed to her.—*Re* WILSON, *Re* GOWLAND'S TRUST (1855), 1 Jur. N. S. 569.

6059. —— —— **Husband's sole income from business—No previous settlement.**]—A married woman, who had no settlement, became entitled to a share of property in remainder. Her husband became bkpt. & obtained his discharge before the share came into possession. Her husband's sole income was derived from his business:—*Held:* the whole of her share must be settled.—*Re* HOWARD, HOWARD *v.* HOWARD (1894), 39 Sol. Jo. 135; 13 R. 233.

6060. —— **Whole of equity of redemption—When wife's estate mortgaged for husband's debt.**]—A husband & wife joined in mortgaging real estate of the wife to secure a debt due from the husband. The husband became bkpt.:—*Held:* the assignees had the prior right to redemption, & subject thereto the wife was entitled to redeem, & to have it settled upon herself & children.—GLEAVES *v.* PAINE (1863), 1 De G. J. & Sm. 87; 1 New Rep. 249; 32 L. J. Ch. 182; 7 L. T. 811; 11 W. R. 273; 9 Jur. N. S. 366; 46 E. R. 34; *subsequent proceedings, sub nom. Re* GLEAVES, *Ex p.* PAINE, 3 De G. J. & Sm. 458, L. C.

6061. —— —— **Bankrupt's debt so large that fund would not benefit creditors—Large number of children.**]—A husband became insolvent, & his estate paid no dividend. His wife became entitled to the income of property amounting to £500 a year:—*Held:* in view of the fact that, the husband's debts amounting to £25,000, with no assets, the whole amount would be absorbed in costs & the creditors would obtain no benefit, the whole income should be settled on the wife.—TAUNTON *v.* MORRIS (1879), 11 Ch. D. 779; 48 L. J. Ch. 408; 41 L. T. 259; 27 W. R. 718, C. A.

Annotation:—**Consd.** *Re* Bryan, Godfrey *v.* Bryan (1880), 14 Ch. D. 516.

6062. **What bars the equity—Not settlement of part of wife's property.**]—The assignees of a bkpt. must make a provision for his wife, & a settlement before marriage of part of her property to her separate use does not bar her.—BURDON *v.* DEAN (1795), 2 Ves. 607; 30 E. R. 801.

Annotations:—**Refd.** Wright *v.* Morley (1805), 11 Ves. 12; Beresford *v.* Hobson (1816), 1 Madd. 362; Barrow *v.* Barrow (1854), 18 Beav. 529. **Mentd.** Sturgis *v.* Champneys (1839), 5 My. & Cr. 97, L. C.; Hanson *v.* Keating (1844), 4 Hare, 1; Spirett *v.* Willows (1865), 3 De G. J. & Sm. 293, L. C.; Taunton *v.* Morris (1878), 47 L. J. Ch. 721.

6063. —— ——.]—A sum of money, being rent of real estate to which a husband was entitled in right of his wife, & which had been the subject of a suit in Ch., was paid into ct. by the agent receiving it:—*Held:* the ct. would not order payment of this sum to the assignee of the husband without a reference to approve of a settlement on the wife, though a large sum had already been settled on the wife.—FREEMAN *v.* FAIRLIE (1847), 11 Jur. 447.

6064. —— ——.]—The fact of a settlement having been made of part of an intended wife's personalty on her marriage, upon trusts for her & her children does not bar her equity to an additional settlement out of other personal property belonging to her prior to her marriage & left unsettled upon the occasion of the marriage as against her husband's assignee.—SPIRETT *v.* WILLOWS (1865), 3 De G. J. & Sm. 293; 5 New Rep. 255; 34 L. J. Ch. 365; 11 L. T. 614; 11 Jur. N. S. 70; 13 W. R. 329; 46 E. R. 649, L. C.; *subsequent proceedings* (1865), 6 New Rep. 364; (1866), 1 Ch. App. 520, L. C.

Annotations:—**Mentd.** Smith *v.* Cherrill (1867), L. R. 4 Eq. 390; Freeman *v.* Pope (1870), 5 Ch. App. 538, L. C. & L. J.; *Re* Bamford, *Ex p.* Games (1879), 12 Ch. D. 314, C. A.; *Re* Johnson, Golden *v.* Gillam (1881), 20 Ch. D. 389; *Re* Lane-Fox, *Ex p.* Gimblett, [1900] 2 Q. B. 508; Glegg *v.* Bromley (1911), 81 L. J. K. B. 334.

6065. —— **Wife's agreement to accept husband's covenant.**]—A husband covenanted upon marriage, that his heirs, exors., etc., of the husband should, within six months after his death, pay to the wife, if she should survive him, the fortune he received, with the addition of 50 per cent.; &, in case he should receive any other part of her fortune, to which she was entitled in reversion under a will, to pay that in the same manner, & with the same profit. The husband became bkpt.:—*Held:* the wife had no claim upon that reversionary fund against a purchaser under the commission.—BASEVI *v.* SERRA (1807), 14 Ves. 313; 3 Mer. 674; 33 E. R. 542.

Annotations:—**Consd.** Corsbie *v.* Free (1840), Cr. & Ph. 64. **Mentd.** Shuttleworth *v.* Howarth (1841), Cr. & Ph. 228.

6066. —— **Debts of wife before marriage—When her creditors prove in husband's bankruptcy—Equity barred pro tanto.**]—Where a woman before her marriage is indebted, & her creditors have proved in her husband's bkpcy., she has no equity to a settlement out of her property as against the official assignee until the debts incurred before her marriage are provided for.—BARNARD *v.* FORD, CARRICK *v.* FORD (1869), 4 Ch. App. 247; 38 L. J. Ch. 671; 20 L. T. 289; 17 W. R. 478, L. JJ.

Annotation:—**Mentd.** *Re* Lush's Trusts (1869), 4 Ch. App. 591, L. JJ.

6067. —— **Husband domiciled where equity does not exist.**]—A domiciled Manxman came to England in 1855 & married a wife who had a vested reversionary interest. In 1875 he returned with his wife to the Isle of Man. In 1878 he became insolvent & executed a deed whereby he specifically assigned his interest in the fund to trustees for the benefit of creditors. In 1880 husband & wife returned to England, where they resided till 1882, when the husband went to America. The fund fell into possession in 1885. In Manx law an equity to a settlement does not exist:—*Held:* the domicile was Manx, & the

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wife's share of the fund went to the husband's assigns.—*Re* MARSLAND (1886), 55 L. J. Ch. 581; 54 L. T. 635; 34 W. R. 540.

Annotation:—**Mentd.** *Re* De Nicols, De Nicols *v.* Curlier, [1898] 1 Ch. 403.

6068. Whether equity can be released.]—A wife's equity to a settlement is personal to her, & the children are deprived if the wife consents that the husband or those who claim under him shall possess the property.—STEINMETZ *v.* HALTHIN (1820), 1 Gl. & J. 64.

Annotations:—**Consd.** Baker *v.* Bayldon (1848), 8 Hare, 210. **Refd.** Groves *v.* Clarke (1836), 1 Keen, 132; De La Garde *v.* Lempriere (1843), 6 Beav. 344. **Mentd.** Pierce *v.* Thornely (1828), 2 Sim. 167; Lloyd *v.* Mason (1845), 5 L. T. O. S. 454; Wallace *v.* Auldjo (1863), 2 Drew. & Sm. 216.

6069. —— Not in favour of husband when claimed against his assignees.]—If the wife insists upon her equity as against the assignees in bkpcy. of her husband it attaches for the benefit of her children, & then she cannot afterwards release it in favour of her husband.—BARKER *v.* LEA (1822), 6 Madd. 330; 56 E. R. 1117.

Annotation:—**Mentd.** Whittem *v.* Sawyer (1839), 1 Beav. 593.

SUB-SECT. 4.—PROPERTY ACQUIRED IRREGULARLY OR BY FRAUD.

6070. Bill of exchange—Transaction cancelled & bill restored on eve of bankruptcy.]—S. obtained bills of exchange from deft. upon a fraudulent representation that a security given by him to deft., which was void, was an ample security. On the next day having resolved to stop payment, he informed deft. that he had repented of what he had done, & had sent express to stop the bills, & would return them, & three days afterwards committed an act of bkpcy., after which he returned to deft. all the bills, except one, which had been discounted, & also two bank-notes, part of the proceeds of such discount, & deft. delivered back the security. Afterwards a commission of bkpcy. issued against S., the assignees under which commission brought trover against deft. for the bills & bank-notes:—*Held*: deft. was entitled to retain them.—GLADSTONE *v.* HADWEN (1813), 1 M. & S. 517; 2 Rose, 131; 105 E. R. 193.

Annotations:—**Apld.** Carvalho *v.* Burn (1833), 4 B. & Ad. 382. **Mentd.** Parnham *v.* Hurst (1841), 8 M. & W. 743; St. Thomas' Hospital, Governors *v.* Richardson (1909), 101 L. T. 771, C. A.

See, further, Sect. 2, *ante*.

6071. Title deeds pledged in breach of trust.]—M. & Co. being in possession of all the title deeds of certain leasehold premises belonging to bkpt., as a security for a debt due from him, at his request, delivered to the solr. of the original lessor, upon an engagement of redelivery, the original lease & the immediate assignment to bkpt., for the purpose of enabling bkpt. to procure an extension of the term of the lease. Bkpt. received the lease & assignment from the solr. of the original lessor, & deposited them with C. & Co. as a security for money advanced. After the bkpcy., Messrs. C. & Co., upon payment of their claim thereon, delivered the lease & assignment to the assignees under the commission:—*Held*: M. & Co. were, in equity, to be considered as in possession of the lease & assignment, & they had a priority of lien.—*Re* FOOT, *Ex p.* MEUX, *Ex p.* CAWTHORNE (1821), 1 Gl. & J. 116; *subsequent proceedings* (1822), 1 Gl. & J. 240, L. C.

Annotation:—**Mentd.** Jones *v.* Jones (1838), 8 Sim. 633.

6072. Goods delivered in breach of trust.]—Bkpt. had a contract for the supply of candles. Petitioner agreed to assist him, on condition that they were delivered in his name. Bkpt. made out a bill in petitioner's name, but delivered candles supplied by petitioner in his own waggons. His assignee after the bkpcy. received the price:—*Held*: the assignee, if the candles had been sold in bkpt.'s own name, could not ground a title on his fraud, & the assignee held the money on trust for petitioner.—*Re* BIRKS, *Ex p.* CARLON (1834), 4 Deac. & Ch. 120; 2 Mont. & A. 39; 4 L. J. Bcy. 6, Ct. of R.

See, also, Sect. 5, *post*.

6073. Sale at reduced price—Right to benefit on paying back purchaser.]—A trader was entitled to leaseholds, subject to an annuity for lives granted to an insurance co., who, at the instance of the trader, & on his representation that he was in failing circumstances, agreed to release it for less than its estimated value. The trader's solr. afterwards wrote to the co., stating that difficulties had been met with in attempting to sell the leaseholds, by reason of a mtge., & proposing that the annuity should be sold at the reduced price to an auctioneer, who had acted for the trader in attempting to sell the property (at a loss to himself), & who would be "still able to serve the trader in some degree." The co. assented, provided the trader signed a written consent. That was done, & the annuity was assigned absolutely to the auctioneer. The trader immediately afterwards became bkpt.:—*Held*: the creditors were entitled to the benefit of the purchase on repayment to the acutioneer of the purchase-money & interest, & the latter should be ordered to pay the costs of the assignees in a suit instituted by them, in which he insisted that he was entitled to retain the purchase for his own benefit.—BASKETT *v.* CAFE (1851), 4 De G. & Sm. 388; 64 E. R. 881.

6074. Goods purchased without intention of paying for them.]—On Nov. 23 S. was served with a debtor's summons for a debt slightly exceeding £50, & on Dec. 1 committed an act of bkpcy., by non-compliance with it. On Dec. 3 the creditor filed & served a petition for adjudication. On Dec. 5 S. bought wool at an auction, & called for it on the 12th. The vendor, being unaware of his embarrassed circumstances, allowed him to take it away without his paying for it, & without his making any representation as to payment. On the 14th S. was adjudged bkpt., not having taken any steps to oppose the adjudication. He had not sold any of the wool, nor did it appear that he had attempted to raise money on it:—*Held*: the trustee was entitled to retain the wool as against the vendor, for the above facts did not furnish sufficient reason for assuming that S. did not intend

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6074 i. *Goods purchased without intention of paying for them.*]—Goods obtained in circumstances which lead the ct. to believe that they were purchased with a preconceived design of never paying for them will not, upon the purchaser's bkpcy., pass to his assignee, but will be returned to the vendor.—*Re* GAFFNEY (1868), 2 I. L. T. Jo. 317.—IR.

6074 ii. —— *On eve of bankruptcy.*]—When goods are delivered on the eve of bkpcy. they will not be returned by the assignees unless it can be shown that there was fraud in contracting the debt.—*Re* BEHUN (1869), 20 L. T. 179.—IR.

6074 iii. —— ——.]—A party purchased whisky to be paid on delivery. At the time of delivery he induced the seller to take a portion of the price, with a promise to pay the balance in a few days, & concealed the fact that he was then taking steps for his sequestration, which was shortly afterwards awarded. In a question between the seller & the trustee:—*Held*: the delivery did not pass the property.—WATT *v.* FINDLAY & HENDRIE (1846), 8 Dunl. (Ct. of Sess.) 529.—SCOT.

to pay for the wool. *Semble :* if it had been made out that S. did not intend to pay for the wool, the vendor would have been entitled to rescind.—*Re* SHACKLETON, *Ex p.* WHITTAKER (1875), 10 Ch. App. 446 ; 44 L. J. Bcy. 91 ; 32 L. T. 443 ; 23 W. R. 555, L. JJ.

Annotation :—**Mentd.** Edgington *v.* Fitzmaurice (1885), 29 Ch. D. 459.

6075. ——.]—When goods have been purchased on credit by debtor with the fraudulent intention of not paying for them, the vendor, on discovering this fact, is entitled to disaffirm the sale within a reasonable time & retake possession of the goods, although he has knowledge of the committal of an act of bkpcy. by debtor.—*Re* EASTGATE, *Ex p.* WARD, [1905] 1 K. B. 465 ; 74 L. J. K. B. 324 ; 92 L. T. 207 ; 53 W. R. 432 ; 21 T. L. R. 198 ; 49 Sol. Jo. 205 ; 12 Mans. 11.

Annotation :—**Folld.** Tilley *v.* Bowman, [1910] 1 K. B. 745.

See, further, No. 5736, *ante.*

SUB-SECT. 5.—OTHER PROPERTY.

A. Life Interests and Legacies.

6076. Money of wife lent to husband for life—No interest to be paid until trade declined—Right of trustee to life interest during life of husband.]—A wife's money was paid to trustees in trust to advance same to the husband on bond at 5 per cent., no interest to be paid till he should decline trade, when the interest was to be paid him for life, remainder to the wife, remainder to the children. The husband having become bkpt. : —*Held :* the assignees were entitled to the interest of the dividends during the life of the husband.—STRATTON *v.* HALE (1789), 2 Bro. C. C. 490 ; 29 E. R. 269, L. C.

Annotations :—**Dbtd.** *Re* Brown, *Ex p.* Turpin (1832), 1 Deac. & Ch. 120, Ct. of R. *Stratton* v. *Hale* appears to rest upon an erroneous foundation, & has been in practice overruled by a series of orders in bkpcy. (ERSKINE, C.J.) ; *Re* Prior, *Ex p.* Young (1835), 4 Deac. & Ch. 645, Ct. of R. **Refd.** *Re* Severn, *Ex p.* King (1835), 1 Deac. 143, L. C. ; Smith *v.* Smith (1835), 1 Y. & C. Ex. 338.

6077. Bankrupt entitled to life interest in stock vested in trustees—Trustees authorizing third party to receive & pay over income to wife of bankrupt—Liability to trustee in bankruptcy for money had & received.]—By a marriage settlement, the trustees covenanted to permit the husband to receive during his life the dividends arising from bank stock vested in their names. The husband became bkpt., & the trustees authorised a third party to receive the dividends & pay them over to bkpt.'s wife :—*Held :* they were liable to the husband's assignee in an action for money had & received.—ALLEN *v.* IMPETT 1818), 2 Moore, C. P. 240 ; 8 Taunt. 263 ; 129 E. R. 384.

Annotations :—**Dbtd.** Bartlett *v.* Dimond (1845), 14 M. & W. 49. **Refd.** Edwards *v.* Lowndes (1852), 1 E. & B. 81. **Mentd.** L. & N. W. Ry. Co. *v.* Glyn (1859), 28 L. J. Q. B. 188.

6078. Bankruptcy of tenant for life & tenant in tail—Nature of estate taken by trustee.]—A joint commission of bkpcy. having issued against the tenant for life & the tenant in tail :—*Held :* the assignees, by the bargain & sale, only took an estate for life in the premises, & a base fee in remainder.—JERVIS *v.* TAYLEUR (1820), 3 B. & Ald. 557 ; 106 E. R. 765.

Annotation :—**Refd.** Johnson *v.* Smiley (1853), 17 Beav. 223.

6079. Devise to bankrupt & wife for joint lives & life of survivor—Trustee holding land till death of bankrupt—Action by widow for permissive waste.] —Lands were devised to A. & his wife during their joint lives & the life of the survivor. A. became bkpt., & his estate vested in deft. as assignee, who entered & held the lands till A.'s death :—*Held :* the widow could not maintain an action for permissive waste suffered by deft. while in possession. —BACON *v.* SMITH (1841), 1 Q. B. 345 ; Arn. & H. 280 ; 4 Per. & Dav. 651 ; 10 L. J. Q. B. 119 ; 5 Jur. 549 ; 113 E. R. 1164.

Annotation :—**Refd.** Woodhouse *v.* Walker (1880), 5 Q. B. D. 404, D. C.

6080. Trustee of tenant for life cutting ornamental timber—Right of tenant in tail in remainder to produce & accumulations.]—Assignees of bkpt. tenants for life cut down ornamental timber. On a bill filed on behalf of the first tenant in tail, an infant :—*Held :* the assignees must bring the produce of sale into ct., & the fund & accumulations should be paid out to the tenant in tail on attaining his majority.—LUSHINGTON *v.* BOLDERO (1851), 15 Beav. 1 ; 21 L. J. Ch. 49 ; 18 L. T. O. S. 151 ; 16 Jur. 140 ; 51 E. R. 435.

Annotations :—**Consd.** Bagot *v.* Bagot, Legge *v.* Legge (1863), 32 Beav. 509. **Refd.** Seagram *v.* Knight (1867), 36 L. J. Ch. 918, L. C.

6081. Life interest to be applied for maintenance, etc., of bankrupt & children.]—Bequest in trust to pay the interest to testator's wife for life, for the separate use of his wife & their children, & applied for the maintenance & support of herself, & the maintenance, education, clothing, & support of such children. The widow mortgaged her interest & became insolvent :—*Held :* the trust was only for the benefit of those children requiring support, & a reference was directed to ascertain what part of the income was necessary for that purpose.

The widow having become insolvent & assigned away all her interest, her assignees are entitled to receive merely the surplus over & above what is necessary for the maintenance & support of her children (ROMILLY, M.R.).—CARR *v.* LIVING (1860), 28 Beav. 644 ; 54 E. R. 514.

Annotation :—**Consd.** *Re* Booth, Booth *v.* Booth (1894), 42 W. R. 613.

6082. Bankrupt indebted to estate from which income derived—Right of trustee to income on dividends.]—The trustee of bkpt.'s marriage settlement proved his debt before the comrs. The

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PART XX. SECT. 4, SUB-SECT. 5.—A.

a. *Annuity.*]—A will provided for the payment of an annuity to W. "for the maintenance of herself & such of her unmarried daughters as shall for the time being be living with her" :—*Held :* an assignment by W. & her daughters of the annuity for the benefit of her creditors was valid.—*Re* PHARAZYN, IZORD *v.* LLOYD (1905), 25 N. Z. L. R. 591.—N.Z.

c. *Life interest to enable bankrupt to maintain children.*]—P. & his wife made a mutual will, in which they bequeathed their landed property to their two sons, subject to an usufruct in favour of the survivor "in that he or she may be better enabled to maintain & support & educate our children until they become of age or marry." P. died, & the wife adiated under the will & subsequently married B. B. & his wife thereafter became insolvent, & the trustee in her estate claimed the benefit of the bequest to B.'s wife :—*Held :* the trustee was entitled thereto, & he was not bound by any condition as to maintenance, support & education of the children.—PRICE'S ESTATE *v.* BAKER & PRICE (1905), 22 S. C. 321.—S. AF.

e. *Life interest to bankrupt & after her death to children—Death of bankrupt without issue.*]—Testator devised the residue of his estate to trustees on trusts & directed the trustees, subject to certain prior trusts, to sell freehold property & to stand possessed of the share of his granddaughter S. in the purchase price upon trust to pay the rents & profits to her for life, & after her death for her children, who should attain majority or, if girls, should marry before majority. A similar trust was imposed in respect to leasehold property. S. survived testator & married out of community of property. In 1905 her estate was sequestrated as insolvent, & in 1913 she died without issue & without having been discharged from insolvency :—*Held :* the share of S. upon her death without issue vested in her trustee in insolvency & not in the trustees or residuary legatees under the will.—KEMP'S ESTATE *v.* MCDONALD'S TRUSTEE (1915), App. D. 491.—S. AF.

g. *Reversionary interest.*]—Insolvent's reversionary interest in an estate passes to his assignee.—GRAY *v.* HATCH (1871), 18 Gr. 72.—CAN.

Sect. 4.—"The property of the bankrupt": Sub-sect. 5, A. & B.; sub-sect. 6, A.]

assignee having refused to pay the dividend in respect of the debt or to set apart any of bkpt.'s estate to answer the trusts of the settlement, the trustee was admitted a creditor & allowed a dividend in respect thereof which was to be invested by the trustee & the interest thereon paid to the assignee for the benefit of the creditors during the life of bkpt., & after his decease upon trust for the purposes of the settlement.—*Ex p.* SMITH (1741), 1 Cooke's Bankrupt Laws, 7th ed., p. 224, L. C.

Annotation:—**Distd.** *Re* Brown, *Ex p.* Turpin (1832), 1 Deac. & Ch. 120, Ct. of R.

6083. —— Dividends retained until estate made good—Bond given by bankrupt in consideration of wife's fortune.]—Bkpt., in consideration of his wife's fortune, had given a bond, which was settled on bkpt. for life, with remainder to his wife. He had not paid the money secured by the bond, & the trustees proved for the amount due:—*Held:* (1) if there had been no bkpcy., the husband could have claimed no interest until he had made good the principal, & his assignees were subject to all the equities which effected him; (2) dividends should be invested & accumulate in the hands of the trustees until the principal sum had been realised, & then the interest should be paid to bkpt.'s assignees during his life.—*Re* BROWN, *Ex p.* TURPIN (1832), 1 Deac. & Ch. 120; Mont. 443; 1 L. J. Bcy. 46, Ct. of R.

Annotations:—**Distd.** *Re* Shute, *Ex p.* Shute (1833), Mont. & B. 385, Ct. of R. **Folld.** *Re* Prior, *Ex p.* Young (1835), 4 Deac. & Ch. 645, Ct. of R. **Consd.** *Re* Severn, *Ex p.* King (1835), 1 Deac. 143, L. C.; Smith *v.* Smith (1835), 1 Y. & C. Ex. 338. **Refd.** *Re* Manning, *Ex p.* Smith (1836), 2 Mont. & A. 536, Ct. of R.; Courtenay *v.* Williams (1844), 3 Hare, 539; Jones *v.* Mossop (1844), 3 Hare, 568.

See, further, Sect. 2, *ante*.

6084. —— —— Settlement of wife's property.]—By a marriage settlement, a wife's property was settled on her husband for life, with a share if he survived the wife, with remainder to the wife. The husband became bkpt.:—*Held:* she was entitled to have her interest protected, & to prove by a trustee, the interest on the amount recovered to accumulate for her benefit.—*Re* SAUNDERS, *Ex p.* SAUNDERS (1834), 3 Deac. & Ch. 568, Ct. of R.

6085. —— —— Bond given by bankrupt to testator—Bequest to bankrupt's wife & after her death to bankrupt.]—Bkpt. was indebted, on bond, to testator, his father-in-law, who bequeathed a sum to his daughter for life, & after her decease to bkpt for life, & afterwards to their children:—*Held:* the assignees could not, after the death of the wife, receive the interest on the dividend received by the trustees under the will, until the sum bequeathed was made good by the accumulation of interest.—*Re* PRIOR, *Ex p.* YOUNG (1835), 4 Deac. & Ch. 645; 2 Mont. & A. 228; 4 L. J. Bcy. 60, Ct. of R.

Annotation:—**Folld.** *Re* Severn, *Ex p.* King (1835), 1 Deac. 143, L. C.

6086. —— —— Bond given by bankrupt's firm for sum due to testator's estate.]—Testator, who was possessed of a large capital in a house of trade, in which he was a partner, bequeathed the residue of his estate to trustees, of whom A. was one, upon trust to permit A. to receive the annual produce for his life, & after his death to transfer the principal to his children, directing that if A. became a partner in the house of trade, testator's whole capital should continue therein, A. & the other partners giving to his exors. their joint bond for the amount. A. became a partner, the bond was given, & the firm became bkpt., & the trustees proved the amount due against the joint estate:—*Held:* the dividends on the proof should be invested in stock, & the interest should accumulate, until the loss occasioned by the bkpcy. was made good, & the whole of the principal sum then due was realised.

The principle is, that the assignees represent bkpt., & take his separate estate, subject to the equities that affect it, one of which is, that before he receives the dividends on the trust fund, he shall make good the loss occasioned by his bkpcy. (*per* CUR.).—*Re* SEVERN, *Ex p.* KING (1835), 1 Deac. 143; 2 Mont. & A. 410, L. C.

Annotations:—**Refd.** Woodyatt *v.* Greisley (1836), Donnelly, 135; *Re* March, *Ex p.* Gonne (1837), 2 Deac. 278, Ct. of R.

6087. —— —— Covenant to pay sum to marriage trustees.]—A trader covenanted to pay a sum to the trustees of his marriage settlement, on trust to pay half the interest to the wife, half to the husband, with usual trusts for wife & children. The trader became bkpt., having paid part only:—*Held:* the trustees alone should prove, & the dividends on the whole proof should be paid into ct. & accumulated till the amount agreed by the husband was made up, with liberty for any party to apply.—*Re* MANNING, *Ex p.* SMITH (1836), 1 Deac. 385; 2 Mont. & A. 536, Ct. of R.

See, further, Sect. 2, *ante*.

6088. —— —— Trust funds invested in bankrupt's firm—Right of trustee in bankruptcy to income from settled real estate.]—Testatrix devised real estate to A., in trust for B. for life, & bequeathed £2,000 to A., in trust to pay the dividends to B. for life. The money was in the hands of A., B. & C., who were in partnership, & by the will the money was allowed to be retained by A., he paying interest, & the same was secured by the joint & several promissory note of the partners. A., B. & C. transferred the £2,000 to an account in their books, as due to A., as trustee & exor. of testatrix. A., B. & C., became bkpt., & trustees of the estate & fund being appointed in lieu of A., one of them proved against the joint estate, & a dividend being declared, the same was invested & paid to an account of "the legatees under the will." The assignees presented a petition, praying a declaration of their rights in the real estate & in the fund representing the £2,000, & that it might be declared that they were entitled to the dividends on the money invested for the life of B.:—*Held:* the dividends, on the proof of the £2,000, must be accumulated during the life of B. to make good the trust fund, but the assignees were entitled to the life interest of B. in the real estate.—*Re* COUSEN, *Ex p.* BARFF (1848), De G. 613; 17 L. J. Bcy. 22; 11 L. T. O. S. 474; 12 Jur. 668.

Annotations:—**Consd.** Fox *v.* Buckley (1876), 3 Ch. D. 508, C. A. **Apld.** *Re* Milnes, Milnes *v.* Sherwin (1885), 53 L. T. 534. **Refd.** *Re* Moore, Moore *v.* Moore (1881), 45 L. T. 466; Doering *v.* Doering (1889), 42 Ch. D. 203.

6089. —— Residuary legatee—Right of pecuniary legatee.]—Under an order of the ct., bkpt. had proved against his own estate in respect of a

h. ——.]—*Held:* all the equitable estate, right & interest of insolvent to part of the rents & profits of certain lands, to which he had a title expectant in reversion, had not vested in the assignees under 53 Geo. 3, c. 38, s. 18.—SMITH *v.* SMITH (1879), 3 L. R. Ir. 394, H. L.—IR.

j. ——.]—*Held:* Irish 1849 Act, s. 145, which contained provisions similar to those contained in 1857 Act, s. 271, did not affect mere equitable interests in leaseholds, & bkpt.'s mere equitable reversionary interest in a share of the rents & profits in a leasehold estate vested in the assignee in bkpcy.—*Re* DEANE'S TRUSTS, [1909] 1 I. R. 334.—IR.

k. *Bankrupt indebted to estate from which income derived—Beneficiary trustee—Breach of trust.*]—Where a *cestui que trust*, who is a trustee of a fund & entitled to a life interest in the

devastavit, where he was exor. & residuary legatee : —*Held :* a pecuniary legatee was entitled to be paid in full out of the dividend payable on the proof, the remainder only passing to the assignees as bkpt.'s representatives.—*Re* WEST, *Ex p.* TURNER (1842), 2 Mont. D. & De G. 613 ; 6 Jur. 840, Ct. of R.

6090. Legacy given to bankrupt before bankruptcy.]—A legacy given to bkpt. before his bkpcy. may be assigned by the comrs.—TOULSON *v.* GROUT (1701), 2 Vern. 432 ; 23 E. R. 877.

6091. Bankruptcy of married woman trader—No restraint on anticipation.]—Real property was by a marriage settlement vested in a trustee, in trust for a married woman for life for her separate use without restriction on anticipation, with remainder to such persons as she might appoint, with remainder in default of appointment. The married woman carried on a trade separately from her husband & became bkpt. :—*Held :* the trustee in bkpcy. in claiming the life estate was not interfering with or affecting the settlement within Married Women's Property Act, 1882 (c. 75), s. 19, & it passed to him under the bkpcy.

The question arises whether this life estate has passed to her trustee in bkpcy., or whether she is entitled to enjoy it notwithstanding her bkpcy. I can find no warrant for drawing any distinction between separate property acquired by settlement & separate property otherwise acquired, as regards the consequences attaching to it when acquired (LINDLEY, L.J.).—*Re* ARMSTRONG, *Ex p.* BOYD (1888), 21 Q. B. D. 264 ; 57 L. J. Q. B. 553 ; 59 L. T. 806 ; 36 W. R. 772 ; 32 Sol. Jo. 577, C. A.

Annotations :—**Consd.** *Re* Onslow, Plowden *v.* Gayford (1888), 39 Ch. D. 622 ; *Re* Lumley, *Ex p.* Hood Barrs, [1896] 2 Ch. 690, C. A. ; *Re* Wheeler's Settlmt. Trusts, Briggs *v* Ryan, [1899] 2 Ch. 717.

6092. —— Restraint on anticipation—Effect of death of husband.]—Where a married woman, entitled to separate estate with a restraint on anticipation, trades separately from her husband & becomes bkpt., her separate estate, subject to the restraint on anticipation, vests in her trustee in bkpcy. &, on the death of her husband in her lifetime, is assets for her creditors. In such a case the restraint on anticipation is in the nature of an incumbrance, which is removed by the death of the husband.—*Re* WHEELER'S SETTLEMENT TRUSTS, BRIGGS *v.* RYAN, [1899] 2 Ch. 717 ; 68 L. J. Ch. 663 ; 81 L. T. 172 ; 48 W. R. 10 ; 15 T. L. R. 545 ; 6 Mans. 372.

Life interests liable to forfeiture on bankruptcy.] —*See* Sub-sect. 2, D., *ante*.

Exercise of powers under Settled Land Acts, 1882 (c. 38), & 1890 (c. 69) by bankrupt tenant for life.]—*See* Sect. 8, *post*.

B. Estate Tail.

6093. Bankrupt tenant in tail in remainder of copyholds—No power to bar entail until falling into possession—Purchase of life estate from trustee by bankrupt after certificate—Right of trustee to bar entail on estate vesting in possession.]—A tenant in tail in remainder of copyholds became bkpt., & by the custom the entail could not be barred until it fell into possession. Bkpt. obtained his certificate, & purchased of his assignees his life-estate only. On the subsequent death of the tenant for life :—*Held :* the assignees had then no power to bar the entail & acquire the remainder in fee, subject to the life-estate sold to bkpt.—JOHNSON *v.* SMILEY (1853), 17 Beav. 223 ; 1 Eq. Rep. 397 ; 22 L. J. Ch. 826 ; 22 L. T. O. S. 39 ; 1 W. R. 440 ; 51 E. R. 1019.

Annotations :—**Mentd.** *Re* Inkson's Trusts (1855), 26 L. T. O. S. 146 ; Betteley *v.* Stainsby (1862), 9 Jur. N. S. 440.

6094. Insolvent tenant in tail in remainder—Mortgage of estate after vesting in possession—Estate tail barred in subsequent bankruptcy—Title of trustee.]—Debtor took the benefit of Insolvent Debtors Act, & conveyed all his property to his assignee. He did not disclose the fact that he was entitled to an estate in tail in remainder, expectant on the death of his father. After his father's death he mortgaged the estate. The mtgee. had notice of the insolvency. Debtor subsequently became bkpt., & under the bkpcy. the estate tail was barred :—*Held :* the interest of the assignee in the insolvency ceased on debtor's death, & the estate belonged to the mtgee. & the assignees in bkpcy.—STURGIS *v.* MORSE (1860), 2 De G. F. & J. 223 ; 29 L. J. Ch. 766 ; 2 L. T. 647 ; 6 Jur. N. S. 766 ; 8 W. R. 737 ; 45 E. R. 607, L. JJ.

Annotations :—**Consd.** *Re* Gaskell & Walters' Contract, [1906] 1 Ch. 440. **Refd.** Hankey *v.* Martin (1883), 49 L. T. 560.

SUB-SECT. 6.—" WHETHER SITUATED IN ENGLAND OR ELSEWHERE."

A. Bankruptcy in England.

6095. General policy of Bankruptcy Acts—As to colonial property.]—The policy of the legislature is clearly shown by reference to other statutes. By 1849 Act, s. 142, all lands of bkpt. " in England, Scotland, Ireland, or in any of the Dominions, Plantations, or Colonies belonging to Her Majesty,

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whole of the fund, misapplies it & becomes bkpt., & the corpus has been replaced through the accumulation of the income received on the dividends, the income of the fund so replaced is, during the life of bkpt., available for distribution among the creditors.—*Re* GLOAG'S ESTATE (1892), 11 N. Z. L. R. 90.—**N.Z.**

6091 i. *Bankruptcy of married woman—No restraint on anticipation—Effect of protection order.*]—In 1875, P. transferred lands to defts. as trustees for the separate use of his wife M. Subsequently M., being deserted by her husband, obtained a protection order under 22 Vict. No. 6, s. 4. Afterwards she drew a bill for £50 in favour of pltf. on defts. which they refused to accept, & pltf. sued M. & obtained a verdict. M. then sequestrated her estate, & her official assignee sold her interest in the lands to pltf. :—*Held :* the separate estate of M. was liable to sequestration, she having obtained a protection order.—ROBERTS *v.* HILL (1889), 10 N. S. W. Eq. 72.—**AUS.**

6092 i. —— *Restraint on anticipation.*]—Under Married Women's Property Act, 1890 (Vict. No. 1116), s. 22, property of a married woman, which she is restrained from anticipating, does not, on her insolvency, form part of the estate divisible among her creditors, notwithstanding Insolvency Act, 1897 (Vict. No. 1513), s. 119.—FORSTER *v.* SHACKELL (1906), 3 C. L. R. 460.—**AUS.**

PART XX. SECT. 4, SUB-SECT. 5.—B.

s. *Insolvent tenant in tail—Mortgage by insolvent in belief he was seised in fee—Application by commissioner to bar entail.*]—A trader, believing that he was seised in fee of lands, mortgaged & charged them with debts, & became bkpt. It afterwards appeared that he was only tenant in tail. On application to the Lord Chancellor, that the comr. might execute the deed necessary to bar the estate tail, he was directed to execute the deed of confirmation under 4 & 5 Will. 4, c. 92, ss. 48, 49.—*Re* WHITTLE (1850), 2 Ir. Jur. 113.—**IR.**

t. *Bankrupt tenant in quasi tail.*]—R. took an estate in *quasi* tail under a will, & became bkpt. without having barred the *quasi* entail :—*Held :* though there was no provision in Irish Bkpcy. Acts for disposition of estates in *quasi* tail, all the estate which bkpt. could have disposed of became vested in his assignees.—*Re* LEADBEATER'S ASSIGNEES ESTATE (1873), I. R. 8 Eq. 42.—**IR.**

6094 i. *Insolvent tenant in tail in remainder—Evidence of property passing.*]—By deed of 1795, A. conveyed the lands of K., whereof he was seized in fee, to his own use, for life, remainder, subject to £500 secured by a term for his younger children, to J., his second son, for life, remainder to his third, etc., sons in tail. In 1818 G., the fourth son, entitled to an estate tail in remainder under the deed, became insolvent. On a sale of the fee the abstract of title stated G.'s insolvency. The assignment under the insolvency had been lost, but the deed of 1795 was referred to in the sched. :—*Held :* the abstract & sched, afforded sufficient evidence of an actual assignment of the estate tail in remainder under Insolvent Act then in force.—KEOGH *v.* KEOGH (1850), 13 I. Eq. R. 284.—**IR.**

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are to vest in his assignees." By 1883 Act, s. 168, the property which is passed to the trustee includes "land, whether situate in England or elsewhere." Scotch 1856 Act, s. 102, vests in the trustee bkpt.'s "real estate situate in England, Ireland, or in any of Her Majesty's dominions." Irish 1857 Act, s. 268, vests in bkpt.'s assignees all his land "wheresoever situate." No reason can be assigned why 1869 Act should be governed by a different policy from that which was directly expressed in the Scotch & Irish Acts, & in the English Acts immediately preceding & immediately succeeding. It is a much more reasonable conclusion that the framers of the Act considered that in using general terms they were applying their law wherever the Imperial Parliament had power to apply it, & there is no good reason why the literal construction of the words should be cut down so as to make them inapplicable to a colony (*per* CUR.).—CALLENDER SYKES & Co. *v.* LAGOS COLONIAL SECRETARY & DAVIES, WILLIAMS *v.* DAVIES, [1891] A. C. 460; 60 L. J. P. C. 33; 65 L. T. 297, P. C.

6096. Personal property—In Scotland.]—A commission of bkpcy. vests in the assignees under it all the personal or movable property of bkpt., precluding creditors in Scotland, where bkpt. has also resided & traded, from attaching, by legal process, the personal or movable property of bkpt., in that country, or from administering it in a course of distribution under a sequestration.—SELKRIG *v.* DAVIES (1814), 2 Dow, 230; 2 Rose, 97, 291; 3 E. R. 848, H. L.

Annotations:—**Consd.** *Ex p.* Cridland (1814), 3 Ves. & B. 94, L. C. **Apld.** *Re* Oriental Steam Co. (1874), 22 W. R. 622. **Refd.** Scott *v.* Bentley (1855), 1 K. & J. 281. **Mentd.** *Re* Mowat, *Ex p.* Geddes (1824), 1 Gl. & J. 414, H. L.; Randall *v.* Randall (1835), 7 Sim. 271; Cockerell *v.* Dickens (1840), 3 Moo. P. C. C. 98, P. C.; Fergusson *v.* Spencer (1840), 2 Scott, N. R. 229; Darby *v.* Darby (1856), 3 Drew. 495; *Re* Douglas, *Ex p.* Wilson (1872), 7 Ch. App. 490, L. JJ.; Banco de Portugal *v.* Waddell (1880), 5 App. Cas. 161, H. L.; *Re* Artola Hermanos, *Ex p.* Châle (1890), 59 L. J. Q. B. 254, C. A.

6097. —— ——.]—Where an English commission precedes a Scotch sequestration, all the Scotch personal estate passes under the commission.—*Re* CRIDLAND, *Ex p.* CRIDLAND (1814), 3 Ves. & B. 94; 2 Rose, 164; 35 E. R. 415.

Annotation:—**Mentd.** *Re* O'Reardon (1873), 9 Ch. App. 74, L. C. & L. J.

6098. —— ——.]—Circumstances in which:—*Held:* the assignees took all the property in the hands of bkpt.'s agent at Edinburgh as property to be administered under the English Commission.—*Re* MABERLEY, *Ex p.* SOLOMONS (1833), Mont. & B. 308; 3 Deac. & Ch. 77; 2 L. J. Bcy. 62, Ct. of R.

Annotation:—**Refd.** *Re* Maberly, *Ex p.* National Bank of Scotland (1834), 4 Deac. & Ch. 32, Ct. of R.

6099. —— **In foreign country—Power of court to order bankrupt to execute transfer or power of attorney.**]—Petition that bkpt. might assign to his assignees certain debts due to him in North America, or might execute a power of attorney to them to receive same, upon affidavits that debtors in America refused to take notice of the interest of the assignees, or to pay the debts without an actual assignment or power of attorney from the creditor:—*Held:* the ct. could not grant the petition.—*Ex p.* BLAKES (1787), 1 Cox, Eq. Cas. 398; 29 E. R. 1219, L. C.

6100. —— —— **Money invested in name of wife.**]—W., after committing an act of bkpcy., sold his property in England & remitted the proceeds to France, where it was invested in French funds, which he transferred into his wife's name & she transferred them to her sisters:—*Held:* the French funds were the property of W.'s assignee.—STEAD *v.* CLAY (1828), 4 Russ. 550; 6 L. J. O. S. Ch. 138; 38 E. R. 913.

PART XX. SECT. 4, SUB-SECT. 6.—A.

6096 i. *Personal property—In Scotland.*]—A commission of bkpcy. vests in the assignees under it all the property of bkpt., wherever situate, precluding creditors in Scotland, from attaching by sequestration their debtor's property remaining or situate in that country, & from administering it in a course of distribution, under such process of sequestration.—ROYAL BANK OF SCOTLAND *v.* CUTHBERT (1813), 1 Rose, 462.—**SCOT.**

6096 ii. —— ——.]—Assignees under an English commission preferred to an arrester, in a competition respecting the effects of an Englishman situate in Scotland.—STROTHER *v.* READ (1803), 13 Fac. Coll. 622.—**SCOT.**

6096 iii. —— ——.]—On July 8, 1819, a commission was issued in England against F., a merchant in Berwick-upon-Tweed, & an assignment of his effects in favour of P. & W. was made on Aug. 13. It was alleged that in the Feb. preceding he had committed certain secret acts of bkpcy., & had become notoriously insolvent on Apr. 29, & that, on June 5, he had also granted an assignment of all his effects to certain persons for behoof of his creditors. On May 3, H. & Co., & G., merchants in Scotland, creditors of F., used arrestments *ad fundandam jurisdictionem* in the hands of M. & others, of Scotland, who were debtors to F., & again arrested, on the dependence of an action in the Ct. of Admiralty for constituting their debts, upon the 5th, 6th, 8th, & 13th of the same month, & they obtained decree on July 8:—*Held:* the arrestments were not affected by the commission, & the creditors, & not the assignees, should be preferred to the fund *in medio*.—HUNTER & Co. *v.* PALMER (1825), 3 Sh. (Ct. of Sess.) 586.—**SCOT.**

6096 iv. —— ——.]—*Held:* English assignees under a commission had no power to homologate a trust-deed executed by bkpts. in relation to their effects in Scotland, which it was alleged, fell under the commission.—STEIN'S ASSIGNEES *v.* BROWN & GIBSON-CRAIG (1831), 5 Wils. & S. 47.—**SCOT.**

6096 v. —— ——.]—Arrestment held preferable to an English creditor-deed of indenture & not intimated, the question being one of remedy, to be determined by the *lex fori*.—FINDLAY (OR DONALDSON) *v.* ORD (1855), 27 Sc. Jur. 625.—**SCOT.**

6096 vi. —— ——.]—A. & Co., storekeepers in Glasgow, received into their stores there a quantity of iron, for which they granted to B. & Co., merchants in Liverpool, warrants in the following terms:—"We have received into our stores & entered in our warehouse book in the name of B. & Co., & we now hold to their order, five hundred tons pig-iron, of Nos. 1 & 3, & we will deliver to their order by indorsement hereon, 'free on board' here, that quantity of pig-iron, same number & brand." In a competition between C., the holder of the warrants, blank indorsed, & B. & Co.'s inspectors in bkpcy.:—*Held:* B. & Co.'s inspectors could not compete with C.—CONNAL & Co. *v.* LODER (1868), 6 Macph. (Ct. of Sess.) 1095.—**SCOT.**

v. —— *In Ireland.*]—*Held:* by 6 Geo. 4, c. 16, s. 63, the debts due in Ireland, to a person found a bkpt. in England, vested in the assignees under the English commission.—TRONSON *v.* CALLAN (1827), 1 Hud. & B. 113.—**IR.**

w. —— *In Australia.*]—The Insolvency Ct. has no jurisdiction to remit proceeds of an insolvent estate in Victoria to be paid to English creditors in a concurrent bkpcy. there.—*Re* FENTON & SONS (1900), 26 V. L. R. 88. **AUS.**

y. —— *In Canada.*]—*Held:* 1869 Act did not extend to Canada for the purpose of vesting in a trustee under the Act the personal property situate in Canada of bkpt. having a Canadian domicil.—NICHOLSON *v.* BAIRD (1884), N. B. Dig. 312.—**CAN.**

a. —— ——.]—An agent claimed to retain possession of property for his indemnification in respect of accommodation notes given to his principals living in England, before the bkpcy. there of the latter, on which he had paid nothing:—*Held:* the assignee was entitled to a receiver.—KEMP *v.* JONES (1866), 12 Gr. 260.—**CAN.**

b. —— ——.]—Debts due to an English bkpt. in Nova Scotia cannot be attached.—HILL *v.* GOODALL, 3 Murd. Epit. 149.—**CAN.**

d. —— ——.]—A party cannot attach a debt due to an English bkpt. after the fiat of bkpcy. has issued.—FRASER *v.* MORROW (1858), 2 Thom. 232.—**CAN.**

e. —— ——.]—The personal estate situated in Canada belonging to bkpt. domiciled in England, vests in his trustee, as does (subject to the rule in *Cohen* v. *Mitchell* (1890), 25 Q. B. D. 262) property acquired after bkpcy. & before the loss of the English domicil.—*Re* EADE'S ESTATE, [1917] 2 W. W. R. 65; 33 D. L. R. 335.—**CAN.**

Annotations :—**Mentd.** Atchison *v.* Le Mann (1854), 23 L. T. O. S. 302, L. C. & L. JJ. ; Vaughan *v.* Vanderstegen (1854), 2 Drew. 363.

6101. —— —— English petition before foreign insolvency proceedings.]—Two persons of the name of H. carried on trade in Portugal as wine exporters, under the style of H. Brothers, & the same two persons carried on trade in London as wine merchants, under the style of H. & Sons. The traders fell into difficulties, & in Dec., 1877, presented a petition in England. Proceedings in insolvency were taken in Portugal, after the date of the petition, but before that of the adjudication, & the Portuguese Ct. took possession of the property there :—*Held :* the adjudication had relation back to the petition, from the date of which all the property of the traders abroad & in England became vested in the trustee.—BANCO DE PORTUGAL *v.* WADDELL (1880), 5 App. Cas. 161 ; 49 L. J. Bcy. 33 ; 42 L. T. 698 ; 28 W. R. 477, H. L.

Annotation :—**Mentd.** *Re* Somes, *Ex p.* De Lemos (1896), 3 Mans. 131.

6102. Real property—In Scotland—Obligation on bankrupt to convey.]—A commission does not affect the heritable or real property of bkpt. out of England, nor is there any legal obligation on him to convey it to his assignees, further than what the creditors are indirectly enabled to enforce, by the power which they have of granting or withholding his certificate.—SELKRIG *v.* DAVIES (1814), 2 Dow, 230 ; 2 Rose, 97, 291 ; 3 E. R. 848, H. L.

Annotations :—**Consd.** *Ex p.* Cridland (1814), 3 Ves. & B. 94, L. C. ; Cockerell *v.* Dickens (1840), 3 Moo. P. C. C. 98, P. C. **Mentd.** *Re* Mowat, *Ex p.* Geddes (1824), 1 Gl. & J. 414, H. L. ; Randall *v.* Randall (1835), 7 Sim. 271 ; Fergusson *v.* Spencer (1840), 2 Scott, N. R. 229 ; Scott *v.* Bentley (1855), 1 K. & J. 281 ; Darby *v.* Darby (1856), 3 Drew. 495 ; *Re* Douglas, *Ex p.* Wilson (1872), 7 Ch. App. 490, L. JJ. ; *Re* Oriental Steam Co. (1874), 22 W. R. 622 ; Banco de Portugal *v.* Waddell (1880), 5 App. Cas. 161, H. L. ; *Re* Artola Hermanos, *Ex p.* Chale (1890), 59 L. J. Q. B. 254, C. A.

6103. —— In colony.]—The bkpcy. laws vest in the assignees all the property. The whole interest in the property, which was bkpt.'s previously to the bkpcy., subject only to the distinction as to the local situation, is after the bkpcy. legally vested in the assignees, & the creditors shall have the benefit of an estate in Berbice under the bkpcy., & that principle is adopted as to estates in Scotland & also in the Plantations.—BENFIELD *v.* SOLOMONS (1803), 9 Ves. 77 ; 32 E. R. 530, L. C.

Annotations :—**Mentd.** Yewens *v.* Robinson (1840), 11 Sim. 105 ; Heath *v.* Chadwick (1848), 2 Ph. 649, L. C. ; Rochfort *v.* Battersby (1849), 2 H. L. Cas. 388, H. L. ; Smith *v.* Moffatt (1865), L. R. 1 Eq. 397 ; Payne *v.* Dicker (1871), 24 L. T. 492.

6104. —— —— Vests according to law of colony.]—1869 Act only passed immovable property in the colonies according to the law of the colonies (JESSEL, M.R.).—*Re* BOUSTEAD, *Ex p.* ROGERS (1881), 16 Ch. D. 665 ; 44 L. T. 357, C. A.

Annotation :—**Apprvd.** Callender, Sykes *v.* Lagos, Williams *v.* Davies, [1891] A. C. 460, P. C.

6105. —— —— ——.]—1869 Act applies to all Her Majesty's dominions, & an adjudication under that Act operates to vest in the trustee in bkpcy. bkpt.'s title to real estate situate in Lagos, subject to any requirements of the local law as to the conditions necessary to effect a transfer of real estate there situate.—CALLENDER SYKES & CO. *v.* LAGOS COLONIAL SECRETARY & DAVIES, WILLIAMS *v.* DAVIES, [1891] A. C. 460 ; 60 L. J. C. P. 33 ; 65 L. T. 297, P. C.

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g. —— *In Newfoundland.*]—Where trustees, under a composition deed, had distributed part of the property that came into their hands among the Newfoundland creditors at large, & retained the remainder in satisfaction of their own claims as creditors :—*Held :* assignees, under a commission in England, could not recover the amount of those payments from the trustees.—RYAN & SONS *v.* RYAN & SONS TRUSTEES (1819), 1 Nfld. L. R. 146.—**NFLD.**

h. —— ——.]—A partnership firm was insolvent in Newfoundland. One of the partners was also bkpt. in England :—*Held :* his assignees in England could not share with judgment creditors in the firm's estate, on the ground of debts due by the firm to the separate estate of the partner.—*Re* HAYES & GLYNN'S INSOLVENCY (1830), 2 Nfld. L. R. 5.—**NFLD.**

j. —— ——.]—Bkpt.'s place of residence was in Newfoundland, & his only place of business was there also, but, being in England, he was adjudged bkpt. & his assets vested in the hands of assignees. Subsequent to the vesting order bkpt.'s agent conducting his business in Newfoundland paid certain parties there in full for goods previously sold to bkpt. In an action by bkpt.'s assignees against the parties so paid to recover back the several sums :—*Held :* the English bkpcy. laws did not extend to the colonies as a code regulating bkpcies. in the colonies, but their effect was to vest in the assignee debtor's personal property which might be there.—WILLIAMS (ASSIGNEES OF RUTHERFORD) *v.* ROGERSON, *Re* INSOLVENCY OF RUTHERFORD (1854), 4 Nfld. L. R. 21, 55.—**NFLD.**

6102 i. *Real property—In Scotland—Obligation on bankrupt to convey.*]—Although a commission of bkpcy. does not in itself operate upon the heritable property of bkpt. in Scotland yet it imposes upon him a legal obligation to execute the proper conveyances, & do the necessary acts for transferring it to his assignees.—ROYAL BANK OF SCOTLAND *v.* CUTHBERT (1813), 1 Rose, 462.—**SCOT.**

6102 ii. —— ——.]—Where a commission in England is prior in date to a sequestration of the same person's estate in Scotland, but the disposition by bkpt. of his heritable property in Scotland to the assignees is posterior to the sequestration, the trustee under the sequestration is preferable to the assignees under the commission to the extent of the heritable estate of bkpt. situated in Scotland.—FALCONER *v.* WESTON (1814), 18 Fac. Coll. 32.—**SCOT.**

6102 iii. ——.]—*Held :* an English vesting order & appointment of an assignee, when registered in the General Register of Sasines at Edinburgh, operated a transference of the real right in bkpt.'s heritable property in Scotland in favour of the English assignee, & it was illegal for bkpt.'s creditors in Scotland to interfere with heritable property there, so vested in the assignee, or with his disposal or judicial management thereof.—RATTRAY *v.* WHITE (1842), 4 Dunl. (Ct. of Sess.) 880.—**SCOT.**

k. —— *In Ireland.*]—An English vesting order transfers to the assignee insolvent's property, subject to the Irish law relating thereto, & a creditor by judgment, prior to the date of the vesting order, is entitled to obtain a receiver over insolvent's lands in Ireland.—REILLY *v.* JACOB (1844), 7 I. Eq. R. 199.—**IR.**

l. —— ——.]—A., entitled to lands in Ireland, was discharged in England as an insolvent, under 1 Geo. 4, c. 119. The assignment of all his estate & effects to the provisional assignee was filed in the Insolvent Ct., but was not registered. The subassignment to the general assignee was not registered. Afterwards A., by deed duly registered, mortgaged his Irish estates to B., who had not notice of the insolvency :—*Held :* the mtgee.'s title should be preferred to that of insolvent's assignees.—BATTERSBY *v.* ROCHFORT (1845), 8 I. Eq. R. 284 ; 2 Jo. & Lat. 431 ; *on appeal* 2 H. L. Cas. 288.—**IR.**

6103 i. —— *In Australia.*]—K. was adjudicated bkpt. in England, but claimed to be entitled to land in Western Australia :—*Held :* all real estate possessed by bkpt. in Western Australia vested in bkpt.'s trustee.—SMITH *v.* LIDDELOW (1900), 2 W. A. L. R. 69.—**AUS.**

6103 ii. —— *In Canada.*]—An English commission in bkpcy. does not operate in Canada as an absolute conveyance of bkpt.'s property to the assignees, nor does it affect the privileges of provincial creditors, but the assignees may by action attach the property of bkpt., & out of the proceeds take the share which belongs to the English creditors.—BRUCE *v.* ANDERSON & RANDALL (1818), 2 R. de L. 75, 79.—**CAN.**

6103 iii. ——.]—*Held :* 1869 Act did not extend to Canada for the purpose of vesting in a trustee under the Act the real property situate in Canada of bkpt. having a Canadian domicil.—NICHOLSON *v.* BAIRD (1884), N. B. Dig. 312.—**CAN.**

6103 iv. —— ——.]—The real estate situated in Canada, belonging to bkpt. domiciled in England, vests in his trustee, as does (subject to the rule in *Cohen* v. *Mitchell* (1890), 25 Q. B. D. 262) property acquired after bkpcy., & before the loss of the English domicil.—*Re* EADE'S ESTATE, [1917] 2 W. W. R. 65 ; 33 D. L. R. 335.—**CAN.**

Sect. 4.—"The property of the bankrupt": Sub-sect. 6, B. (a) & (b).]

B. Bankruptcy outside England.

(a) Property situated in England.

6106. Personal property in England—Bankruptcy in Scotland.]—Where a Scotch sequestration precedes an English commission:—*Semble:* all the English personal estate passes under the sequestration.—*Re* CRIDLAND, *Ex p.* CRIDLAND (1814), 3 Ves. & B. 94; 2 Rose, 164; 35 E. R. 415.

Annotation:—**Mentd.** *Re* O'Reardon (1873), 9 Ch. App. 74, L. C. & L. J.

6107. —— —— Scotch 1856 Act—Vested reversionary interest.]—In 1860 H. was adjudicated a bkpt. in Scotland, under the above Act, & a creditors' trustee appointed. At the time of his bkpcy. H. was entitled to a vested reversionary interest in some property comprised in an English settlement, expectant on the decease of his father. In 1869 H. mortgaged his interest under the settlement to an assurance institution, who had notice of the bkpcy. In 1870 before H. had obtained his discharge, H.'s father died. The trustees of the settlement paid H.'s share into ct., & a petition was presented by the creditors' trustee, praying for payment of the fund to him:—*Held:* bkpt.'s interest under the settlement passed on his bkpcy. to the creditors' trustee, & the claim of the assurance institution was subject to the claims of the creditors.—*Re* LYDDON'S TRUSTS (1871), 24 L. T. 180; 19 W. R. 521.

6108. —— —— —— Subject to all equities.]—A judgment for a sum of money which was obtained in an action against A. in Scotland was extended to England under Judgments Extension Act, 1868 (c. 54), & the judgment creditor served a garnishee order on a debtor of A. in England. After the service of the garnishee order *nisi* A.'s estate was sequestrated:—*Held:* the trustee in the sequestration took the assets of bkpt. in England, subject to all liabilities to which they were subject at the date of the sequestration.—GALBRAITH *v.* GRIMSHAW, [1910] A. C. 508; 79 L. J. K. B. 1011; 103 L. T. 294; 54 Sol. Jo. 634; 17 Mans. 183, H. L.

Annotation:—**Apld.** Singer *v.* Fry (1915), 84 L. J. K. B. 2025.

6109. —— Bankruptcy in Ireland—Irish Insolvent Debtors Act, 1840 (c. 107).]—*Held:* the above Act vested all deft.'s property in England in the Irish assignees for the benefit of the creditors.—SHEPHERD *v.* BERESFORD (1851), 17 L. T. O. S. 295.

Annotation:—**Mentd.** Longbottom *v.* Stokes (1851), 18 L. T. O. S. 66.

6110. —— —— Prior to English adjudication.]—The property of bkpt., wherever situate, passes to his assignees in that ct. which first acquires jurisdiction; & where there was an Irish bkpcy., prior to an English adjudication, the ct. in England declined to order a trustee under an assignment for creditors, executed by bkpt. in England previously to both bkpcies., to pay over the money received by him under the assignment to the English official assignee, notwithstanding the creditors were all residents in England, & the money so received by the trustee was the proceeds of property situate in England.—*Re* HUGHES (1858), 32 L. T. O. S. 207.

6111. —— Bankruptcy in colony—Vested reversionary interest.]—A person having a vested reversionary interest in a trust fund of personal property in England became insolvent in South Australia. The property fell into possession, but before it was paid over insolvent died:—*Held:* if his domicil was Australian, the assignees under the insolvency were entitled to payment of the fund, but if it was English, the extrix. who had proved in England was entitled, & the assignees, in order to obtain it, must sue such personal representative, & on petition by the extrix. for payment of the fund inquiry as to domicil ordered.—*Re* BLITHMAN (1866), L. R. 2 Eq. 23; 35 Beav. 219; 35 L. J. Ch. 255; 14 L. T. 6; 12 Jur. N. S. 84; 55 E. R. 879.

Annotations:—**Consd.** *Re* Davidson's Settlmt. Trusts (1873), L. R. 15 Eq. 383. **Folld.** *Re* Hayward, Hayward *v.* Hayward, [1897] 1 Ch. 905. **Expld.** *Re* Anderson, [1911] 1 K. B. 896. **Consd.** *Re* Craig, Catling *v.* Esson (1916), 114 L. T. 896.

6112. —— —— ——.]—In 1898 debtor, whose domicil was English & who was entitled to a reversionary interest in personalty in England, was adjudicated bkpt. in New Zealand. In 1904 he was adjudicated bkpt. in England. The reversionary interest, which by an oversight was not disclosed in the New Zealand bkpcy., was discovered by the trustee in bkpcy. in England, & he at once gave notice of his title to the trustee of the funds:—*Held:* the official assignee in New Zealand was entitled, as against the trustee in bkpcy. in England, to the reversionary interest.—*Re* ANDERSON, [1911] 1 K. B. 896; 80 L. J. K. B. 919; 104 L. T. 221; 18 Mans. 217.

Annotation:—**Folld.** *Re* Craig, Catling *v.* Esson (1916), 86 L. J. Ch. 62.

6113. —— —— ——.]—Bkpt., so adjudicated in the State of Western Australia, was at the date of the adjudication entitled to a reversionary interest in a one-fifth share of funds in the English Ct. of Ch. standing to the credit of an administration action. By the law of the State the order of adjudication vested in the trustee, all the movable estate of bkpt. wheresoever situate. The trustee duly assigned the reversionary interest of bkpt. for value. Upon the reversionary interest falling into possession & a petition being presented for the payment out of the funds in ct.:—*Held:* the assignees of the reversionary interest had a good title thereto, irrespective of the domicil of bkpt. at the date of his bkpcy.—*Re* CRAIG, CATLING *v.*

PART XX. SECT. 4, SUB-SECT. 6.—B. (a).

6106 i. *Personal property in England—Bankruptcy in Scotland.*]—*Semble:* a sequestration in Scotland will preclude English creditors from suing out or sustaining a commission against debtor, the subject of an antecedent & operative sequestration.—ROYAL BANK OF SCOTLAND *v.* CUTHBERT (1813), 1 Rose, 462.—**SCOT.**

6106 ii. —— ——.]—A., a domiciled Scotsman, being the creditor of B., a banker in Scotland, obtained writs from the Mayor's Ct. in London, under which he attached funds in the hands of a banker there, who was indebted to B. Within sixty days thereafter the estates of B., were sequestrated on the petition of A.:—*Held:* the trustee in the sequestration was entitled to an interdict to prohibit A. from further following out the proceedings in the Mayor's Ct., & from preventing the trustee from recovering payment from the banker in London of the debt due to B.—LINDSAY *v.* PATERSON (1840), 2 Dunl. (Ct. of Sess.) 1373.—**SCOT.**

6111 i. —— *Bankruptcy in Canada.*]—The attachment or assignment by involuntary proceedings under the bkpcy. laws of a foreign country, in which bkpt. is domiciled, affects or transfers the titled to his purely personal property in England, unless the rights of citizens under some special statute are prejudicially affected.—BRAND *v.* GREEN, 20 C. L. T. 279; 13 Man. L. R. 101.—**CAN.**

6111 ii. —— *Insolvency in Newfoundland.*]—Where there are two branches of the same firm carrying on business, the one in England & the other in Newfoundland, the property of the firm in each country is, in the event of insolvency, exclusively divisible amongst the creditors who trusted the branch of the firm established in that country in which the property is situated.—*Re* RYAN'S ESTATE (1818), 1 Nfld. L. R. 96.—**NFLD.**

6111 iii. ——.]—Where insolvents are the sole members of a co-partnership, carrying on business in England & Newfoundland, though trading under different titles, the assets in England & Newfoundland form a common fund for the general body of creditors, subject to such prior & preferable claims as parties may have against the assets in either country.—*Re* INSOLVENT ESTATE OF SLADE (1862), 4 Nfld. L. R. 710.—**NFLD.**

ESSON (1916), 86 L. J. Ch. 62; 114 L. T. 896; [1917] H. B. R. 1.

6114. —— —— Interest in default of appointment.]—W., who had settled in Australia, & had, upon his own petition, been adjudicated an insolvent, & received his certificate there, afterwards visited England, & died there intestate, leaving a widow in Australia & creditors who had received only a small dividend on their debts. Under a settlement made on the marriage of the father & mother of W., the father, who died in 1869, had power to appoint a fund amongst his children, who in default of appointment were entitled equally. The power was not exercised. W.'s share of the fund had been paid into ct. On a petition by the official assignee in the insolvency:—*Held:* he was entitled to the fund in ct.—*Re* DAVIDSON'S SETTLEMENT TRUSTS (1873), L. R. 15 Eq. 383; 42 L. J. Ch. 347; 21 W. R. 454; 37 J. P. 484, L. J.

Annotations:—**Folld.** *Re* Lawson's Trust, [1896] 1 Ch. 175. **Consd.** *Re* Hayward, Hayward *v.* Hayward, [1897] 1 Ch. 905; *Re* Anderson, [1911] 1 K. B. 896; *Re* Craig, Catling *v.* Esson (1916), 86 L. J. Ch. 62.

6115. —— —— Fund in court.]—A fund in ct., which stood to the credit of a person who had become insolvent at Bombay, & had afterwards died there intestate, was ordered to be paid out to the official assignee of the Insolvent Ct. at Bombay, in whom all the property of Insolvent had been vested by an order of that ct., without requiring administration in England to be taken out, administration having been granted to his estate in India, & there being evidence that the debts proved in the insolvency were still unpaid, & that insolvent had not obtained his discharge.—*Re* LAWSON'S TRUSTS, [1896] 1 Ch. 175; 65 L. J. Ch. 95; 73 L. T. 571; 44 W. R. 280.

Annotations:—**Consd.** *Re* Anderson, [1911] 1 K. B. 896; *Re* Craig, Catling *v.* Esson (1916), 114 L. T. 896. **Refd.** *Re* Hayward, Hayward *v.* Hayward, [1897] 1 Ch. 905.

6116. Real property in England—Bankruptcy in colony.]—Upon a bkpcy. in Australia, real estate of bkpt. in England does not become vested in his assignee.—WAITE *v.* BINGLEY (1882), 21 Ch. D. 674; 51 L. J. Ch. 651; 30 W. R. 698.

(b) Property situated elsewhere.

6117. Bankruptcy in India—Real property in Java.]—The Orphan Chamber of Batavia, being the exors. of a foreign creditor in the island of Java, by their agent in Calcutta, proved the amount of their whole debt against the estate of A., who had been declared insolvent under Indian Insolvent Act, 1828 (c. 73), & after making such proof, & receiving the dividends upon the whole debt, instituted a suit on the island of Java, to recover a plantation or estate there, held by one of insolvents as trustee for the firm of A. & C. in equal shares, to which suit the assignees of insolvent appeared as defts., but judgment was given in favour of the creditor, & for the sale of the estate for his benefit, the proceeds of which amounted to three-fifths of his whole debt. The assignees of

PART XX. SECT. 4, SUB-SECT. 6.—B. (b).

n. *General rule.*]—The distribution of insolvent's effects is to be made *in loco concursus creditorum.* The *locus concursus creditorum* is the domicil of the insolvent. An assignment under the law of the domicil will operate as an assignment of the movable property wherever situate, subject to any rights which preferent creditors attaching any property before the date of assignment may have acquired by the law of the country in which such property is situate.—HOWSE SONS & CO.'S TRUSTEE *v.* HOWSE SONS & CO.'S TRUSTEES, JOCELYNE *v.* SHEARER & HINE (1884), 3 S. C. 14.—**S. AF.**

o. —— *After acquired property.*]—Although the assignment of bkpt.'s property to the representative of his creditors under the law of a country, which has jurisdiction over his person, operates as an assignment of the movables of bkpt. wherever locally situate, this rule does not extend to after acquired property situate in another country & which is acquired by bkpt. when he is not domiciled in the country where the assignment was made.—HALL *v.* WOOLF (1908), 7 C. L. R. 207.—**AUS.**

See, further, Sect. 7, *post.*

r. *Bankruptcy in foreign country—Property in Canada.*]—Bkpcy. proceedings in a foreign country will not affect real estate in Canada, & a bkpt. assignment made under the provisions of an Act of the Congress of the U. S. A. will not transfer immovable property in Canada.—MACDONALD *v.* GEORGIAN BAY LUMBER CO. (1878), 2 S. C. R. 364.—**CAN.**

t. —— —— *British Columbia.*]—Before an adjudication of bkpcy. in a foreign country can have effect as a transfer of property in British Columbia, it must be shown that bkpt. was domiciled in the country of the ct. making the adjudication.—BARINDS *v.* GREEN (1911), 16 B. C. R. 433.—**CAN.**

v. —— *Property in Scotland.*]—A foreign firm trading with Scotland had been sequestrated in the country of their domicil. An English creditor arrested a sum of money due to them in Scotland, & bkpts. & their foreign assignee presented a petition for sequestration:—*Held:* bkpt.'s goods wherever situated were carried by the foreign sequestration, & a second sequestration here was incompetent.—GOETZE & SOHN *v.* ADERS PREYER & CO. (1874), 12 Sc. L. R. 121.—**SCOT.**

x. —— ——.]—A commission of bkpcy. issued in America preferable to an arrestment used in Scotland subsequent to its date, though prior to the date of the assignment.—MAITLAND *v.* HOFFMAN (1807), 13 Fac. Coll. 622.—**SCOT.**

y. —— *Property in Transvaal.*]—A foreign order of sequestration has, *per se,* no effect upon immovable property situated in the Transvaal, but the ct. may, acting upon grounds of comity, recognise & give effect to such an order in respect of such property. This power is in the absolute discretion of the ct., & will only be exercised in cases in which no prejudice can be suffered by Transvaal creditors. In cases of such recognition the ct. will only empower the trustee to administer the Transvaal immovables on condition that their sale & disposal shall be in accordance with the law of the colony.—*Ex p.* STEGMANN (1902), S. C. 40.—**S. AF.**

a. *Bankruptcy in New South Wales—Property in Queensland.*]—R., who was domiciled in Queensland, had his estate sequestrated in New South Wales. H. obtained a judgment against R. in Queensland, & proceeded to levy execution on R.'s goods at Toowoomba:—*Held:* the Queensland cts. alone could deal with the property of bkpt. domiciled there, & H. was entitled to the goods in priority to the official assignee in New South Wales.—HARRIS *v.* RUSSELL (1868), 2 Q. S. C. R. 17.—**AUS.**

b. *Bankruptcy in Queensland—Property in Western Australia.*]—H., in 1890, being then a resident of & domiciled & naturalised in Queensland, filed there a petition for liquidation of his affairs by arrangement, & his then present as well as his after-acquired property, until his discharge became vested in the trustee appointed in the liquidation for distribution amongst the creditors. The estate in Queensland only paid a small dividend & no discharge was ever obtained by debtor, nor was the trustee ever released. Afterwards H. went to Western Australia, acquired a new domicil there, & traded & acquired property there. In 1908 H. executed a deed of assignment to W., as trustee, which was equivalent to a new bkpcy. The trustee in Queensland having applied for an order declaring that the property assigned by such deed was the property of the trustee in the Queensland liquidation proceedings, & for an order for transfer & delivery of same:—*Held:* the Queensland trustee had never had any title to the property, as it had not been the property of bkpt. at any time when he was subject to the jurisdiction of the Ct. or laws of Queensland.—*Re* HORAWITZ, *Ex p.* HALL (1908), 10 W. A. L. R. 152.—**AUS.**

c. *Bankruptcy in Victoria—Property in New Zealand.*]—S., a merchant residing & carrying on business in Victoria, consigned goods to an agent in Dunedin for sale, & subsequently left Victoria for New Zealand "for a time," according to an affidavit sworn by him. The estate of S. was sequestrated by the Supreme Ct. of Victoria shortly after he had left that colony for New Zealand. Some months afterwards S. executed in New Zealand a deed assigning his estate under Debtors & Creditors Act, 1862, for the benefit of all his creditors. Pltf. was the trustee under the deed, & deft. the assignee under the Victorian insolvency:—*Held:* at the time S.'s estate was sequestrated in Victoria he had not lost his Victorian domicil, & deft. was entitled to the proceeds of the goods consigned to Dunedin.—CLEVE *v.* JACOMB, Mac. 171.—**N.Z.**

6117 i. *Insolvency in Bombay—Property in Shanghai.*]—T. & Co. filed their petition in insolvency in Bombay on Apr. 29, 1907. M., one of the partners, was then at Shanghai, & swore his petition there on Oct. 16:—*Held:* the property of insolvent debtor's firm in

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A. filed a bill on the equity side of the Supreme Ct. at Calcutta, against the agent of the foreign creditor, resident within the jurisdiction, praying that the dividends might be refunded, & that defts. might be restrained by injunction from receiving any further dividends, until all the other creditors were put on an equal footing with the creditor at Java. Deft. having demurred, & obtained judgment against the assignees:—*Held*: the estate of Java, not passing to the assignees under the assignment, did not form any part of the fund that was available for the benefit of the general creditors, & the creditor was not bound to refund the dividends, & ought not to be prevented from receiving any future dividends, provided he did not receive more than 20*s.* in the pound upon his whole debt.—COCKERELL *v.* DICKENS (1840), 3 Moo. P. C. C. 98; 2 Moo. Ind. App. 353; 1 Mont. D. & De G. 45; 13 E. R. 45, P. C.

Annotation:—**Refd.** Banco De Portugal *v.* Waddell (1880), 42 L. T. 698, H. L.

SUB-SECT. 7.—PROPERTY ASSIGNED BY BANKRUPT.

See, generally, BILLS OF SALE; CHOSES IN ACTION; EQUITY.

6118. Freight.]—To an action by the assignees of bkpt. shipowner for the freight of a voyage to India, accruing to him before his bkpcy., deft. pleaded that the shipowner before his bkpcy. assigned by deed the freight in question to I., in trust to discharge a debt due from the shipowner to I., & to pay the surplus, if any, to the shipowner, that deft. had notice of such assignment, & that the freight, which was not sufficient to discharge the debt, had been demanded of him by I.:—*Held*: a good bar to the action.—LESLIE *v.* GUTHRIE (1835), 1 Bing. N. C. 697; 1 Scott, 683; 4 L. J. C. P. 227; 131 E. R. 1286; *sub nom.* LEISLE *v.* GUTHRIE, 1 Hodg. 83.

Annotations:—**Refd.** Tibbits *v.* George (1836), 5 Ad. & El. 107; D'Arnay *v.* Chesneau (1845), 13 M. & W. 796; Desborough *v.* Harris (1855), 5 De G. M. & G. 439, L. C. **Mentd.** The Ariel (1857), 11 Moo. P. C. C. 119, P. C.

6119. Substituted effects.]—R. obtained a loan from W. on the guarantee of deft., &, in consideration thereof, for the indemnity of deft., executed to him a deed. The deed witnessed that R., in consideration of the premises, did thereby "bargain, sell, assign, transfer & set over unto" deft., his exors., etc., a messuage & premises held by R. for a term of years, certain trade premises of R. held also for a term of years & the trade fixtures not removable by the tenant, & a farm & land of R., also that. for the above consideration, R. did thereby "bargain, sell & assign unto" deft., his exors., etc., the steam engine, dye-vats, & all other fixtures in the trade premises, & all the dyeing apparatus, & utensils, machines, tools, effects, & things in the trade premises, & all horses, cattle, carts, farming utensils & stock at the trade premises & the farm or lands, & all tillages, growing crops, etc., in the farm or lands, & all dye wares & consumable stores in the trade premises, & all stacks of hay, straw, & other consumable stores in the trade premises & the farm, & all the household furniture & effects in R.'s dwelling-house, "& all the estate, right, title, interest, use, trust, property, claim & demand whatsoever, both at law & equity," of R. to the same; & it was thereby declared that deft. should "stand possessed of" the several matters assigned, upon trust, to permit R. to have possession, for carrying on the trade, till W. should require payment, or deft. should apply to be relieved from the guarantee, &, in either of the last-mentioned two events, if R. should, in case W. should require payment, or deft. require to be relieved, fail to pay W. & to procure the guarantee to be given up, then deft., his exors., etc., should "stand & be possessed of the tenements & premises, upon trust to enter upon & take actual possession of all & singular the tenements & premises, including all substituted consumable stores," & it was declared "that, when & as any of the dye-wares, farm produce, cattle, chattels, & effects hereby assigned shall be used up, or consumed, dead, sold or worn out, & other dye-wares," etc., "shall, in the ordinary course of carrying on the business, be purchased, grown, or otherwise substituted for them, or any of them, the dye-wares," etc., "so purchased, grown or otherwise substituted, shall belong to" deft., his exors., etc., "in like manner & as fully as if same were now the property of" R., "& were included therein." After the deed was executed, R.

Shanghai vested in the official assignee of the Insolvent Debtor's Ct. at Bombay, & that ct. could order M. to hand over such property to the official assignee in Bombay.—*Re* NAOROJI SORABJI TALATI (1908), I. L. R. 33 Bom. 462.—**IND.**

e. *Bankruptcy in Ireland—Property in foreign country.*]—Adjudication in Ireland vests the property of bkpt., situate in a foreign State, in the assignees, so far as the law of Ireland is concerned.

The law of New York recognises, to a certain extent, the rights of the assignees under the adjudication.—*Re* ROBINSON (1860), 11 I. Ch. R. 385; 13 Ir. Jur. 42.—**IR.**

f. *Insolvency in Natal—Property in Tasmania.*]—Testator by his will devised land in Tasmania to trustees to pay his widow out of the income an annuity, & to pay the residue of the income to his sons in equal shares, & he directed that upon the death of his widow the trustees should sell the land, with a discretionary power to postpone the sale for seven years, & divide the proceeds equally among the sons, one of the sons having gone to Natal, in South Africa, before the death of his mother, became insolvent there, & according to the Law of Natal his trustee would have priority over subsequent incumbrances of insolvent's choses in action without the necessity of giving notice. Insolvent having returned to Tasmania, executed an assignment of his interest in his father's estate to an assignee who had no notice of the insolvency & who gave notice to the trustee of the property:—*Held*: from the date of testator's death until the date of the sale of the land the interest of each son was an immovable, & the insolvency in Natal did not operate in Tasmania as an assignment of insolvent's interest in his father's estate.—AUSTRALIAN MUTUAL PROVIDENT SOCIETY *v.* GREGORY (1908), 5 C. L. R. 615.—**AUS.**

g. *Bankruptcy in Scotland—Property in Newfoundland.*]—Two firms, consisting entirely of the same members, carried on distinct branches of trade in Newfoundland & Scotland. The firm in Scotland was sequestrated, & afterwards the firm in Newfoundland became insolvent:—*Held*: the property & effects of the firm in Newfoundland should be distributed by trustees appointed by the creditors of that firm, & under the laws of Newfoundland.—*Re* CRAWFORD & CO.'S INSOLVENCY (1818), 1 Nfld. L. R. 85.—**NFLD.**

h. —— *Property in Canada—Rights of Canadian mortgagee.*]—In July, 1859, F., a member of the firm of R. M. & Co., mortgaged property of the firm to C. In Sept., 1860, by the "act & warrant" under Scotch 1856 Act, under the hand of the Sheriff Depute of L. in Scotland all the real & personal estate of R. M. & Co. in Canada as well as in Scotland became vested in R. as trustee. In June, 1861, C. being ignorant of the proceedings in bkpcy. filed his bill of foreclosure against F., & in 1862 a final order of foreclosure was obtained & registered by C., who in 1863 conveyed to G.:—*Held*: the "act & warrant," though containing no attestation clause, without a witness to its execution, & specifying no lands in Upper Canada, was capable of registration, & pltf. not entitled to redeem.—ROBSON *v.* CARPENTER (1865), 11 Gr. 293.—**CAN.**

PART XX. SECT. 4, SUB-SECT. 7.

j. *Bill of sale with power to seize after-acquired property.*]—Where the holder of a bill of sale by way of mtge. has made a valid seizure of after-acquired property under his security, goods delivered at the place of business of the mtgor., & made use of by the mtgee., may be regarded (1) either as passing under the bill of sale, or (2) as delivered to the mtgee., he being responsible to the vendor. But the trustee of the mtgor., not having paid the vendor, is not entitled to regard the goods so delivered as his (the trustee's)

remained in possession, carried on the business, &, in the ordinary course thereof, used up & consumed certain of the consumable effects, & substituted others. Deft. required to be relieved from the guarantee, &, R. having taken no step for that purpose, deft. entered, & took possession of the property, including the substituted stores. R. was aware of this, & made no objection. Deft. paid W. Afterwards R. committed an act of bkpcy. & was made bkpt.:—*Held:* deft. was entitled, as against the assignees, to retain, to the extent of the payment made by him to W., not only the property mentioned in the deed of which R. was possessed at the time of the execution of the deed, but also the substituted effects.—HOPE *v.* HAYLEY (1856), 5 E. & B. 830; 25 L. J. Q. B. 155; 26 L. T. O. S. 199; 2 Jur. N. S. 486; 4 W. R. 238; 119 E. R. 690.

Annotations:—**Refd.** Chidell *v.* Galsworthy (1859), 6 C. B. N. S. 471; Holroyd *v.* Marshall (1862), 10 H. L. Cas. 191, H. L.; Krehl *v.* Great Central Gas Co. (1870), L. R. 5 Exch. 289. **Mentd.** Carr *v.* Allatt, Allatt *v.* Carr (1858), 27 L. J. Ex. 385; Morris *v.* Delobbel-Flipo, [1892] 2 Ch. 352.

6120. "Effects then being or thereafter to be upon the premises."]—A. being indebted to deft., assigned to him by bill of sale all his household furniture, plate, linen, etc., & all other his personal estate & effects whatsoever then being or thereafter to be upon or about his dwelling-house, farm or premises at R. or elsewhere in Great Britain, upon trust to sell & satisfy his debt. Power was given to deft. to enter premises where the goods assigned might be, & take possession of such goods, & a further power, in case the sum due should not be paid upon demand, to enter upon any premises, which might from time to time be in A.'s occupation, & "distrain" the goods there found for the sum due, & if it should not be paid within one day to sell, & it was declared that until deft. should think fit to take possession of the assigned premises, A. might retain possession. Deft., five years after, entered A.'s premises, & having demanded payment of A.'s wife, forthwith seized, along with other goods of A., goods which A. had acquired since the execution of the bill of sale, & after remaining in possession six days sold them. The day after the sale A. became bkpt.:—*Held:* A.'s assignees were entitled to recover the value of the after-acquired goods.—BELDING *v.* READ (1865), 3 H. & C. 955; 6 New Rep. 301; 34 L. J. Ex. 212; 13 L. T. 66; 11 Jur. N. S. 547; 13 W. R. 867; 159 E. R. 812.

Annotations:—**Consd.** Greenbirt *v.* Smee (1876), 35 L. T. 168; Leatham *v.* Amor (1878), 47 L. J. Q. B. 581. **Distd.** Lazarus *v.* Andrade (1880), 5 C. P. D. 318. **Folld.** *Re* D'Epineuil, Tadman *v.* D'Epineuil (1882), 20 Ch. D. 758. **Consd.** Clements *v.* Matthews (1883), 11 Q. B. D. 808, C. A.; Official Receiver *v.* Tailby (1886), 18 Q. B. D. 25, C. A.; *Re* Clarke, Coombe *v.* Carter (1887), 35 Ch. D. 109. **Dbtd.** *Re* Clarke, Coombe *v.* Carter (1887), 36 Ch. D. 348, C. A. **Overd.** Tailby *v.* Official Receiver (1888), 13 App. Cas. 523, H. L. **Refd.** Joseph *v.* Webb, Joseph *v.* Lyons, Joseph *v.* Pidcock, Joseph *v.* Jones (1884), Cab. & El. 262; Reeves *v.* Barlow (1884), 12 Q. B. D. 436, C. A.

6121. "All that might thereafter be brought thereon."]—A. assigned to B. for value by bill of sale certain chattels then on his premises & all others which might thereafter be brought thereon in addition or substitution:—*Held:* the assignment of the after-acquired chattels, though absolute in form, amounted merely to a contract to assign, & goods brought on the premises after A.'s discharge could not be seized by B.—COLLYER *v.* ISAACS (1881), 19 Ch. D. 342; 51 L. J. Ch. 14; 45 L. T. 567; 30 W. R. 70, C. A.

Annotations:—**Consd.** Robinson *v.* Ommanney (1882), 21 Ch. D. 780. **Distd.** *Re* Reis, *Ex p.* Clough, [1904] 2 K. B. 769, C. A.; *Re* Lind, Industrials Finance Syndicate *v.* Lind, [1915] 1 Ch. 744. **Consd. & Distd.** *Re* Lind, Industrials Finance Syndicate *v.* Lind, [1915] 2 Ch. 345, C. A. **Refd.** Clements *v.* Matthews (1882), 47 L. T. 251; *Re* Bastable, *Ex p.* Trustee, [1901] 2 K. B. 518, C. A.; Pullan *v.* Koe, [1913] 1 Ch. 9. **Mentd.** Joseph *v.* Lyons (1884), 15 Q. B. D. 280, C. A.; Aberdare & Plymouth Co. *v.* Hankey (1887), 3 T. L. R. 493; *Re* Lawley, Gaiser *v.* Lawley (1902), 71 L. J. Ch. 895, C. A.; *Re* Dallas, [1904] 2 Ch. 385, C. A.

6122. Payments to accrue under building contract.]—H., a builder, as security for timber supplied & to be supplied, assigned to T. £200 of what should be coming to him under a building contract with A. The contract provided that the building should be finished by a certain day, & if not, that A. might employ another builder to complete it. When the assignment was made the time for completion had expired. Soon afterwards H. executed a creditor's deed. The trustee of the deed completed the building with his own money & was repaid by A. Allowing such repayment as proper, nothing remained due on the contract. T. then filed his bill to enforce payment of the £200:—*Held:* the payments by A. to the trustee were proper, & the bill ought to be dismissed with costs, as there was nothing due to H. under the contract, which could be made the subject of a valuable assignment to T.—TOOTH *v.* HALLETT (1869), 4 Ch. App. 242; 38 L. J. Ch. 396; 20 L. T. 155; 17 W. R. 423, L. JJ.

Annotations:—**Distd.** Brice *v.* Bannister (1878), 3 Q. B. D. 569, C. A.; *Re* Toward, *Ex p.* Moss (1884), 14 Q. B. D. 310, C. A.; Drew *v.* Josolyne (1887), 18 Q. B. D. 590, C. A.

6123. ——.]—A shipbuilder agreed to build a vessel, the price to be paid in specified instalments. Part of the work having been done, but less than

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property, & to sue the mtgee. for the wrongful conversion thereof.—BATHGATE *v.* BANK OF OTAGO, Mac. 914.—N.Z.

k. *After-acquired stock — Necessity of covenant to brand.*]—In order that a chattel security may affect after-acquired stock there must be a covenant to brand or mark the stock with a specified or indicated brand; & a provision in an instrument that subsequently acquired stock is to be subject to the instrument will not give a right to the stock against the official assignee of a bkpt. mtgor., at any rate, if the stock was in the possession of bkpt. at the time of the act of bkpcy. The abbreviated covenant in "will brand" will be read as a covenant to brand after-acquired sheep with the brand mentioned in the sched. as the brand of the specified sheep.—*Re* CHRISTIE (1901), 19 N. Z. L. R. 615.—N.Z.

l. *"Which shall then be in the possession of the mortgagor."*]—A bill of sale executed by a trader contained an assignment of property mentioned & specified in the sched., but not of after-acquired property. It also contained a power to enter on default & take possession of "all & singular the property & things hereby assigned or intended so to be, or which shall then be in the possession of or belonging to the mtgor., & whether in possession or not, & to sell & dispose of them, etc." The mtgee. having seized goods, which had been brought upon the premises after the date of the deed, an action was brought against him by the trustee of the estate of the mtgor. to recover the value of the goods seized:—*Held:* power was given to seize all property in the possession of mtgor. at the time of the seizure, & mtgee. entitled to seize all property belonging to mtgor. at the time of seizure.—MATSON *v.* CRAIG, 3 J. R. N.S. 33.—N.Z.

m. *"Any stock purchased hereafter by the mortgagor which may be in his possession upon the premises."*]—On a sale by a partner of his interest in the partnership effects to his co-partner, the purchaser, T., executed a mtge. to the vendor on (*inter alia*) "any stock purchased hereafter by T. & which may be in his possession upon the premises during the continuance of this security or any renewal thereof." Afterwards T. executed a renewal of the mtge., describing the property, & "also any stock purchased by the mtgor. thereafter & now in his possession, & also any stock purchased hereafter by the mtgor., & which may be in his possession, upon the premises, at any time during the continuance of this security or any renewal thereof":—*Held:* stock acquired by T. after the execution of such second mtge., as well as that acquired by him after the date of the first & before the execution of the second mtge., was bound by such second mtge., & the mtgee. was entitled to retain same as against the assignee in insolvency of the mtgor.—*Re* THIRKELL, PERRIN & WOOD (1874), 21 Gr. 492.—CAN.

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the value of such part having been paid to the builder, he charged in favour of a creditor the instalment due to him on the delivery of the vessel. Before the ship was completed he became bkpt. The trustee completed the vessel, & in so doing expended less than the amount which remained to be paid by the purchaser:—*Held:* the charge, being upon money which had been already earned by the builder, was valid as against the trustee.—*Re* TOWARD, *Ex p.* MOSS (1884), 14 Q. B. D. 310; 54 L. J. Q. B. 126; 52 L. T. 188, D. C.; *affd.*, 14 Q. B. D. 318, C. A.

Annotation:—**Mentd.** Barnetts, Hoares *v.* South London Tram. Co. (1886), 2 T. L. R. 848.

6124. —— Retention money.]—A building contract provided that payments should be made, as the work proceeded, of such sums on account of the price of the work as should be stated in the certificates of an architect, such certificates to be given at the architect's discretion at the rate of 80 per cent. upon the contract value of the work done at the dates of such certificates, & that the remaining 20 per cent. should be retained till the completion of the work. The contract empowered the building owners, in the event of the contractor's committing an act of bkpcy., to discharge them from the further execution of the work, & employ some other person to complete it, & to deduct the amount paid to such other person for completing the same from the contract price. The contractors assigned a portion of the retention money, *i.e.*, the price of work done under the contract retained under the before-mentioned provision, by way of mtge. to secure a debt, & notice of the assignment was given to the building owners. After making such assignment the contractors filed a petition for liquidation, the works then remaining incomplete. A trustee in liquidation & a committee of inspection were appointed. The trustee, in pursuance of a resolution of the committee, completed the work, himself advancing money for that purpose, of which an amount exceeding that of the retention money assigned as above was still unpaid, there being no other assets from which he could be recouped in respect thereof. The trustee & the mtgees. both claimed the amount of the retention money assigned from the building owners:—*Held:* in the absence of anything to show that the building owners had exercised the power of taking the work out of the contractors' hands, the trustee must be taken to have completed the work under the original contract as trustee of the contractors' estate, & not as a person employed to complete the work in substitution for the contractors, & as the assignment of the retention money held good as against the trustee, the mtgees. were entitled to succeed.—DREW *v.* JOSOLYNE (1887), 18 Q. B. D. 590; 56 L. J. Q. B. 490; 57 L. T. 5; 35 W. R. 570; 3 T. L. R. 482, C. A.

6125. Payments to become due under hire purchase agreement.]—An agreement for the hire, & ultimate purchase by the hirer, of specified articles of furniture, provided that, on payment by the hirer of an agreed price, which was to be paid in a fixed number of periodical instalments, the articles should become his property, but that, until the agreed price had been fully paid, they should remain the property of the lender. It was further provided that, if default should be made in the punctual payment of the hire, the lender might immediately enter upon the dwelling-house of the hirer & take possession of, & remove & sell the goods. During the currency of this agreement the lender assigned all his right & interest under the agreement to a person who had lent him money, as security for the advance, authorising him, if default should be made in repayment of the loan as agreed, to exercise all the powers contained in the hiring agreement, until the balance due to him should have been repaid:—*Held:* the assignment of the instalments, which accrued due under the hiring agreement after the commencement of the bkpcy. of the assignor, was valid as against the trustee in the bkpcy.—*Re* DAVIS & CO., *Ex p.* RAWLINGS (1888), 22 Q. B. D. 193; 37 W. R. 203; 5 T. L. R. 119, C. A.

Annotation:—**Consd.** Wilmot *v.* Alton, [1897] 1 Q. B. 17, C. A.

6126. Payments to become due under hiring agreement—Nothing due unless bankrupt performed his part.]—A trader, in consideration of a weekly payment, let on hire goods for a fixed period, agreeing to keep them in repair. The trader afterwards mortgaged his rights under the contract, & before any money had become due under the contract, was adjudicated bkpt.:—*Held:* the mtge. gave no title as against the trustee to any money becoming due from the hirer after the commencement of the bkpcy.—WILMOT *v.* ALTON, [1897] 1 Q. B. 17; 66 L. J. Q. B. 42; 75 L. T. 447; 45 W. R. 113; 13 T. L. R. 58; 4 Mans. 17, C. A.

6127. Rent to become due.]—A customer, in July, borrowed £200 from his bankers, upon the terms of a verbal agreement that the loan should be repaid out of the rent of a farm which would become due to him at Michaelmas, & wrote a letter authorising payment of the rent to the bankers:—*Held:* the authority was revoked by the customer's bkpcy.—*Re* WHITTING, *Ex p.* HALL (1879), 10 Ch. D. 615; 48 L. J. Bcy. 79; 40 L. T. 179; 27 W. R. 385, C. A.

n. *Payments to become due.*]—Though there may be a present equitable assignment of a future debt which is not yet due, the right of the assignee is defeated by the bkpcy. of the assignor in respect of an act of bkpcy. which precedes the due date.—*Re* IRVINE, [1919] N. Z. L. R. 351.—**N.Z.**

o. *Pension.*]—P. agreed to advance to N. at his request £300 upon conditions, embodied in a written agreement, whereby N. agreed to "give & grant to P. or to any person nominated by him an irrevocable power of attorney to ask, draw, & receive month by month as same shall fall due" a pension paid to N. by the Govt. It was further agreed that the amount of the pension should be refunded each month to N. less £7 1*s.*, which should be paid over to P. In pursuance of such agreement N. executed a power of attorney in favour of M., which, after authorising M. to receive & account for the amount of the pension, proceeded "I further irrevocably authorise & empower my attorney to exercise the powers herein conferred for a period of eight years commencing July 1, 1908." M. drew the pension due for June & July, 1908, but in Aug. N. revoked the power of attorney. Though the power did not so state M. was in fact the nominee of P.:—*Held:* N. had effected a valid cession to P. to receive out of N.'s pension £7 1*s.* per month, which could not be affected by N.'s insolvency.—PICK *v.* NEYLAN'S ESTATE (1910), C. P. D. 100; 20 C. T. R. 475.—**S. AF.**

p. *Property obtained through wife after marriage.*]—An insolvent, although he may obtain property by his wife after marriage, has no right to put it in settlement for the benefit of her & their children, if he then has creditors.—*Re* CLARK (1864), 16 Ir. Jur. 384.—**IR.**

q. *Money payable under policy of insurance.*]—L. assured his life for £1,500, & assigned for value the policy as a security. He then became insolvent & died an uncertified insolvent. At his death £648 was due upon the security of the policy:—*Held:* a personal representative of L. was entitled to the balance of the policy money, after payment of the £648 secured upon it but with a duty to distribute such balance amongst all the creditors of L. at the time of his death, & the trustee in insolvency of L. had no claim upon the policy.—DAVEY *v.* PEIN, COLONIAL MUTUAL LIFE ASSURANCE SOCIETY *v.* DAVEY (1885), 11 V. L. R. 446.—**AUS.**

Annotations :—**Distd.** Greenway *v.* Atkinson (1881), 29 W. R. 560, C. A. ; Brandts *v.* Dunlop Rubber Co., [1904] 1 K. B. 387, C. A. **Mentd.** Mounsey *v.* Rankin (1885), Cab. & El. 496 ; Percival *v.* Dunne (1885), 29 Ch. D. 128 ; McManus *v.* Cooke (1887), 35 Ch. D. 681.

6128. Book debts.]—An assignment for value of future debts, though not limited to book debts in any particular business, is sufficiently defined & passes the equitable interest in book debts incurred after the assignment, so as to defeat the claim of the official receiver in the assignor's bkpcy.—TAILBY *v.* OFFICIAL RECEIVER (1888), 13 App. Cas. 523 ; 58 L. J. Q. B. 75 ; 60 L. T. 162 ; 37 W. R. 513 ; 4 T. L. R. 726, H. L. ; *revsg.* S. C. *sub nom.* OFFICIAL RECEIVER *v.* TAILBY (1886), 18 Q. B. D. 25, C. A.

Annotations :—**Consd.** *Re* Clarke, Coombe *v.* Carter (1887), 36 Ch. D. 348, C. A. ; *Re* Yorkshire Woolcombers Assocn., Houldsworth *v.* Yorkshire Woolcombers Assocn., [1903] 2 Ch. 284. **Distd.** *Re* Dallas, [1904] 2 Ch. 385, C. A. **Consd.** Imperial Paper Mills of Canada *v.* Quebec Bank (1913), 110 L. T. 91, P. C. ; *Re* Lind, Industrials Finance Syndicate *v.* Lind, [1915] 2 Ch. 345, C. A. ; National Provincial Bank of England *v.* United Electric Theatres, [1916] 1 Ch. 132. **Refd.** *Re* Ellenborough, Towry Law *v.* Burne, [1903] 1 Ch. 697 ; Ward, Lock *v.* Long, [1906] 2 Ch. 550 ; *Re* Cope, Marshall *v.* Cope (1914), 110 L. T. 905 ; *Re* Lind, Industrials Finance Syndicate *v.* Lind, [1915] 1 Ch. 744 ; Horwood *v.* Millar's Timber & Trading Co., [1917] 1 K. B. 305, C. A. **Mentd.** *Re* Clarke, Coombe *v.* Carter (1887), 35 Ch. D. 109 ; *Re* Turcan (1888), 40 Ch. D. 5, C. A. ; *Re* Pyle Works (1890), 44 Ch. D. 534 ; Western Wagon & Property Co. *v.* West, [1892] 1 Ch. 271 ; *Re* Kelcey, Tyson *v.* Kelcey, [1899] 2 Ch. 530 ; Nelson *v.* Faber, [1903] 2 K. B. 367 ; *Re* Fitzgerald, Surman *v.* Fitzgerald, [1904] 1 Ch. 573, C. A. ; *Re* Reis, *Ex p.* Clough, [1904] 2 K. B. 769, C. A. ; Glegg *v.* Bromley, [1912] 3 K. B. 474, C. A. ; British Union & National Insce. *v.* Rawson, [1916] 2 Ch. 476, C. A. ; London County & Westminster Bank *v.* Tompkins (1918), 87 L. J. K. B. 662, C. A.

6129. Future receipts of business.]—An assignment by a trader of the future receipts of his business, even if made for value, is, as regards receipts accruing after the commencement of his subsequent bkpcy., inoperative as against the title of the trustee.

By no assignment or charge can bkpt. give a good title as against his trustee to profits of his business accruing after the commencement of the bkpcy. Bkpt. cannot, as against the trustee, assign these profits ; they are not his property (JESSEL, M.R.).—*Re* JONES, *Ex p.* NICHOLS (1883), 22 Ch. D. 782 ; 52 L. J. Ch. 635 ; 48 L. T. 492 ; 31 W. R. 661, C. A.

Annotations :—**Distd.** *Re* Toward, *Ex p.* Moss (1884), 14 Q. B. D. 310, D. C. ; *Re* Davis, *Ex p.* Rawlings (1888), 22 Q. B. D. 193, C. A. **Apld.** Wilmot *v.* Alton, [1897] 1 Q. B. 17, C. A. **Refd.** Mercer *v.* Vans Colina (1897), 67 L. J. Q. B. 424. **Mentd.** Durham *v.* Robertson, [1898] 1 Q. B. 765, C. A.

Relation back of title of trustee.]—*See* Sect. 3, *ante*.

Assignments of after-acquired property.]—*See* Sect. 7, *post*.

SECT. 5.—**"PROPERTY HELD BY THE BANKRUPT ON TRUST FOR ANY OTHER PERSON."**

See, now, 1914 Act, s. 38 (1).

SUB-SECT. 1.—PROPERTY SUBJECT TO EXPRESS TRUST.

6130. Personalty held in trust to pay debts.]—A. made an assignment of leases & personal estate to B. in trust to pay A.'s debts. On the bkpcy. of B. :—*Held :* his assignees must account for all the estate of A., which was declared not subject to the bkpcy. of B.—COPEMAN *v.* GALLANT (1716), 1 P. Wms. 314 ; 24 E. R. 404, L. C.

Annotations :—**Folld.** Collins *v.* Forbes (1789), 3 Term Rep. 316 ; Taylor *v.* Plumer (1815), 3 M. & S. 562. **Distd.** *Re* Kidder, *Ex p.* Burbridge (1835), 1 Deac. 131, L. C. **Refd.** Scott *v.* Surman (1742), Willes, 400. **Mentd.** Ryall *v.* Rolle (1749), 1 Atk. 165, L. C. ; West *v.* Skip (1749), 1 Ves. Sen. 239 ; Edwards *v.* Hodges (1855), 15 C. B. 477 ; Drummond *v.* Drummond (1866), 2 Ch. App. 32, L. C. & L. JJ. ; *Re* Sinclair, *Ex p.* Chaplin (1884), 53 L. J. Ch. 732, C. A.

6131. Debt due to bankrupt as trustee.]—A debt due to bkpt., as trustee for another, does not pass under the assignment of his effects by his comrs.—WINCH *v.* KEELEY (1787), 1 Term Rep. 619 ; 99 E. R. 1284.

Annotations :—**Consd.** Scholey *v.* Page (1806), 3 Smith, K. B. 145. **Apld.** Carvalho *v.* Burn (1833), 4 B. & Ad. 382. **Refd.** Doe d. Shaw *v.* Steward (1834), 1 Ad. & El. 300 ; Young *v.* Rishworth (1838), 8 Ad. & El. 470 ; Parnham *v.* Hurst (1841), 8 M. & W. 743 ; Westoby *v.* Day (1853), 2 E. & B. 605 ; St. Thomas' Hospital *v.* Richardson (1909), 101 L. T. 771, C. A. **Mentd.** Master *v.* Miller (1791), 4 Term Rep. 320 ; Dean *v.* James (1832), 1 Ad. & El. 809, n. ; Buck *v.* Lee (1834), 1 Ad. & El. 804 ; Sherrington *v.* Yates (1844), 13 L. J. Ex. 249, Ex. Ch. ; Boddington *v.* Castelli (1853), 17 Jur. 781, Ex. Ch. ; *Re* Milnes & Robertson (1854), 15 C. B. 451 ; De Pothonier *v.* De Mattos (1858), E. B. & E. 461 ; Jeffs *v.* Day (1866), 7 B. & S. 250 ; De Mattos *v.* Saunders (1872), L. R. 7 C. P. 570.

6132. Bankrupt's interest as trustee.]—*Held :* bkpt.'s interest as trustee was not assignable by the comrs. in bkpcy.—WEBSTER *v.* SCALES (1784), cited 1 Term Rep. p. 622 ; 4 Doug. K. B. 7 ; 99 E. R. 1286.

Annotations :—**Folld.** Winch *v.* Keeley (1787), 1 Term Rep. 619. **Refd.** Scholey *v.* Page (1806), 3 Smith, K. B. 145.

6133. Trust estate does not pass.]—Property in which a bkpt. has only a trust estate does not pass to his assignees under the assignment.—CARPENTER *v.* MARNELL (1802), 3 Bos. & P. 40 ; 127 E. R. 23.

Annotations :—**Apld.** Carvalho *v.* Burn (1833), 4 B. & Ad. 382. **Consd.** Parnham *v.* Hurst (1841), 8 M. & W. 743. **Apld.** D'Arnay *v.* Chesneau (1845), 13 M. & W. 796. **Refd.** St. Thomas' Hospital *v.* Richardson (1909), 101 L. T. 771, C. A.

6134. —— Bankrupt merely bare trustee.]—Under 6 Geo. 4, c. 16, estates, of which bkpt. is seised as bare trustee, do not pass to his assignees.

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r. ——.]—In Apr., 1854, A. was discharged as an insolvent, & W. was appointed an assignee. In Dec., 1854, A. effected on his life an insurance, which he mortgaged to B. for £60. In Apr., 1856, A. again presented his petition & was discharged. No assignee was appointed under the second insolvency. In Nov., 1856, A. died. The insurance co. paid the mtgee. his debt & costs, & the residue of the policy to W. Only two premiums became due on the policy ; the first was paid by insolvent, & the second by the mtgee. No notice of either insolvency had been given to the co. until after the death of insolvent. The sum in ct., the residue of the policy, was claimed by the next of kin of insolvent, the assignee under the first insolvency, & the creditors under the second insolvency :—*Held :* the amount of the policy was not future-acquired property, & the fund passed to the assignee.—*Re* ARMSTRONG (1858), 8 I. Ch. R. 309.—**IR.**

s. *Personal earnings—Earned before but paid after bankruptcy.*]—An equitable assignment by a debtor of money earned before, but which does not become payable till after, his bkpcy. is good as against the official assignee.—*Re* WINEFIELD (1885), 3 N. Z. L. R. 394.—**N.Z.**

PART XX. SECT. 5, SUB-SECT. 1.

6133 i. *Trust estate does not pass.*]—As Insolvency Act, by virtue of the terms of s. 40, incorporates all existing & future enactments passed in England for the purpose of determining what debts may be proved, & as by English 1869 Act, s. 15, property held by bkpt. in trust for others is not the property of bkpt. divisible among his creditors such property cannot be regarded as having vested in the official assignee.—*Re* VARDALACA CHARRI (1877), I. L. R. 2 Mad. 15.—**IND.**

6133 ii. ——.]—Under 26 Geo. 3, c. 13, the trustees of an absconding debtor do not become entitled to the property & credits held by such debtor as administrator of a deceased person.—WILSON *v.* MCBRINE (1844), 4 N. B. R. (2 Kerr), 535.—**CAN.**

6133 iii. ——.]—Heritage was held by bkpt. on an unqualified *ex facie* absolute disposition registered in his own name, but only as trustee for the right owners, to whom he had given unrecorded acknowledgment of the trust :—*Held :* the heritage did not vest in, or pass to, bkpt.'s trustee for the benefit of the general creditors.—HERITABLE REVERSIONARY CO., LTD. *v.* MILLAR, [1892] A. C. 598.—**SCOT.**

6134 i. —— *Bankrupt merely bare trustee—Interest under agreement for sale.*]—A few days before making a general assignment for the benefit of his creditors to pltf., W. assigned to his wife, one of defts., his interest under an agreement for sale of land, on which he had paid $200, & had erected on the land a building, the money for

Sect. 5.—"Property held by the bankrupt on trust for any other person": Sub-sects. 1 & 2, A.]

—*Re* ELFORD, *Ex p.* GENNYS (1829), Mont. & M. 258.

Annotation:—**Folld.** *Re* Bridgman (1860) 1 Drew. & Sm. 164.

6135. —— Unless bankrupt has beneficial interest.]—Under [1869] Act, where a trustee has no beneficial interest, the legal estate does not pass, but where he has, it does pass (JESSEL, M.R.). —MORGAN *v.* SWANSEA URBAN SANITARY AUTHORITY (1878), 9 Ch. D. 582.

Annotations:—**Apld.** St. Thomas's Hospital *v.* Richardson, [1910] 1 K. B. 271, C. A. **Mentd.** *Re* Cunningham & Frayling, [1891] 2 Ch. 567; Tendring Hundred Waterworks Co. *v.* Jones, [1903] 2 Ch. 615; *Re* Blandy Jenkins' Estate, Blandy Jenkins *v.* Walker, [1917] 1 Ch. 46.

6136. —— —— Right of indemnity against estate.]—The property of bkpt. includes property held by him on any trust for his own benefit, & when he holds property to secure his own right of indemnity in priority to all claims of any *cestui que trust*, & the retention of such property is necessary to give full effect to such right, the property, *i.e.*, the legal estate & right to possession vest in the trustee in bkpcy. to the extent to which they were vested in bkpt.

Where R., the assignee of leaseholds with onerous covenants as trustee for his wife, was adjudicated bkpt.:—*Held:* the leaseholds vested in the trustee in bkpcy., who held them, subject to satisfying his own lien & right of indemnity, for R.'s wife.—ST. THOMAS'S HOSPITAL (GOVERNORS) *v.* RICHARDSON, [1910] 1 K. B. 271; 79 L. J. K. B. 488; 101 L. T. 771; 17 Mans. 129, C. A.

Annotation:—**Mentd.** *Re* Law Guarantee Trust & Accident Soc., Liverpool Mortgage Insce. Case, [1914] 2 Ch. 617, C. A.

—— —— —— Right to money recovered under.]—*See* No. 5958, *ante*.

6137. Lease held on trust—Declaration of trust after bankruptcy.]—A lease was granted to W., who afterwards committed an act of bkpcy., & then executed a deed stating that his name had been used in the lease in trust for R., & declaring the trust. A bill was filed on behalf of the creditors of W. under the commission, claiming the lease as part of his estate, & on an issue to try whether W.'s name was used in the lease as a trustee for R., the jury found a verdict in the affirmative:—*Held:* the declaration of trust was valid, though executed after bkpcy., & the lease did not pass to W.'s assignees.—GARDNER *v.* ROWE (1828), 5 Russ. 258; 7 L. J. O. S. Ch. 2; 38 E. R. 1024, L. C.

Annotation:—**Mentd.** Morton *v.* Tewart (1842), 2 Y. & C. Ch. Cas. 67.

6138. Legacy subject to trust—Admission by bankrupt of trust.]—A testator appointed an exor. & trustee, to whom specific properties were left upon definite trusts. The will also contained an absolute bequest to the trustee. About the time the will was made testator purported to create a trust of the property left absolutely to the trustee, & informed him that a letter, which was not to be opened till after his death, contained his wishes. The trustee promised that, if the property was left to him, he would carry those wishes out. The trustee admitted that he was a trustee of such property. He was subsequently adjudicated a bkpt.:—*Held:* without deciding whether a valid trust was created, it would be inequitable to allow the trustee in bkpcy. to take property, which bkpt. honestly considered he held as trustee.—*Re* BELL, *Ex p.* DEBTOR (1908), 99 L. T. 939.

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which was supplied by his wife, on the understanding that she was to have the property. Three months earlier she had entered into an agreement, with the knowledge & consent of W., to transfer the property to S., the other deft., in consideration of a promissory note for $1,200 made by W. & indorsed by her, the property to be re-transferred on payment of the note with interest. At that time all the parties considered that the property was hers. Just before the general assignment, when the vendors under the agreement for sale were pressing for payment, W. made the assignment to his wife, who then assigned to S., who subsequently paid the balance due to the vendors, & obtained title. In an action to set aside the transactions & make the property available for W.'s debts:—*Held:* as W. was in effect a trustee for his wife, who had the beneficial interest under the agreement for sale, he was not assigning his own interest, but hers.—SMITH *v.* SUGARMAN (1910), 13 W. L. R. 671; 3 Alta. L. R. 108, *revsd.* 47 S. C. R. 392; 23 W. L. R. 576 & judgment of trial judge 12 W. L. R. 585 *restd.*—**CAN.**

6135 i. —— *Unless bankrupt has beneficial interest—Disqualification of cestui que trust.*]—Two Asiatics purchased immovable property, &, owing to their disqualification from becoming registered owners, had transfer passed to L. in his private capacity, but under an unregistered agreement between them & L., whereby L. agreed to hold the property for them. Thereafter L. became insolvent. The Asiatics had always occupied the property under lease from L.:—*Held:* the dominium of the property had passed to L. & on his insolvency had vested in his trustee for the benefit of the estate & not for the Asiatics only.—LUCAS'S TRUSTEE *v.* ISMAIL (1905), T. S. 239.—**S. AF.**

a. *Real property bought on trust—Declaration of trust after bankruptcy.*]—A. & B., partners, being indebted to C. & D., pltfs., A. by letter, proposed to assign a claim which A. & B. had upon P.'s estate, then the subject of a Ch. suit. Properties of P., sold under a decree, were bought by A. in his own name, but, as he alleged in letters to C., really in trust for C. & D. Shortly afterwards, A., having committed an act of bkpcy., executed deeds declaring that he held in trust for C. & D. His assignee having obtained a judgment in ejectment against part of the premises, a bill was filed praying that he should be directed to convey to them:—*Held:* though there was not express proof of B.'s concurrence, A. was authorised in all that he had done, & as the trust was clearly established, pltfs. were entitled to the conveyance sought.—JOHNSON *v.* PERRIN (1831), Hayes, 322.—**IR.**

c. *Shares bought on trust—Acknowledgment by bankrupt of trust.*]—In 1805, A. purchased a share in a co. in his own name, but really for B., to whom he granted a letter, whereby he acknowledged that the share was B.'s property, & obliged himself to account to B. for the whole profits drawn from the share. The co. was afterwards united with another co., & each original share was converted into two. The name of A. alone appeared in the books of the co., & he regularly drew the profits corresponding to the two shares, for which he accounted to B. Fourteen years from the date of the letter, A. became bkpt., & his estate was sequestrated:—*Held:* the two shares belonged to B.'s exor. in virtue of the letter, & not to A.'s trustee.—GORDON *v.* CHEYNE (1824), 2 Sh. (Ct. of Sess.) 675.—**SCOT.**

d. —— *Presumption of trust—Burden of proof.*]—The fact of bank shares being purchased in trust at a time when the trustee was solvent imports an interest in somebody else, & the *onus* is upon a party who has seized such shares to prove that they are in fact the property of the trustee, & as such available to satisfy the demand of his creditors.—MUL CARTER, HOLMES *v.* CARTER (1888), 16 S. C. R. 473.—**CAN.**

f. *Promissory notes held by bankrupt for himself & others.*]—Promissory notes were received by one of several joint-creditors for the benefit of himself & his co-creditors; the creditor died:—*Held:* the notes continued a distinct trust in the hands of the trustees of his insolvent estate, & only in his own interest in same became merged in the general assets of his estate, & one of the joint-creditors could recover against the trustees a share of the notes or proceeds thereof.—EARLY *v.* O'BRIEN (1853), 3 Nfld. L. R. 353.—**NFLD.**

h. *Bequest subject to legacies & annuity.*]—Testator bequeathed to F. the premises in which he carried on his trade, together with the stock, etc., subject to certain legacies, & an annuity to his wife to be paid by F. "out of the profits of the business to be carried on by F." in testator's house, & should F. at any time "wish to discontinue carrying on the business," the annuity to testator's wife should cease, & she was to be paid £1,000 in full for all claims. F. was appointed residuary legatee & exor. He continued to carry on the trade with the assets, contracted trade debts to an amount larger than he had assets to meet, & was adjudged bkpt.:—*Held:* the will contained such a direction to carry on the trade that on F.'s bkpcy. the trade assets existing at the time of testator's death, & those substituted therefor, were affected, & rendered liable to be administered by the Ct. of Bkpcy.—HALL *v.* FENNELL (1875), 10 I. L. T. 1. —**IR.**

Actions to recover—In whose name they must be brought.]—*See* Part XXI., Sect. 5, sub-sect. 1, C., *post.*

SUB-SECT. 2.—PROPERTY IN WHICH BANKRUPT HAS ONLY SPECIAL OR LIMITED INTEREST.

A. Property held as Agent or in Fiduciary Capacity.

6139. Agent—Price of goods sold by.]—A. living in Ireland employed B. in London to sell goods, which B. sold to J., A., not knowing to whom they were sold & J. not knowing whose property they were. B. became bkpt. & J. paid the money to his assignees:—*Held:* A. could recover it from them, though as between A. & J. the payment was a discharge.—GARRAT *v.* CULLUM (1709), Bull. N. P. 42.

Annotation:—**Folld.** Scott *v.* Surman (1742), Willes, 400.

6140. —— Certificates remitted to.]—*Held:* certificates of East India Co., on payment into their treasury in India, & a Navy bill, remitted, indorsed by testator to his agent in England, being at the time a creditor, if they did not pass at law by the indorsement, after the death of both parties, the agent having become bkpt., did not pass in equity, the inference from the absence of a specific appropriation being against the assignees, who had obtained possession of all the letters, etc.—WILLIAMSON *v.* THOMSON; *Ex p.* THOMSON (1810), 16 Ves. 443; 33 E. R. 1052, L. C.

6141. —— Short bills in hands of.]—Short bill in the hands of bkpt., as agent, & not by consent or in the course of dealing considered as cash, ordered to be returned, or the proceeds received after the bkpcy., though the bill was due previously & retained so as to discharge the indorser.—*Re* BURROUGH, *Ex p.* SOLLERS (1811), 1 Rose, 155; 18 Ves. 229; 34 E. R. 304, L. C.

See, further, BANKERS & BANKING, Vol. III., pp. 210 *et seq.*

6142. Auctioneer—Proceeds of sales received by—Paid into special bank account.]—S. & Co., auctioneers, having overdrawn their account at their bankers, came to a parol understanding with the bankers that the old account should be closed & that a new account should be opened in their names which was to be kept sacred against the claims of the bankers for the balance due to them. S. & Co. were in the habit of drawing on the new account for general disbursements, & having received considerable sums from the proceeds of sales made on behalf of petitioner & other customers, paid portions thereof into the new account. On S. & Co. being adjudicated bkpts. on their own petition:—*Held:* the money so paid which was included in the new account, passed to their assignees.—*Re* SHUTTLEWORTH, *Ex p.* PARSONS (1854), 2 Bankr. & Ins. R. 4.

6143. Factor—Stock bought for principal.]—A trader in London having money of J. who resided in Holland, in his hands, bought South-Sea stock as factor for J., & took the stock in his own name, but entered it in his account book as bought for J. after which the trader became bkpt.:—*Held:* the trust stock was not liable to the bkpcy.—*Ex p.* CHION (1721), 3 P. Wms. 187 n.; 24 E. R. 1023, L. C.

Annotations:—**Refd.** Banks *v.* Farquharson (1752), 2 Hov. Supp. 178; Taylor *v.* Plumer (1815), 3 M. & S. 562.

6144. —— Goods entrusted to.]—If I send goods to B. from beyond sea to the use of B. & before these goods are paid for B. dies insolvent, I cannot have my goods again; but if I send goods to a factor to dispose of to my use, & he becomes a bkpt., these goods are not liable to the debts of such bkpt.—GODFREY *v.* FURZO (1733), 3 P. Wms. 185; 24 E. R. 1022, L. C.

Annotations:—**Consd.** Lickbarrow *v.* Mason (1793), 6 East, 20, n. **Folld.** Harris *v.* Truman (1881), 7 Q. B. D. 340. **Refd.** Ryall *v.* Rolle (1749), 1 Atk. 165, L. C.; The Figlia Maggiore (1868), L. R. 2 A. & E. 106; Burdick *v.* Sewell (1883), 10 Q. B. D. 363.

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j. *Insurance policy on bankrupt's life—For benefit of wife.*]—A husband in 1882, by a policy expressed to be issued under Married Women's Property Act, 1870, insured his life "for the sole benefit of his wife, for her separate use under Married Women's Property Act, 1870," & in 1901, his wife being still alive, assigned to a trustee upon trust for the benefit of his creditors all other his personal estate & effects whatsoever & wheresoever, whether in possession, reversion, remainder, or expectancy. The wife died in 1907:—*Held:* the husband's interest in the policy was captured by the deed of assignment & passed to the trustee subject to the trust in favour of the wife.—ROBB *v.* WATSON, [1910] 1 I. R. 243; 44 I. L. T. 151.—IR.

PART XX. SECT. 5, SUB-SECT. 2.—A.

6139 i. *Agent—Price of goods sold by.*]—Pltf. purchased barley from R., telling him to consign it to C., who was to keep the barley as pltf.'s agent until pltf. directed him to sell, pltf. paying him such a sum as he might require by way of margin to protect himself against a fall in price. C., to reimburse his advance on R.'s draft, obtained a discount from the bank on his own note secured by the warehouse receipt for the barley, which he transferred to the bank. While C. held the barley pltf. paid to him $540 as margin to hold it. The barley was shipped by pltf.'s instructions to O., to the order of the bank, where it was sold, & the bank received the proceeds, having previously had notice that pltf. owned the barley. Later C. was adjudicated bkpt.:—*Held:* the balance of such proceeds above the bank's advances belonged to pltf. & not to C.'s assignee.—COTTER *v.* MASON (1870), 30 U. C. R. 181.—CAN.

6139 ii. —— ——.]—An agent took over a stock on consignment, under an agreement in writing, by which he was to account for goods sold as per price list supplied to him by the consignor, the profits over such price to belong to the agent:—*Held:* the consignor was entitled to be paid in full, per price list, for goods sold by the agent before his insolvency, but the price of which was collected by his assignee subsequently.—SEHLBACH *v.* STEVENSON (1887), M. L. R. 3 Q. B. 391.—CAN.

6139 iii. —— ——.]—H. & Co., while carrying on business in London, employed S. as their agent for disposal of their merchandise in Ireland, & by a deed executed between them on June 15, 1875, it was provided that S. should collect all debts due to H. & Co., contracted through his agency, & should accept the drafts of H. & Co. to a certain amount, as being the average amount of such debts, & that he should lodge in a bank all money received, on account of & in discharge of such acceptances. In July, 1875, H. & Co. went into a voluntary liquidation in England. S. was adjudicated bkpt. in Ireland in Dec. following. In Mar., 1876, C., as liquidator of H. & Co., exhibited a proof of debt in respect of S.'s acceptances, in the matter of S.'s bkpcy., & afterwards, under the order of the ct., furnished an account respecting same. On May 6 an order was pronounced, directing that the liquidation of H. & Co. should be carried out thenceforth under the supervision of the Ct. in England, & on May 11 C. was discharged as the liquidator of H. & Co., & M. was appointed in substitution. It was alleged that a portion of the proceeds of the debts collected by S. were not lodged by him in bank, as provided for by the deed, & no proof was entered on foot of any of his acceptances. On his assignees moving that both M. & C. should pay to them the amount of debts collected by them due to H. & Co., & that M. & C. should be restrained by injunction from collecting or receiving such debts:—*Held:* the motion should be refused.—*Re* SHERIDAN (1876), 11 I. L. T. 23.—IR.

6144 i. *Factor—Goods entrusted to.*]—Goods were supplied by deft. to a trading co., & it was arranged between the co. & deft. that the co. might sell the whole or any part of the goods to whomsoever they chose, & for such price & on such terms as they might see fit, but they were, whenever a sale was made, to pay in cash to deft. the price of the article sold, according to a price list which was furnished to them by deft. when the goods were from time to time delivered to the co. The co. had also the right, whether they had made a sale or not, to become the owners of the whole or any part of the goods at the prices named in the list, & they had also the right at any time to return the whole or any of the goods which remained unsold. The co. made a statutory assignment to pltf. for the benefit of creditors, & deft. took back the goods:—*Held:* the goods were not at the time of the assignment the property of the co., but were in their possession either as bailees or agents of deft., with the right, if & when they elected to buy, to become the purchasers of the whole or any part of them at the prices mentioned in the price list.—LANGLEY *v.* KAHNERT (1905), 25 C. L. T. Occ. N. 69; 40 W. R. 396; 9 O. L. R. 169; 36 S. C. R. 397.—CAN.

Sect. 5.—"Property held by the bankrupt on trust for any other person": Sub-sect. 2, A. & B.]

6145. —— Price of goods sold by.]—A factor is in the nature of a trustee for his principal, & money due to him for goods sold belong, on his bkpcy., not to his estate, but to the principal, subject to the payment of the factor's commission.—BURDETT *v.* WILLETT (1708), 2 Vern. 638; 23 E. R. 1017, L. C.

Annotations:—**Refd.** Scott *v.* Surman (1742), Willes, 400. **Mentd.** Gladstone *v.* Hadwen (1813), 1 M. & S. 517.

6146. —— Proceeds of goods sold by—Right to follow—Set-off.]—If goods are consigned to a factor for sale, & he sells & receives the money before his bkpcy. & does not purchase with it any specific thing capable of being distinguished from the rest of his property, the consignors cannot recover the whole money from his assignees, but must come in under the commission. So, if the factor, at time of sale agrees to set off a debt of his own due to the vendee, it is the same as if the factor received so much money from the vendee, & the consignors must come in under the factor's commission.

But if the goods remain in specie in the factor's hands at the time of his bkpcy. consignors may recover the goods in trover from the assignees; or if a factor sells goods for his principal, & becomes bkpt. before payment, & his assignees afterwards receive the money for them, the principal may recover it from them in an action for money had & received. So, if the factor on such a sale takes notes in payment from the vendee payable to him at a future day, & his assignees afterwards receive the money due on the notes, the principal may recover it from assignees in an action for money had & received. If the assignees of a bkpt. factor receive bounty money on any article under an Act of Parliament giving the bounty to the importer, the consignor of that article may recover such bounty money from them in an action for money had & received.—SCOTT *v.* SURMAN (1742), Willes, 400; 125 E. R. 1235.

Annotations:—**Consd.** Taylor *v.* Plumer (1815), 3 M. & S. 562. **Folld.** *Re* West of England & South Wales District Bank, *Ex p.* Dale (1879), 11 Ch. D. 772. **Refd.** Houghton *v.* Matthews (1803), 3 Bos. & P. 485; Gladstone *v.* Hadwen (1813), 1 M. & S. 517; Thompson *v.* Giles (1824), 2 B. & C. 422; Carvalho *v.* Burn (1833), 4 B. & Ad. 382; D'Arnay *v.* Chesneau (1845), 13 M. & W. 796; Boddington *v.* Castelli (1853), 1 E. & B. 879; Morgan *v.* Taylor (1859), 5 C. B. N. S. 653; *Re* Hallett's Estate, Knatchbull *v.* Hallett (1879), 13 Ch. D. 696, C. A.; Patten *v.* Bond (1889), 60 L. T. 583; St. Thomas' Hospital *v.* Richardson (1909), 101 L. T. 771, C. A. **Mentd.** Ryall *v.* Rowles (1750), 1 Ves. Sen. 348; *Re* Trye & Lightfoot, *Ex p.* Pauli (1838), 3 Deac. 169, Ct. of R.; Parnham *v.* Hurst (1841), 8 M. & W. 743; De Mattos *v.* Saunders (1872), L. R. 7 C. P. 570.

6147. —— —— Entry in factor's books.]—Where bills sold by a factor are not paid for at the time of his bkpcy., the proceeds do not belong to his assignees, but to the principal. The entry of the amount of the price in the factor's books as cash, to the credit of the principal, who has the right of drawing on them for the amount, does not change the contract of the parties, nor deprive the principal of his rights against the purchaser.—*Re* TRYE & LIGHTFOOT, *Ex p.* PAULI (1838), 3 Deac. 169; 2 Jur. 208, Ct. of R.

6148. Broker—Goods in hands of—After void sale.]—Where bkpt. had been employed as a broker by petitioners to sell a parcel of goods, & secretly agreed with the buyer to share the profit or loss of the transaction, in lieu of brokerage, & part of the goods remained in bkpt.'s hands at the time of his bkpcy.:—*Held:* the transaction was fraudulent, as against petitioners, & the sale void, & the assignees were bound to deliver up to petitioners the remaining portion of the goods—*Re* PEMBERTON, *Ex p.* HUTH (1840), 4 Deac. 294; Mont. & Ch. 667, Ct. of R.

6149. —— Dividend warrants entrusted to—For collection of dividends.]—Dividend warrants, on which bkpts., in their character of stockbrokers, were intrusted to receive the dividends, & which they had pledged for their own debt, were ordered to be delivered up to trustees, who had employed bkpts. as their brokers.—*Re* WAKEFIELD, *Ex p.* GREGORY (1842), 2 Mont. D. & De G. 613, Ct. of R.

6150. —— Securities bought for client & pledged for purchase price—Marshalling.]—A. employed brokers to purchase securities for him, the arrangement being that on each occasion they advanced him part of the purchase price & he paid the margin in cash or in account. It was also part of the arrangement that the money so advanced should be obtained by the brokers from their bankers, on deposit of A.'s securities so purchased. The brokers pledged A.'s securities & their own with their bankers as cover for their current overdraft. On the bkpcy. of the brokers the bank paid themselves by selling A.'s securities & handed over the surplus securities in their hands to the trustee:—*Held:* by analogy to the doctrine of marshalling A. was entitled to have the surplus securities in the hands of the trustee applied towards satisfaction of the balance due to him from the brokers on the account between them.—*Re* BURGE, WOODALL & Co., *Ex p.* SKYRME, [1912] 1 K. B. 393; 81 L. J. K. B. 721; 106 L. T. 47; 20 Mans. 11.

Banker—Rights of customer as to—Money or bills in hand of.]—*See* BANKERS & BANKING, Vol. III., pp. 289 *et seq.*

—— Right to follow trust money in customer's accounts with.]—*See* BANKERS & BANKING, Vol. III., p. 189.

Building society carrying on banking business ultra vires—Right to follow money in hands of.]—*See* BANKERS & BANKING, Vol. III., p. 159.

B. Property held by Bankrupt for special Purpose.

6151. Specific purpose—Bills remitted to meet drawings on particular account.]—Petitioners drew bills of exchange on J. & Son for £1,115 & undertook to make remittances to pay same, & at the same time acquainted them that the bills were for the proper account of petitioners' house at Cadiz, & desired J. & Son would keep a distinct account, & distinguish such new account by the

6146 i. —— *Proceeds of goods sold by—Unsold goods.*]—Goods having been consigned to a factor, who became insolvent:—*Held:* the principal, to whom a balance was due was entitled to recover (1) unsold goods consigned by him & at date of insolvency in the factor's possession, (2) bills in the factor's possession for the principal's goods sold to the extent of the unpaid balance due to the principal on goods, (3) the unpaid price of goods sold by the factor in his own name, & (4) a proportionate amount of promissory notes made in favour of the factor partly in settlement of the principal's goods.—CHIAPPINI & Co. *v.* JAFFRAY'S TRUSTEES (1843), 2 Men. 192.—**S. AF.**

k. *Commercial traveller — Money collected by.*]—A traveller for a commercial firm uplifted certain debts due to them, & retained them to account of his own personal claims against the firm. The firm was sequestrated, & the traveller was also declared bkpt.:—*Held:* the traveller was not entitled to collect the funds & retain them for payment of his own debt.—DICKSON *v.* NICHOLSON (1855), 17 Dunl. (Ct. of Sess.) 1011.—**SCOT.**

m. *Grantee of power of attorney to trade in grantor's name—Stock-in-trade of.*]—A. gave B. a general power of attorney to enable B. to trade as a general dealer under A.'s certificate. B. thereafter became insolvent, & his stock-in-trade was seized by deft. in his capacity as trustee in B.'s estate. A. claimed restoration of the goods:—*Held:* as neither A. nor B. intended to create the relation of principal & agent or to invest A. with the ownership of the goods, A. was not entitled to succeed.—MAHOMED ABDULLAH *v.* LEVY (1916), C. P. D. 302.—**S. AF.**

letter G. Bills drawn on V. in London to the amount of £1,146 11*s.* 11*d.* were remitted accordingly. J. & Son by letter acknowledged the receipt thereof, & promised petitioners to give credit in the account G. J. the father died on Feb. 25, 1754. The day before the son stopped payment, he got two of the remittances discounted for £566 11*s.* 11*d.* On Mar. 20 a commission of bkpcy. issued against J. the son. On an application that the assignees might be directed to deliver to petitioners the several bills of £1,146 11*s.* 11*d.* or pay the full value :—*Held :* the specific bills amounting to £580, ought to be delivered by the assignees of J. to petitioners, petitioners waiving their claim as to those which were discounted.—*Re* JULLIAN, *Ex p.* DUMAS (1754), 1 Atk. 232 ; 2 Ves. Sen. 582 ; 26 E. R. 149.

Annotations :—**Distd.** Tooke *v.* Hollingworth (1793), 5 Term Rep. 215. **Consd.** *Re* West of England & South Wales District Bank, *Ex p.* Dale (1879), 11 Ch. D. 772. **Refd.** *Ex p.* Emery (1755), 2 Ves. Sen. 674 ; *Re* Julians, *Ex p.* Oursell (1756), Amb. 297, L. C. ; *Re* Boldero, *Ex p.* Pease (1812), 19 Ves. 25, L. C. ; Muttyloll Seal *v.* Dent (1853), 5 Moo. Ind. App. 328, P. C. ; *Re* Hallett's Estate, Knatchbull *v.* Hallett (1880), 13 Ch. D. 696, C. A.

6152. —— Bills remitted to be applied for.]—Where a bill is sent by a correspondent to a merchant, to be applied to a particular use, & the merchant becomes bkpt. before the money is received, the correspondent has a special lien, & shall be preferred to the general creditors. It is otherwise where the bills are sent on a general account.—*Re* JULIANS, *Ex p.* OURSELL (1756), Amb. 297 : 27 E. R. 200, L. C.

Annotation :—**Refd.** Thompson *v.* Giles (1823), 3 Dow. & Ry. K. B. 733.

6153. —— Bills remitted to agent—For collection.]—Whether bills in possession of bkpt., not due at the time of bkpcy., pass to the assignees, or remain the property of the remitter, always turns upon the fact, whether the bills are remitted in order that the party to whom they are sent may recover the amount as agent to the party remitting, or whether the bills are so sent on a general account between the parties, that the person receiving them has a right to deal with them for his own use.

Where a foreign firm remitted to a London firm bills, some of which were not due when the London firm became bkpt. :—*Held :* (1) the London firm acted as agents to procure payments for the foreign firm, & were not at liberty to deal with the bills for their own purposes ; (2) the bills did not pass to the assignees.—*Re* POWER & WARWICK, *Ex p.* SMITH (1819), Buck, 355.

Annotation :—**Consd.** Jombart *v.* Woollett (1837), Donnelly, 229, L. C.

6154. —— —— To be held till covered.]—A merchant abroad sent drafts from time to time to his London correspondent for acceptance, under an authority for that purpose, & upon an understanding that the liabilities of the latter in respect of all such acceptances should be covered by means of bills payable in London to be remitted to him from time to time. Under such an arrangement, the presumption was, until an agreement to the contrary was shown, that the London correspondent was not intended or entitled to treat the bills, so remitted, as cash, or to discount them before maturity :—*Held :* two of such bills which were existing in specie in his hands at the time of his bkpcy., & were not then due, did not pass to his assignees, but were the property of the party who had remitted them.—JOMBART *v.* WOOLLETT (1837), 2 My. & Cr. 389 ; Donnelly, 229 ; 6 L. J. Ch. 211 ; 40 E. R. 688, L. C.

Annotation :—**Consd.** *Re* Trye & Lightfoot, *Ex p.* Pauli (1838), 2 Jur. 208, Ct. of R.

6155. —— —— For particular creditor.]—The assignees of an agent cannot retain bills sent to him before his bkpcy., but received afterwards, & accompanied by a letter directing the bills to be appropriated to a particular creditor, who received notice thereof.—*Re* DOUGLASS, *Ex p.* COTTERILL (1837), 3 Mont. & A. 376 ; 3 Deac. 12 ; 7 L. J. Bcy. 2 ; 1 Jur. 825, Ct. of R.

6156. —— —— For principal.]—A., through the agency of B., consigned goods to C. in India, for sale, who remitted bills to B., directing him to pay them over to A., " being remittance to account against A.'s consignment of the goods," & C. also wrote to A., advising him of the remittance thus made in his favour to B. Before the bills reached B.'s hands, he became bkpt. ; at which time C. was indebted to him in a large amount :—*Held :* B.'s assignees were bound to deliver up the bills to A., & they could not apply them towards the payment of the debt due from C. to B.—*Re* DOUGLAS, *Ex p.* HANKEY (1838), 4 Deac. 1 ; Mont. & Ch. 1, L. C.

6157. —— Bills remitted in payment for goods.]—A London firm advanced money to a merchant, about to make a consignment to their correspondents in Calcutta, & took as a security the bill of lading, which they sent to their correspondents with an account of the transaction, & a direction for the correspondents to remit the returns proceeds to the merchant, through them. The correspondents sold the goods, & remitted directly to the merchant a bill of exchange drawn upon the London firm for the full amount of the proceeds in the following form :—" Pay through your good selves, etc." The bill of exchange was received by the assignees of the merchant, who became bkpt. before its arrival :—*Held :* the assignees of bkpt. were bound to give up the bill on being paid the difference between the proceeds of the sale & the advance made to bkpt.—*Re* MORRISON, *Ex p.* MACKEY (1841), 2 Mont. D. & De G. 136, Ct. of R.

Annotations :—**Consd.** De Lizardi *v.* Pennel (1856), 6 E. & B. 742. **Mentd.** Ebsworth *v.* Alliance Marine Insce. (1873), L. R. 8 C. P. 596.

6158. —— Money received for—Knowledge of purpose.]—In order to make the assignees of bkpt. liable for money had & received by bkpt. for a specific purpose, it is necessary to prove that the money came into their hands with a knowledge of the purposes for which it was destined.—KIERAN *v.* JOHNSON (1815), 1 Stark. 109 ; 2 Rose, 463.

6159. —— Money advanced to pay creditors—Failure of purpose.]—Act of bkpcy. by lying two months in prison. During the imprisonment A. advanced to bkpt. money for the purpose of settling with his creditors. The purpose failing, a part of the money was repaid to A. by bkpt. :—*Held :* the repayment was protected, & the assignees could not recover the money so repaid.

The fair inference was that this money was advanced for a special purpose, & that being so clothed with a specific trust, no property in it passed to the assignee (ABBOTT, C.J.).—TOOVEY

PART XX. SECT. 5, SUB-SECT. 2.—B.

p. *Specific purpose—Debenture received to assign to creditor.*]—A bank holding movable property of H. & Co. in security of a debt, released part of such property in consideration of H. & Co. obtaining a debenture by J. & Co. & assigning it to the bank. The debenture was granted by J. & Co. to H. & Co., but was not assigned by H. & Co. to the bank at the date of the liquidation of H. & Co. :—*Held :* the debenture formed part of the assets of H. & Co. at the date of the liquidation & the bank was not entitled to claim it as a security for their debt.—BANK OF SCOTLAND *v.* HUTCHESON, MAIN & CO., LTD. (LIQUIDATORS OF), [1914] 1 S. L. T. 111, H. L.—**SCOT.**

Sect. 5.—"Property held by the bankrupt on trust for any other person": Sub-sect. 2, B.]

v. MILNE (1819), 2 B. & Ald. 683; 106 E. R. 514.

Annotations:—**Apld.** Edwards *v.* Glyn (1859), 2 E. & E. 29. **Distd.** Bills *v.* Smith (1865), 6 B. & S. 314. **Apld.** *Re* Rogers, *Ex p.* Holland & Hannen (1891), 8 Morr. 243, C. A. **Refd.** Buchanan *v.* Findlay (1829), 4 Man. & Ry. K. B. 593; *Re* Vautin, *Ex p.* Saffery, [1900] 2 Q. B. 325.

6160. —— —— Money paid over—Right of trustee to recover.]—After an act of bkpcy. had been committed by debtor his solr. called upon the solr. for applts., who were creditors having knowledge of the act of bkpcy., & informed him that a sum of money had been provided by a third party to be paid to debtor's pressing creditors. An arrangement was thereupon come to for payment of £270 to applts. on certain terms, which sum was on the same day paid to applt.'s solr. by cheque drawn by debtor's solrs. on their own banker, he being again assured in answer to special inquiry that the money was not debtor's but that a friend was finding it. Debtor was subsequently adjudicated bkpt., & repayment of the money was claimed by the trustee:—*Held:* as the money was advanced to bkpt. for the special purpose of enabling his pressing creditors to be paid & was impressed with a trust for that purpose, it never became the property of bkpt., & the trustee was not entitled to demand repayment.—*Re* ROGERS, *Ex p.* HOLLAND & HANNEN (1891), 7 T. L. R. 746; 8 Morr. 243, C. A.

Annotations:—**Folld.** *Re* Drucker, *Ex p.* Basden, [1902] 2 K. B. 237, C. A.; *Re* Watson, *Ex p.* Schipper (1912), 107 L. T. 783, C. A. **Refd.** *Re* Vautin, *Ex p.* Saffery, [1900] 2 Q. B. 325.

6161. —— —— —— ——.]—After a petition had been presented debtor's solrs. offered petitioning creditor's solr. £300, on condition that the petition should be dismissed, they stating that debtor had no money & that they should have to find the money, & the creditor's solr. accepted the £300, believing that it was not debtor's money, & the petition was dismissed. Debtor was subsequently adjudicated bkpt. on a later petition, when it appeared that bkpt.'s solrs. had themselves advanced the £300 to the creditor's solr. & had taken a charge on bkpt.'s property contemporaneously with the advance of the £300 to secure same:—*Held:* as the £300 had been advanced for the express purpose of obtaining the dismissal of the petition, & had never come into the hands of bkpt., it did not form part of his general assets.—*Re* DRUCKER, *Ex p.* BASDEN, [1902] 2 K. B. 237; 71 L. J. K. B. 686; 9 Mans. 237; *sub nom. Re* DRUCKER, *Ex p.* TRUSTEE *v.* BIRMINGHAM DISTRICT & COUNTIES BANKING CO., LTD., 86 L. T. 785, C. A.

Annotation:—**Consd.** *Re* Hooley, *Ex p.* Trustee (1915), 84 L. J. K. B. 1415.

6162. —— —— —— ——.]—Money was advanced by debtor's stockbroker to debtor in order to pay off a pressing creditor, the understanding being that the money was to be used for that purpose. The creditor's solrs. having accepted payment of the money so advanced:—*Held:* the money had never been under debtor's control, & was so impressed with a trust as to prevent the trustee from recovering the amount from the creditor.—*Re* HOOLEY, *Ex p.* TRUSTEE (1915), 84 L. J. K. B. 1415; [1915] H. B. R. 181.

6163. —— Money received to purchase goods—Profits resulting from misuser.]—B. & Co. gave A. a cash draft for £2,700 for the purchase for them of forty-five cases of indigo. A. made no such purchases, & gave no account of his disposal of the money, & was adjudicated a bkpt. From A.'s books, etc., it afterwards appeared he had applied the money of B. & Co. in reducing mtge. debts., & in investments in indigo, which had resulted in profits. The mortgaged property was afterwards sold, & a surplus resulted to bkpt.'s estate:—*Held:* the £2,700 was clothed with a specific trust & B. & Co. were entitled to the profits made by bkpt. on the dealings in indigo & to the surplus resulting from the sale of the mortgaged property, as the proceeds of their own money misapplied by bkpt., as far as the same could be traced.—*Re* HAMMOND, *Ex p.* BROOKE (1869), 20 L. T. 547; 17 W. R. 665.

6164. —— Money advanced to release goods.]—Under a writ of *fi. fa.* the sheriff seized scenery & theatrical costumes lying at a railway station in the name of a judgment debtor, but not being in fact his property. Debtor had a few days previously been adjudicated bkpt., although the sheriff had no notice of the fact at the time. To release the property for a performance, which bkpt. was under a contract to present, a sum of money was paid over to the sheriff by a third party, who took a receipt from bkpt. & deducted the amount so paid from a share of the takings at the theatre, to which bkpt. became entitled under the contract at the end of the week:—*Held:* the money was paid for the specific purpose of releasing goods which were not the property of bkpt., & the official receiver was not entitled to the goods seized or the money.—*Re* WATSON, *Ex p.* SCHIPPER (1912), 107 L. T. 783, C. A.

6165. —— Cheque sent for—But not used.]—Deft. agreed to lend to two persons, who afterwards became bkpts., £200, to be applied to a specific purpose, drew a cheque on his banker for that sum, & delivered it to them before their bkpcy. Not having used the cheque, they returned it to the lender after having committed an act of bkpcy.:—*Held:* their assignee could not maintain trover for the cheque.—MOORE *v.* BARTHROP (1822), 1 B. & C. 5; 2 Dow. & Ry. K. B. 25; 1 L. J. O. S. K. B. 4; 107 E. R. 2.

Annotations:—**Refd.** Edwards *v.* Glyn (1859), 28 L. J. Q. B. 350. **Mentd.** Keene *v.* Beard (1860), 8 C. B. N. S. 372.

6166. —— Cheque received to remit to creditor—Right to proceeds.]—Three cheques drawn upon bkpts., bankers, were remitted by petitioners, also bankers, to bkpts., & the cheques were received by bkpts. for the sole purpose of being transmitted by them to petitioners or to their London bankers, bkpts. knowing they had no right to the cheques, & that bkpcy. was inevitable:—*Held:* petitioners might obtain relief; (1) if the cheques were to be considered as not paid before the bkpcy., they had been paid since to the assignees, & as in that view the property in the cheques remained in petitioners, the money was received for petitioners' use; (2) if the cheques were to be considered as paid before the bkpcy. they were so in the sense only, as between the drawers & bkpts., that the drawers became the debtors of bkpts. for the amount, & those debts were specific choses in action, separable & distinguishable from their general assets, & were acquired by bkpts. subject to an equity in petitioners' favour not affected by the bkpcy., & the money in discharge of them received by the assignees was had for the use of petitioners.—*Re* WISE, *Ex p.* COLE (1843), 3 Mont. D. & De G. 189.

6167. —— Cheque held by banker on trust—Right to proceeds.]—J. received on behalf of foreign principals a cheque for £154 3*s.* 8*d.* drawn on an English bank, which he handed to A., a banker, "to keep the money for him in trust," & received a receipt. Two days afterwards J. received £4 18*s.* 6*d.* from A. & on or about

Apr. 13, £19 5*s.* 10*d.* from him. The sums were required to send abroad. A. was adjudicated bkpt., & his trustee claimed the proceeds of the cheque:—*Held:* as the cheque was handed to A. in trust, the relationship of banker & customer did not exist between the parties, & the trustee was not entitled to the money.—*Re* BROWN, *Ex p.* PLITT (1889), 60 L. T. 397; 37 W. R. 463; 6 Morr. 81.

See, generally, BANKERS & BANKING, Vol. III., pp. 298 *et seq.*

6168. —— Goods held for.]—If goods are in the possession of bkpt. for any specific purpose, or, in other words, in trust, they do not pass to his assignees (SIR J. CROSS).—*Re* MANNING & ANDERDON, *Ex p.* SMITH, PAYNE & SMITH (1834), 4 Deac. & Ch. 579; 4 L. J. Bcy. 14, Ct. of R.

6169. —— Goods rejected—Held for sale—No trust.]—Bkpt. bought goods, which he refused by letter to accept, offering to hold them for the vendor & to sell them for his account. The vendor did not answer:—*Held:* bkpt. was not a trustee for the vendor, & the goods passed to his trustee in bkpcy.—*Re* LANDROCK, *Ex p.* FABIAN (1884), 1 Morr. 62.

6170. Specific appropriation—Goods sent to meet acceptances—Failure of purpose.]—A. agreed that B. should purchase of A. all the light gold coin which he could send at a stated price, & that A. should from time to time draw upon B. for the money due upon such sale, & that B. should also from time to time accept other bills drawn by A. for his own convenience, for which A. was to remit value. After they had acted under the contract for some time, B. became a bkpt., being under acceptances to a large amount, & A., not knowing of the bkpcy., sent a parcel of light gold & bills, to enable B. to discharge the acceptances, which parcel was taken by B.'s assignees:—*Held:* A. who had since paid B.'s acceptances, might recover back the gold & bills sent after the bkpcy., on the ground that they were sent for the particular purpose of paying those acceptances, & as that purpose was not answered, the property in the gold, etc., remained in A.—TOOKE *v.* HOLLINGWORTH (1793), 5 Term Rep. 215; 101 E. R. 121; *affd.* S. C. *sub nom.* HOLLINGWORTH *v.* TOOKE (1795), 2 Hy. Bl. 501, Ex. Ch.

Annotations:—**Distd.** Bolton *v.* Puller (1796), 1 Bos. & P. 539. **Apld.** Parke *v.* Eliason (1801), 1 East, 544. **Refd.** Bloxam *v.* Sanders (1825), 4 B. & C. 941; *Re* Tappenbeck, *Ex p.* Banner (1876), 2 Ch. D. 278, C. A. **Mentd.** *Re* Boldero, *Ex p.* Pease (1812), 1 Rose, 232, L. C.; Gibson *v.* Carruthers (1841), 8 M. & W. 321; Fleming *v.* Davidson (1843), 1 L. T. O. S. 112; Valpy *v.* Gibson (1847), 16 L. J. C. P. 241; *Re* Edwards, *Ex p.* Chalmers (1873), 28 L. T. 325, L. C. & L. JJ.

See, also, BANKERS & BANKING, Vol. III., p. 248.

6171. —— Bills remitted in repayment of remittances for.]—A. abroad commissioned B., in London, to send him foreign coin, with particular directions as to the manner & times of sending it, & remitted bills, which B. discounted. The coin required not being to be had in England, B. sent two remittances, not equal to the amount of A.'s bills, to Lisbon, for the purpose of procuring it, with directions, if it could not be had, to return bills. The coin not being to be had, bills, nearly to the amount of the remittance to Lisbon, not indorsed by the correspondent there, were returned, & B. in the interval having become bkpt., were received by his assignees:—*Held:* A. had a lien upon those bills in the particular circumstances. *Qu.:* whether the lien would hold in the case of a remittance to buy goods in the way of trade.—*Ex p.* SAYERS (1800), 5 Ves. 169; 31 E. R. 528, L. C.

Annotations:—**Consd.** *Re* Scheibler, *Ex p.* Cooper (1874), 31 L. T. 417, L. JJ. **Refd.** *Re* West of England & South Wales District Bank, *Ex p.* Dale (1879), 11 Ch. D. 772; *Re* Hallett's Estate, Knatchbull *v.* Hallett (1880), 13 Ch. D. 696, C. A.

6172. —— Bills deposited for long bills.]—A. places long bills indorsed by him in B.'s hands, with permission to draw without renewals bills of shorter dates, & desires B. to calculate the sum to be drawn for, allowing commission. B. discounts the bills & specifies the amount to be drawn for. This is not an exchange or sale of bills upon discount, but a deposit of the long bills on condition of being allowed to draw shorter bills, & B. having accepted A.'s bills & such acceptances being dishonoured in consequence of B.'s bkpcy., & the long bills having remained in specie in B.'s hands at the time of his bkpcy., & B.'s assignees having afterwards received the value of them, A. may recover the amount from them as money had & received to his use.—PARKE *v.* ELIASON (1801), 1 East, 544; 102 E. R. 210.

6173. —— Bill drawn in satisfaction of another—Right to proceeds.]—P., who was employed as agent of bkpts. to purchase hemp, drew a bill on bkpts. to obtain money for such purchases, made payable to S. P. was unable to make any purchases, & procured another bill payable to the order of bkpts., which he remitted to them, & which came into the hands of the assignees, who received the amount of it. The bill drawn by P. was dishonoured:—*Held:* the assignees must apply the proceeds of the bill they had received in satisfaction of the bill drawn by P.—*Re* RAMSAY & FOSTER, *Ex p.* PEYRON (1816), 2 Rose, 366.

6174. —— Proceeds of goods to meet acceptances.]—A. agreed to consign goods to B. & C. abroad, to be there sold on commission, on his account, on which deft. guaranteed that B. & C. should sell them to the best advantage, & render a just account of sales. Before any consignments were made, C. had ceased to be a partner with B., & deft. became one in his stead, under the firm of B. & Co. A. afterwards consigned goods to B. & Co., who remitted the proceeds thereof to deft., for the purpose of being handed over to A., who drew bills on deft., which he by letter agreed to accept, depending on A.'s promise to provide for them if remittances should not arrive from B. & Co. to meet them. A. became bkpt., previous to which B. & Co. had remitted to deft., directing him to pay A., on account of the goods consigned by him, which were not received by deft. till after the bkpcy. B. & Co. afterwards sent other remittances, with similar directions, with which deft. credited bkpt. in his account, & debited him for the acceptances given by him before the bkpcy., but which were paid afterwards. In an action by the assignee to recover those subsequent payments:—*Held:* he was not entitled to recover, as there was a specific appropriation of the proceeds to provide for deft.'s acceptances before the bkpcy.—THOMAS *v.* DA COSTA (1818), 2 Moore, C. P. 386; 8 Taunt. 345; 129 E. R. 416.

6175. —— ——.]—A banking co., at the request of L., gave to H., who had been instructed to buy cotton for him, a letter of credit authorising him to draw upon them, the bills of exchange to be accompanied by bills of lading of the cotton to be delivered to them on their accepting the bills. A bill for £7,798 was drawn & accepted by the co., & the bills of lading delivered to them. The co. handed the bills of lading to L., to enable him to obtain an advance. L. obtained an advance of £6,000 on them from his brokers, & paid the

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amount into the co., who carried it to his account. Before the bill of exchange arrived at maturity, the co. was ordered to be wound up. After the commencement of the winding up, but before any claim was sent in upon the bill, the cotton was sold by the brokers, who, after retaining £6,000, paid the balance of £574 to the holders of the bill. The holders having been allowed to prove for the whole amount of the bill, the £574 to be set off against the dividends payable to them :—*Held :* the £574 could not be set off against the dividends. *Semble :* the amount of the proof ought to have been reduced by £574.—*Re* BARNED'S BANKING CO., LEECH'S CLAIM (1871), 6 Ch. App. 388 ; 40 L. J. Ch. 590 ; 24 L. T. 647 ; 19 W. R. 552, L. J.

See, generally, Part X., *ante.*

6176. —— —— General agreement—No appropriation.]—An agreement between bkpt. & defts., before bkpcy., that defts. shall accept bills to enable bkpt. by his agent abroad to purchase cargoes & transmit them to defts., who were to pay their acceptances out of the proceeds & to place the surplus to the account of the bkpcy. is no defence to an action for proceeds received after the bkpcy.—CARTER *v.* BARCLAY (1821), 3 Stark. 43, N. P.

6177. —— Proceeds of goods sold—Acceptances on general account.]—A. trading in London on his separate account & at Brazil in partnership with B. & Co. under the firm of A. & Co. became insolvent, when four of his creditors were appointed inspectors of his estates, who it was agreed should receive the several consignments & remittances expected from the Brazil house, as trustees for the persons to whom the same might ultimately be found to belong. The Brazil house ignorant of A.'s insolvency made various consignments to A., directing him to sell them at certain places abroad & the proceeds to be placed to the account of the Brazil house, & the goods were sold under the direction of the inspectors & the proceeds received by them. At the time of A.'s insolvency he was under acceptances to the Brazil house to a larger amount than the value of the consignments, but such acceptances were on a general account & not on account of any particular consignments from the foreign house. A. afterwards became bkpt. & a cession of the effects of the Brazil house was also made to assignees according to the laws of Brazil :—*Held :* the assignees of the Brazil house & not the assignees of A. in England were entitled to the proceeds of the goods.—*Re* VANZELLER, *Ex p.* WUCHERER (1832), 2 Deac. & Ch. 27, Ct. of R.

6178. —— Bills remitted on account of proceeds of shipments.]—Bkpt. shipped goods to M. & F. at New South Wales, & petitioner accepted bills drawn by bkpt. for the invoice price, upon the express agreement that the proceeds of the several consignments should be received by petitioner & appropriated by him in discharge of such acceptances, & notice of the agreement was given to M. & F. Two bills, which were remitted to England by M. & F. on account of the proceeds of some of the shipments made by bkpt., came to the hands of the assignees :—*Held :* petitioner was entitled to the proceeds of the bills as well as all the future proceeds that might come to the hands of the assignees in respect of the shipments made by bkpt. to M. & F. to be applied in discharge of petitioner's acceptances.—*Re* CORMIE, *Ex p* FLOWER (1835), 4 Deac. & Ch. 449 ; 2 Mont. & A. 224, Ct. of R.

Annotation :—**Consd.** Bligh *v.* Davies (1860), 28 Beav. 211.

6179. —— Shares—Proceeds appropriated to meet bills.]—A firm in England agreed with a firm in America that the latter should purchase American bank shares & remit them to the English firm for sale, drawing bills on the English firm for the purchase-money, & the proceeds of the sale of the shares to be applied in payment of the bills. Bills were drawn by the American firm on the English firm and were negotiated. Both firms became bkpt. The certificates of the shares arrived after the bkpcy. of the English firm & came into the hands of their assignees :—*Held :* the certificates were clothed with a trust to retire the bills, & the proceeds of their sale must be so applied.—*Re* WARWICK & CLAGETT, *Ex p.* BROWN (1838), 3 Deac. 91 ; 3 Mont. & A. 471 ; 7 L. J. Bcy. 29 ; 2 Jur. 82, Ct. of R.

6180. —— Goods consigned to meet bills.]—B., S. & Co., of Calcutta, having consigned goods to G. in England, on which they had a lien for the price, wrote him word that they intended to draw in favour of K. & Co. for the balance of such shipments, & that they inclosed bills of lading & policies of insurance for the goods in question, & they also drew a bill for the amount on G., in favour of K. & Co., which they directed G. to " place to account of shipments per B." Before the goods reached England G. became bkpt., & the goods came to the possession of his assignees :—*Held :* the above expressions in the bill & the letter amounted to a specific appropriation of the goods for the payment of the bill, & the assignees were bound to account to K. & Co. for the proceeds. —*Re* BOGGS, *Ex p.* GLEDSTANES (1842), 3 Mont. D. & De G. 109, Ct. of R.

Annotations :—**Distd.** *Re* Boggs, *Ex p.* Gemmell (1843), 3 Mont. D. & De G. 198, L. C. ; Frith *v.* Forbes (1862), 31 L. J. Ch. 793. **Refd.** Inman *v.* Clare (1858), John. 769.

6181. —— —— Lien.]—B. & Co. consigned a cargo to deft. & sent to them the bill of lading in a letter saying : " The present serves to cover bill of lading for, etc., shipped per *China,* against which we have valued on you at six months in favour of F., S. & Co., for £1,200, which please kindly protect." On the same day B. & Co. sent to F., S. & Co. the bill of exchange, which was drawn on defts. to the order of F., S. & Co., & concluded " place same with or without advice to account consignment per *China.*" After the bill of lading arrived F., S. & Co., presented the bill but defts. refused to accept it. Shortly afterwards B. & Co. stopped payment, & afterwards the cargo arrived : —*Held :* it was effectually appropriated to meet the bill, & F., S. & Co. had a lien upon it in priority to the claim of defts. for the balance due to them on their general account as consignees.—FRITH *v.* FORBES (1862), 4 De G. F. & J. 409 ; 32 L. J. Ch. 10 ; 7 L. T. 261 ; 8 Jur. N. S. 1115 ; 11 W. R. 4 ; 1 Mar. L. C. 253 ; 45 E. R. 1242, L. JJ.

Annotations :—**Expld.** Robey Perseverance Ironworks *v.* Ollier (1872), 7 Ch. App. 695, L. JJ. ; *Re* Entwistle, *Ex p.* Arbuthnot (1876), 3 Ch. D. 477, C. A. **Distd.** Ranken *v.* Alfaro (1877), 5 Ch. D. 786 ; *Re* Suse, *Ex p.* Dever (1884), 13 Q. B. D. 766, C. A. ; Phelps, Stokes *v.* Comber (1885), 29 Ch. D. 813, C. A. **Consd.** Brown, Shipley *v.* Kough (1885), 29 Ch. D. 848, C. A.

6182. —— —— Pledge of bills of lading—Marshalling securities—Lien.]—A firm in Ceylon employed a firm in England as their agents & factors, the course of business being that the Ceylon firm consigned cargoes to the English firm for sale on their account, & drew bills on the English firm against the consignments. Consignments of coffee having been made in such manner, & bills accepted by the English firm against them, the English

firm pledged the coffee, together with securities of their own, with T., to secure a debt due from them to him. The English firm became insolvent & executed a creditor's deed under 1861 Act, & then T. sold the coffee, which produced more than sufficient to cover the bills drawn against it, & enough of the other securities to satisfy his debt :—*Held :* the Ceylon firm were entitled, as against the English firm in liquidation, to have the remaining securities in T.'s hands marshalled, & to have a lien thereon for the balance due to them upon the coffee transaction.—*Re* HOLLAND, *Ex p.* ALSTON (1868), 4 Ch. App. 168 ; 19 L. T. 542 ; 17 W. R. 266, L. C. & L. J.

Annotation :—**Folld.** *Re* Stratton, *Ex p.* Salting (1883), 25 Ch. D. 148, C. A.

6183. —— Bill of lading to meet broker's acceptances.]—Bkpts. employed petitioners as their brokers, for the sale of East India produce, & the brokers accepted bills to a large amount in favour of bkpts., on the credit of goods deposited with them for sale, & of bills of lading for goods shipped & consigned from India to bkpts. On Oct. 14, bkpts., being then in full credit, proposed to the brokers to accept bills in their favour, to the amount of £3,000, &, to induce them to do so, informed them that a cargo of oil was consigned to bkpts. from Bombay, which they intended to place in the brokers' hands for sale, & undertook to hand over to them the bill of lading, when received. On Oct. 24 a fiat was issued against bkpts., & the bill of lading came to the possession of the assignees :—*Held :* the brokers were entitled to have the bill of lading delivered up to them, & had a lien upon the cargo of oil for their general balance.—*Re* EVANS, *Ex p.* BARBER (1843), 3 Mont. D. & De G. 174, Ct. of R.

Annotation :—**Refd.** Ebsworth *v.* Alliance Marine Insce. (1873), L. R. 8 C. P. 596.

6184. —— Money sent to meet accommodation bills.]—A., the drawer of an accommodation bill, before its maturity, handed over money to B., the acceptor, for the purpose of meeting the bill. A fiat having been issued against B. between the day of such deposit & the maturity & payment of the bill :—*Held :* the money having been handed over to B. in pursuance of a binding contract, upon a good consideration, *viz.*, an implied contract of indemnity, the bkpcy. of B. was no revocation of A.'s authority to apply the money in satisfaction of the bill, & B.'s assignees could not recover it from him in an action for money had & received to their use.—YATES *v.* HOPPE (1850), 9 C. B. 541 ; 19 L. J. C. P 180 ; 15 L. T. O. S. 25 ; 14 Jur. 372 ; 137 E. R. 1003.

6185. —— Money paid to bank to meet bills—Instructions carried out.]—The customer of a country bank having a sum of £942 standing to his account paid in a further sum of £707, with a written direction that £500 of that sum should be forwarded to another bank to meet a bill to become due. A sum of £500 was sent as directed, but before the bill became due the country bank ceased to carry on business :—*Held :* the £500 was specifically appropriated, & belonged to the customer of the bank, & not to the general creditors. —FARLEY *v.* TURNER (1857), 26 L. J. Ch. 710 ; 29 L. T. O. S. 257 ; 3 Jur. N. S. 532 ; 5 W. R. 666.

Annotation :—**Distd.** *Re* Barned's Banking Co., Massey's Case (1870), 39 L. J. Ch. 635.

6186. —— —— Instructions not carried out.]—F. accepted a bill for £185 drawn by M., & deposited money to meet it at the B. bank. The bank stopped payment before taking any step towards applying it to the purpose :—*Held :* F. could not recover the money paid, but had merely a right of proof as a general creditor.—*Re* BARNED'S BANKING CO., LTD., MASSEY'S CASE (1870), 39 L. J. Ch. 635 ; 22 L. T. 853 ; 18 W. R. 818.

6187. —— Bills sent to meet bills.]—B. was in the habit of drawing bills on H. & Co., bankers, & of remitting bills to them to an amount fully sufficient to meet their acceptances. H. & Co. became bkpt. At that time there were in the hands of holders for value undue bills to a large amount drawn by B. upon H. & Co., & accepted by them, but H. & Co. had misappropriated the greater part of the bills remitted to meet them :—*Held :* B. could not have returned to him the remitted bills as remained in the hands of H. & Co., at the time of their bkpcy., but they must be applied so far as they would extend in payment of the bills accepted by H. & Co.—*Re* HARRISON, *Ex p.* CARRICK (1858), 2 De G. & J. 208 ; 44 E. R. 968, L. JJ.

Annotation :—**Refd.** Frith *v.* Forbes (1862), 6 L. T. 847.

6188. —— Remittances to meet bills.]—A., a manufacturer, proposed to B. & C., the home agents of A.'s foreign consignees, that they should make advances to him against the consignments, & that "the proceeds of sales, above the advances" should go to the liquidation of an old claim of B. & C. against A. B. & C. assented to the arrangement by a letter which, after stating that there were two ways of making advances, one for A. to draw on B. & C., & take their acceptances, & negotiate them, the other for B. & C. to advance cash to A., & draw on A. for the amounts, A. to accept, & B. & C. to negotiate, concluded thus : "& we shall retire that acceptance from proceeds of the sales." In pursuance of such arrangement, A. directed his consignees to remit to B. & C., & B. & C. made advances to A. by drawing on him, negotiating his acceptances, & remitting the proceeds to him. Afterwards B. & C. being in want of money, directed the consignees to remit, not to themselves, but to bankers, C. & D., having a common partner with themselves, as a security for advances made by C. & D. to B. & C. Upon B. & C. becoming bkpt. :—*Held :* the remittances in the hands of C. & D. were appropriated in equity to the payment of A.'s acceptances, & subject thereto, to the discharge of the old claim.—STEELE *v.* STUART (1866), L. R. 2 Eq. 84 ; 14 L. T. 620.

6189. —— Bills for price of goods to be placed to account—No appropriation—Bills drawn against goods—No agreement to appropriate.]—Bills of exchange were drawn by the vendor & shipper of goods upon the purchaser for the invoice prices of the goods, with a direction to place same to account of the shipments. On the acceptance of the bills by the purchaser the bills of lading were handed over to him. The bills of exchange were dishonoured at maturity, & the purchaser became bkpt. :—*Held :* there was no specific appropriation of the proceeds of sale of the goods to meet the bills of exchange.—*Re* ENTWISTLE, *Ex p.* ARBUTHNOT (1876), 3 Ch. D. 477 ; 25 W. R. 238, C. A.

Annotation :—**Mentd.** Brown, Shipley *v.* Kough (1885), 29 Ch. D. 848.

6190. —— Goods & bills—No appropriation.]—A. purchased from B. & Co. in America a bill of exchange dated Aug. 5, 1875, payable sixty days after sight for £2,500 drawn upon K. in London, on the face of which was a direction "to charge same on account of cheese per *Britannic* & lard per *Greece* as advised." On the same day B. & Co. wrote to K. a letter of advice inclosing bills of lading for the cheese & lard, & informing K. that as against them they valued on him at sixty days sight for £2,500 favour A. The bill was not

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accepted, K. having heard that B. & Co. had suspended payment on Aug. 7, but on the arrival of the consignments in England, K. took possession of them & realised them, receiving the proceeds, out of which he claimed to retain a balance due to him on the general account between him & B. & Co. B. & Co. had for many years been in the habit of consigning American produce to K. & drawing bills on him in a similar form to that of Aug. 5, but there had not been any practice of specifically appropriating the remittances to meet any particular bills. A. brought an action against K. & the trustee of B. & Co., claiming to be entitled to a charge on the proceeds of the cheese & lard in priority to all other persons. No question was raised as between K. & the trustee as to their respective rights:—*Held:* A. was not entitled to the charge claimed either (1) on the ground that the direction on the face of the bill of exchange operated as an equitable assignment, or (2) that the letter of advice created a specific appropriation of the remittances to meet the bill in favour of B. & Co. the benefit of which was transferred to A. by the direction on the bill of exchange.—BROWN, SHIPLEY & Co. *v.* KOUGH (1885), 29 Ch. D. 848; 54 L. J. Ch. 1024; 52 L. T. 878; 34 W. R. 2; 5 Asp. M. L. C. 433, C. A.

Annotations:—**Refd.** Konig *v.* Brandt (1901), 84 L. T. 748, C. A.; Guaranty Trust Co. of New York *v.* Hannay, [1918] 2 K. B. 623, C. A.

6191. —— —— ——.]—A firm at Liverpool & a firm at Pernambuco employed B. as their agent at New York. According to their course of business the firm at Pernambuco received orders from persons there to purchase goods at New York. The firm instructed the Liverpool firm, who instructed B., who then purchased the goods in New York & shipped them to the firm at Pernambuco with the bills of lading. B. drew bills on the Liverpool firm to pay for the goods, but not for the precise amount of the shipments, & sold the bills in New York. B. advised the Liverpool firm of the bills, & with the advice forwarded a statement of his account with them. To each bill was attached a counterfoil headed "Advice of draft," & containing a memorandum of amount of the bill & the name of the drawer, with the words "Against shipments per (naming the vessel). Please protect the draft as advised above." The Liverpool firm on the bills being presented to them for acceptance detached the counterfoils & kept them in their own possession. Pltfs. were the holders for value of bills drawn on the Liverpool firm in accordance with such course of dealing, the goods having been shipped by B. to the Pernambuco firm & the bills of lading being also sent to that firm. On June 10, 1879, the Liverpool firm stopped payment, & on the same day B. telegraphed to the Pernambuco firm as follows:—"Having pledged documents & shipments (naming the vessel) hold proceeds for P. & Co. (pltf.)" The ship arrived on June 11, but the bills of lading had been previously delivered to the purchasers of the goods. The three bills having been dishonoured by the Liverpool firm, pltfs. brought an action against the Pernambuco firm claiming to have the bills paid out of the proceeds of the goods as having been specifically appropriated to meet the bills:—*Held:* there was no specific appropriation of the goods either by the course of dealing or by the "advice of draft" attached to the bills.—PHELPS STOKES & Co. *v.* COMBER (1885), 29 Ch. D. 813; 54 L. J. Ch. 1017; 52 L. T. 873; 33 W. R. 829; 5 Asp. M. L. C. 428, C. A.

Annotation:—**Mentd.** Booth S. S. Co. *v.* Cargo Fleet Iron Co. [1916] 2 K. B. 570, C. A.

SUB-SECT. 3.—PROPERTY OF WHICH BANKRUPT HAS DIVESTED HIMSELF OF BENEFICIAL INTEREST.

A. Property in Possession of Bankrupt.

6192. Specific appropriation—Goods consigned to meet agent's acceptances.]—If a factor accepts bills drawn by his principal upon the faith of consignments agreed to be made by the principal to the factor, & both of them become bkpts. before a cargo consigned come into possession of the factor, his assignees have no property in such cargo, & cannot recover the produce of it against the assignees of the principal, if they have sold it & received the purchase-money.—KINLOCH *v.* CRAIG (1790), 3 Term Rep. 783; 4 Bro. Parl. Cas. 47; 100 E. R. 858, H. L.

Annotations:—**Distd.** Hammonds *v.* Barclay (1802), 2 East, 227. **Consd.** Feise *v.* Wray (1802), 3 East, 93. **Folld.** Patten *v.* Thompson (1816), 5 M. & S. 350. **Apld.** Nichols *v.* Clent (1817), 3 Price, 547. **Distd.** Bryans *v.* Nix (1839), 4 M. & W. 775. **Mentd.** Sweet *v.* Pym (1800), 1 East, 4; M'Combie *v.* Davies (1805), 7 East, 5.

See, also, AGENCY, Vol. I., pp. 343, 344.

6193. —— **Money against bills.**]—J. leaving England executed a power of attorney empowering H. to act for him, & afterwards was in the habit of drawing bills which were accepted by J. J. from Calcutta, whilst solvent, consigned a cargo to F. & Co., of Bombay, directing them to transmit the proceeds to H. in London. J. became a bkpt., & F. & Co., having sold the cargo, remitted to H. a draft for the amount. The question being, whether H. was entitled to retain the money:—*Held:* the remittance having been made in pursuance of an order given by J. when he was solvent, & without fraud, H. was entitled to retain it, he having a lien for the amount of the balance due to him.—JAMIESON *v.* HODSON (1815), 1 Stark. 150, N. P.

6194. —— —— **Bills dishonoured—Right to retain damages.**]—G. paid a sum of money into his bankers, with directions to apply same in payment of certain of his acceptances, then about to become due. The bankers retained the money & suffered the bills to be dishonoured. G. afterwards became bkpt., & his assignees brought an action against the bankers for the injury so done to bkpt. & obtained a verdict for a sum equal to the amount due on the bills:—*Held:* the assignees were entitled to retain such sum against the holders of the bills.—*Re* GEERING, *Ex p.* SPARKES (1850), Fonbl. 51; 14 L. T. O. S. 548.

6195. —— **Bills remitted for unindorsed bills.**]—A., in London, agreed to consign goods to B. & Co. at Hamburg, on a commission *del credere*, to receive the proceeds through the hands of C., their partner in London, who was to make advances to A., & repay himself out of the proceeds. B. & Co. purchased bills at Hamburg, drawn on D. in London, indorsed to themselves, & which they indorsed, & remitted to C., as part of the proceeds, advising A. thereof, & desiring him to give them credit for them, when duly honoured. The bills were accepted by D., but never indorsed over to A., & before they became due D. stopped payment:—*Held:* the jury were justified in considering that the bills were sent on the account, & at the risk, not of A. but of C., & A. having become bkpt., his assignees were entitled to recover the balance of the proceeds from C.—LUCAS *v.* GRONING (1816), 2 Marsh. 460; 7 Taunt. 164; 1 Stark. 391; 129 E. R. 66, N. P.

6196. —— Bill against cargo—Unaccepted bill.]—C. & Co. held a bill for £7,500 on bkpts. in respect of a cargo of coffee, in the form, "Pay C. & Co. £7,500, which place against account of coffee per *Vigilant*." The bill was not accepted, having arrived after the bkpcy. :—*Held :* the bill did not give C. & Co. a lien on the coffee as against the assignees.—*Re* HIGGINSON, *Ex p.* CARRUTHERS (1849), 3 De G. & Sm. 570 ; 13 L. T. O. S. 9 ; 13 Jur. 276 ; 64 E. R. 611.

Annotation :—**Refd.** Frith *v.* Forbes (1862), 31 L. J. Ch. 793.

6197. —— Goods to meet bills.]—The holders of bills of exchange, which have been accepted by bkpts. as consignees against certain specified consignments in their hands, are entitled as against the assignees to have the proceeds of such consignments applied in the first instance towards satisfaction of those bills.—*Re* FRANCIS & HOOPER, *Ex p.* LONDON & WESTMINSTER BANK (1860), 3 L. T. 484.

6198. —— —— Over payment—Right to recover surplus.]—M., in Mar., 1859, consigned oats to the correspondents of pltfs. at Melbourne for sale, the proceeds to be remitted to pltfs., & against such consignment pltfs. accepted in favour of M. a bill at four months for £600, it being agreed that pltfs. should be repaid that sum out of the proceeds of the sale of the oats, any deficiency to be made good by M., who was also to pay interest to pltfs. on the £600 from the time the bill became due till the arrival in England of the proceeds of the oats. In June, 1859, M. became bkpt., pltfs.' acceptance remaining in his hands unnegotiated. The assignees of M. took possession of the bill, & paid it into the Bank of England, to the credit of the accountant in bkpcy. for the estate of M., & the bill was presented to pltfs.' bankers at maturity (July, 1859), & paid by them, pltfs. being in ignorance of the fact of its having remained in M.'s hands unnegotiated. The account sales of the shipment were received from Melbourne in Mar., 1860, showing that M.'s estate had been overpaid to the extent of £269 4*s.* 6*d.* :—*Held :* pltfs. were not in the circumstances entitled to recover back that money from the assignees.—DE PASS *v.* BELL (1861), 10 C. B. N. S. 517 ; 9 W. R. 704 ; 142 E. R. 554.

Annotation :—**Mentd.** Spackman *v.* Evans (1868), L. R. 3 H. L. 171, H. L.

6199. —— ——.]—It was agreed between T., a London merchant, & S. & Co., a firm carrying on business at London & Shanghai, that T. should from time to time accept bills to be drawn upon him by S. & Co. on the security of the bills of lading of goods to be consigned by them to their house at Shanghai for sale, & the net proceeds of the sale were to be remitted to the London house, which was to pay them over to T. Amongst other transactions carried out in pursuance of such agreement, T., in Mar., 1873, accepted two bills at six months' sight for £825 & £750 respectively against goods, & sent the bills of lading of the goods to S. & Co.'s house at Shanghai. They sold part of the goods in two lots for £247 & £757, & paid the proceeds of the sales, together with those of other sales, into a bank at Shanghai to their own credit, & on July 26 with those two sums, & with other money, they purchased drafts on London for £1,198 & £1,000, which they remitted to their London house "to our credit," & in their letter of that date enclosing the drafts they sent lists of sales with which they credited their London house, & which comprised the two sales for £247 & £757. The drafts, on reaching London, came into the hands of the trustee in the liquidation of S. & Co., who had filed a liquidation petition in Aug., 1873 :—*Held :* there was no specific appropriation, so as to entitle T. to receive the £247 & £757 out of the remittances of £1,198 & £1,000, in payment *pro tanto* of his acceptances for £825 & £750.—*Re* SCHEIBLER, *Ex p.* COOPER (1874), 31 L. T. 417, L. JJ.

—— **Of own property by bankrupt—To make good breach of trust.**]—*See* Sect. 12, sub-sect. 4, C., *post.*

6200. Specific performance—Money in box deposited for—Failure of purpose.]—O. & S., bankers, being in want of funds to meet an expected run upon their bank, obtained from friends a written guarantee for £3,000, upon the strength of which defts. advanced to O. & S. £3,000. The guarantee was signed by the sureties, on the understanding with O. & S. that the money should be returned, if they found themselves, notwithstanding the advance, unable to meet the run. Defts. knew nothing of such understanding. S. received from defts. the £3,000 in notes & gold in a box, &, finding that it was impossible to meet the run, O. & S. discussed the propriety of returning the money. While discussing it they received a letter from F., one of the sureties, saying that, as the case was hopeless, O. & S. could not honourably retain the money, & that it ought to be returned, & F. afterwards, in an interview, again urged upon them the return of the money. S., in evidence, stated that the letter & the subsequent application from F. operated upon their minds in coming to the conclusion to return the money, & the box containing the money was returned to defts. unopened. O. & S. suspended payment the next day, & afterwards became bkpts. In an action by the assignees of O. & S. to recover from defts. the £3,000 :—*Held :* the £3,000 was advanced on the specific understanding, & clothed with the specific trust, that it should be returned if the run could not be met, &, as the purpose for which it was advanced had failed, O. & S. had only a legal, & not also an equitable, title to the money, & the interest in such money did not pass to their assignees.—EDWARDS *v.* GLYN (1859), 2 E. & E. 29 ; 28 L. J. Q. B. 350 ; 33 L. T. O. S. 236 ; 5 Jur. N. S. 1397 ; 121 E. R. 12.

Annotations :—**Apld.** *Re* Craven & Marshall, *Ex p.* Tempest (1870), 6 Ch. App. 70, L. JJ. ; *Re* Rogers, *Ex p.* Holland & Hannen (1891), 8 Morr. 243, C. A. **Refd.** *Re* Craven & Marshall, *Ex p.* Craven (1870), L. R. 10 Eq. 648.

B. Property in Possession of Agent of Bankrupt.

6201. Specific appropriation—Proceeds of cargo as security for advances—Irrevocability.]—A., for the purpose of sale, consigned a cargo to B., who was connected with the house of C. C. had advanced money to A., on an engagement that the proceeds of the cargo should be remitted by B. to A. through C., in order that they might constitute a security for the money advanced by C. A. wrote to B. that the cargo was not responsible for any advances made by C. Nevertheless B., after the receipt of A.'s letter, remitted the proceeds to C., who retained them to cover his advance. A. became bkpt., & his assignees sued B. for the

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q. *Specific appropriation — Proceeds of bill to pay debt.*]—A. placed a bill, which was drawn by him on B., in favour of C., in C.'s possession, & ordered C. by letter to pay a named creditor £200 out of the amount of the bill, which the letter stated had been placed in C.'s hands to pay the creditor. C. in a writing admitted intimation of A.'s order, & stated that he would duly honour same, but at that time the bill was lying protested for non-acceptance, & it was not for some time subsequently that C. received money from debtor on the bill when he paid the creditor £50. Thereafter A. became bkpt., & C. paid over the balance to the trustee in the sequestration. In an action by the creditor to render C. liable in payment

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proceeds:—*Held:* a jury was warranted in considering A.'s engagement as an appropriation of the cargo, which he could not rescind, & not a mere order for payment of money, which could be revoked by a subsequent countermand before payment.—FISHER *v.* MILLER (1823), 1 Bing. 150; 7 Moore, C. P. 527; 130 E. R. 61.

Annotation:—**Apld.** Hutchinson *v.* Heyworth (1838), 9 Ad. & El. 375.

6202. —— Goods to be sold to meet bill for price.]—A. & Co., as brokers for B., sold goods, then in their possession, to C., which were paid for by a bill drawn by C. & accepted by D. C. ordered A. & Co. to keep the goods in their hands, & sell them if they could make a certain profit. Before the bill became due D. failed, & A. & Co. applied to C. for security for the bill, whereupon he gave them an order to sell the goods & apply the proceeds in payment of the bill. C. afterwards, & before the goods were sold, became bkpt. A. & Co. handed over the goods to B. at his request, but he afterwards returned them, & after they were returned, C.'s assignees, having made a demand of the goods, brought trover:—*Held:* they could not maintain it, for after the order given by C. to A. & C. to sell the goods & apply the proceeds in payment of the bill, they remained in their hands, subject to that charge, because A. & Co. must be presumed to have asked security as agents for B., whose ratification of their act for his benefit might also be inferred.—BAILEY *v.* CULVERWELL (1828), 8 B. & C. 448; 2 Mans. & Ry. K. B. 564; Dan. & Ll. 176; 7 L. J. O. S. K. B. 19; 108 E. R. 1109.

Annotations:—**Consd.** *Re* Douglas, *Ex p.* Hankey (1838), 4 Deac. 1, L. C. **Apld.** Hutchinson *v.* Heyworth (1838), 9 Ad. & El. 375. **Refd.** Dixon *v.* Yates (1833), 5 B. & Ad. 313; Godts *v.* Rose (1855), 17 C. B. 229. **Mentd.** Meyerstein *v.* Barber (1866), 36 L. J. C. P. 48; Cochrane *v.* Moore (1890), 59 L. J. Q. B. 377, C. A.

6203. —— Bills to meet bills—Agreement to remit funds.]—S. & I., of Buenos Ayres, bought from L. & Co. of that place in May & June ten bills drawn by them on B. & Co. of Liverpool, the sellers giving an express assurance that they would make remittances to Liverpool to meet them. On Aug. 1 L. & Co. despatched bills to B. & Co. with a letter specifically appropriating them to meet the first five of the purchased bills. On Aug. 8 B. & Co. became bkpt. On Sept. 1 L. & Co., not knowing of the bkpcy., despatched other bills to B. & Co., with a letter appropriating them to meet the other five purchased bills. There was evidence to show that the firms of L. & Co. & B. & Co. were identical:—*Held:* the first remittance was effectually appropriated to meet the first five purchased bills, whether the drawing & accepting houses were identical or not, & the assignees of B. & Co. held it for S. & I. to the extent of what was due on those bills. *Qu.:* whether the second remittance, having regard to the time when it was made & to the time of the bkpcy., was effectually appropriated to meet the latter five purchased bills.—*Re* LATHAM, *Ex p.* IMBERT (1857), 1 De G. & J. 152; 26 L. J. Bcy. 65; 29 L. T. O. S. 169; 3 Jur. N. S. 801; 5 W. R. 542; 44 E. R. 681, L. JJ.

Annotations:—**Apld.** Thomson *v.* Simpson (1870), L. R. 9 Eq. 497. **Consd.** *Re* Scheibler, *Ex p.* Cooper (1874), 31 L. T. 417, L. JJ. **Distd.** *Re* Cohn, *Ex p.* Cohen (1878), 38 L. T. 884. **Refd.** Thayer *v.* Lister (1861), 30 L. J. Ch. 427.

6204. —— —— Notice.]—E., carrying on business on his own account in America, & being a partner in T. & Co. in England, drew bills on T. & Co., which he employed T. & B., another American firm, to sell for him, undertaking to provide T. & Co. with remittances to meet them at maturity. T. & B., in accordance with their usual course of dealing with E., indorsed the bills & sold them, giving to E. bills on their agent in England for the amount. E., being on the eve of insolvency, sent the bills so received from T. & B. to the English firm of T. & Co., with instructions to accept the bills drawn by himself & to hold the remittance for the purpose of meeting the payment thereof. On receipt of the remittance T. & Co. accepted the bills drawn by E., &, disregarding the instructions, handed the bills of T. & B. to L., in accordance with a previous promise made to him, in order to enable him to meet some liabilities incurred by him on behalf of T. & Co.:—*Held:* those bills were specifically appropriated by E. to meeting the bills drawn by him, & T. & Co. had received the remittances as agents of E., who had remitted them in a character distinct from his partnership in the firm of T. & Co., & as T. & Co. had no authority to apply the remittances to any other purpose than that directed, L., who had notice of the specific appropriation, was bound to account to T. & B. for the proceeds.—THAYER *v.* LISTER (1861), 30 L. J. Ch. 427; 4 L. T. 50; 9 W. R. 360.

C. Property equitably assigned.

6205. Unindorsed promissory note—Right to proceeds.]—D. being indebted to M. in £71 gave him the following note:—"I promise to pay to M. the sum of £71, witness my hand, Aug. 28, 1734. D." M. being indebted to petitioner in £92 19*s.* 0*d.* delivered D.'s note to him that he might receive the money in part of his debt, & took the following receipt:—"Received Dec. 20, 1734, a bill for £71 which when paid will be on account *per*" petitioner. M. became a bkpt., but not having indorsed or assigned the note to petitioner, the assignees applied to D.'s solr. & received of him the £71:—*Held:* the assignees of M.'s estate ought to be considered as trustees for petitioner with respect to the sum of £71, & should pay him the money accordingly.—*Ex p.* BYAS (1743), 1 Atk. 124; 26 E. R. 81.

Annotations:—**Refd.** Burn *v.* Carvalho (1834), 1 Ad. & El. 883, Ex. Ch.; West *v.* Reid (1843), 2 Hare, 249.

6206. Draft on fund due to debtor.]—A. borrowed money of B. & gave him a draft upon a fund due to A. out of the Exchequer, & became bkpt.:—*Held:* an assignment to B. for valuable consideration, which should prevail against the general assignees under the commission of bkpcy.—ROW *v.* DAWSON (1749), 1 Ves. Sen. 331; 27 E. R. 1064, L. C.

Annotations:—**Distd.** *Re* Severn, *Ex p.* Colvile (1831), 9 L. J. O. S. Ch. 56. **Consd.** Best *v.* Argles (1834), 2 Cr. & M

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of the balance of £150:—*Held:* the balance was not carried to the trustee, & C. liable in payment.—BRIERLY *v.* MACINTOSH (1843), 15 Sc. Jur. 440.—**SCOT.**

r. —— *Cheque to meet order for payment deposited with instructions to hold until required.*]—A., a merchant doing business in St. John's, took delivery of fish from pltfs., & orders were given by the captain of the schooner for payment of the fish upon presentation of the orders to A. A. wishing to make payment of the orders as they would be presented, deposited with deft. a cheque with instructions to hold same until it should be required. The cheque was enclosed in an envelope endorsed "A. S. R., in trust," & placed by him in his safe. Before any of the orders were presented for payment, or notice given to the unpaid vendors of the deposit, proceedings were commenced for a declaration of the insolvency of A., & the trustees in insolvency upon their appointment claimed the fund:—*Held:* the deposit of the cheque did not create a trust which could be enforced by pltfs., & the funds passed to the trustees in insolvency.—HANN *v.* RENDELL (1902), 8 Nfld. L. R. 523.—**NFLD.**

394. **Apld.** Hutchinson *v.* Heyworth (1838), 9 Ad. & El. 375. **Consd.** Rodick *v.* Gandell (1852), 1 De G. M. & G. 763, L. C., where Lord Truro said that the case was not distinctly reported, & set out further facts, which he had obtained after an inspection from the registrar's books; Addison *v.* Cox (1872), 8 Ch. App. 76, L. C. **Refd.** Brice v. Bannister (1878), 3 Q. B. D. 569, C. A. **Mentd.** Priddy *v.* Rose (1817), 3 Mer. 86; Burn *v.* Carvalho (1839), 4 My. & Cr. 690; Morrell *v.* Wootten (1852), 16 Beav. 197; Diplock *v.* Hammond (1854), 2 Eq. Rep. 738; Fitzroy *v.* Cave, [1905] 2 K. B. 364, C. A.

6207. Request to pay balance to creditor.]—S., being indebted to J., & G. to S., S. by letter requested G. to pay J. the balance due to him, S., & stated that J.'s receipt should be a sufficient discharge; G. promised to do so when the amount had been ascertained. After the balance due was ascertained, but before the amount was paid, S. became bkpt.:—*Held:* there had been an equitable assignment of the debt, & S.'s assignees were not entitled to recover the amount from G., who was justified in paying it over to J.—CROWFOOT *v.* GURNEY (1832), 9 Bing. 372; 2 Moo. & S. 473; 2 L. J. C. P. 21; 131 E. R. 655.

Annotations:—**Consd.** Best *v.* Argles (1834), 2 Cr. & M. 394. **Apld.** Hutchinson *v.* Heyworth (1838), 9 Ad. & El. 375. **Consd.** Rodick *v.* Gandell (1852), 1 De G. M. & G. 763, L. C.; Liversidge *v.* Broadbent (1859), 4 H. & N. 603. **Refd.** *Re* Burris (1851), 18 L. T. O. S. 292.

6208. Direction to agent to deliver goods to creditor.]—The assignees of bkpt. do not take property, the equitable title to which had been transferred before the bkpcy.; but such equitable transfer must have been complete before the bkpcy., & it must have been a transfer of the whole or an ascertained part of specific property & absolute, not contingent.

A. at Liverpool having consigned goods to B. at Bahia, for sale on his, A.'s account, drew bills on B. to be paid out of the produce. A. negotiated the bills with C. in London. Upon B.'s refusing to pay the first of the bills, C. wrote to A. as follows: "I request you to write to B. by the first vessel, with orders that, in case he does not pay your drafts, he shall immediately hand over such property as he may have of yours of an equivalent value to the bills not paid by him, to D., my agent at Bahia." A. answered, "Agreeably to your instructions, I will write to B., directing him to hand over to D. property of mine in his hands to cover the amount of the bills that may eventually not be paid." A. wrote to B. a letter, which was not communicated to C., "I have engaged to C. that you shall pass into the hands of D., his agent, all the property which may exist in your hands for my account; you will arrange with D. the mode," etc. Before that letter reached Bahia A. became bkpt., & D. afterwards receiving goods from B. to an account somewhat less than the bill unpaid, sold them, & remitted the produce to C.:—*Held:* C. had not, at the time of the bkpcy., such an equitable interest in the goods as would prevent A.'s assignees from recovering in trover.—BURN *v.* CARVALHO (1834), 1 Ad. & El. 883; 4 Nev. & M. K. B. 889; 110 E. R. 1445, Ex. Ch.; *subsequent proceedings* in equity (1839), 4 My. & Cr. 690, L. C.

Annotations:—**Distd.** Leslie *v.* Guthrie (1835), 1 Bing. N. C. 697; Tibbits *v.* George (1836), 5 Ad. & El. 107. **Apld.** Hutchinson *v.* Heyworth (1838), 9 Ad. & El. 375. **Consd.** Lewis *v.* Edwards (1840), 7 M. & W. 300; Parnham *v.* Hurst (1841), 8 M. & W. 743; Belcher *v.* Capper (1842), 4 Man. & G. 502; Smith *v.* Keating (1848), 6 C. B. 136, Ex. Ch.; St. Thomas's Hospital *v.* Richardson, [1910] 1 K. B. 271, C. A. **Refd.** Boddington *v.* Castelli (1853), 1 E. & B. 879, Ex. Ch. **Mentd.** Best *v.* Argles (1834), 2 Cr. & M. 394; Britten *v.* Perrott (1834), 2 Cr. & M. 597; Rawlings *v.* Bell (1845), 14 L. J. C. P. 265; Freeman *v.* Edwards (1848), 17 L. J. Ex. 258; Congreve *v.* Evetts (1854), 10 Exch. 298; Studdart *v.* Jellico (1863), 9 L. T. 173; Griffin *v.* Weatherby (1868), 9 B. & S. 726.

6209. ——.]—In the above circumstances (*See* No. 6208, *supra*):—*Held:* C. had a good title, in equity, to the goods.—BURN *v.* CARVALHO (1839), 4 My. & Cr. 690; 9 L. J. Ch. 65; 3 Jur. 1141; 41 E. R. 265, L. C.

Annotations:—**Apld.** Hutchinson *v.* Heyworth (1838), 9 Ad. & El. 375. **Consd.** Malcolm *v.* Scott (1843), 3 Hare, 39. **Expld.** Flint *v.* Walker (1847), 5 Moo. P. C. C. 178, P. C. **Consd.** Rodick *v.* Gandell (1852), 1 De G. M. & G. 763, L. C. **Distd.** Farley *v.* Turner (1857), 5 W. R. 666. **Consd.** Elkin *v.* Baker (1862), 8 Jur. N. S. 915. **Expld. & Distd.** Frith *v.* Forbes (1862), 31 L. J. Ch. 793. **Consd.** Percival *v.* Dunn (1885), 29 Ch. D. 128. **Refd.** Anon. (1849), 14 L. T. O. S. 138; Acraman *v.* Bates (1860), 6 Jur. N. S. 294; Addison *v.* Cox (1872), 8 Ch. App. 76, L. C.; *Re* Sheward, Sheward *v.* Brown, [1893] 3 Ch. 502; Palmer *v.* Culverwell, Brooks (1901), 85 L. T. 758. **Mentd.** Re Geering, *Ex p.* Sparks (1850), 14 L. T. O. S. 548; Toulmin *v.* Reid (1851), 14 Beav. 499; Bell *v.* L. & N. W. Ry. Co. (1852), 15 Beav. 548; Pariente *v.* Lubbock (1855), 20 Beav. 588; Sichel *v.* Raphael (1864), 3 New Rep. 662; Steele *v.* Stuart (1864), 3 New Rep. 686; *Re* Thornton (1865), 13 L. T. 568; *Re* Sparke, *Ex p.* Cohen (1870), 40 L. J. Bcy. 14; Calisher *v.* Forbes (1871), 25 L. T. 772, L. JJ.

6210. Order to pay proceeds of goods to creditor.]—H., a manufacturer, had been accustomed to consign goods by the agency of O. & Co., commission merchants, to houses in America, for sale on H.'s account. O. & Co. made advances to H. on the consignments, received the proceeds as his agents, & accounted to him, repaying themselves their commission, advances, & other charges. In 1831 H., being indebted to O. & Co. for such advances & charges, & likewise owing £5,000 to his own bankers, wrote to O. & Co. authorising them, after paying themselves their balance out of the net proceeds of H.'s shipments down to that date, to pay R. & Co., the bankers, half the remainder of such proceeds, so that the payment should not exceed £5,000. O. & Co. thereupon wrote to R. & Co., stating that they, agreeably to H.'s authority, engaged to pay R. & Co., after liquidating their own balance, a proportion of the remaining proceeds, etc., as in H.'s letter, in consideration of R. & Co. guaranteeing O. & Co. from claims by any other party in consequence of such payment. R. & Co. then wrote to O. & Co., that, understanding from H. that O. & Co. had agreed to pay any surplus balance, etc., as in H.'s letter, they, R. & Co., agreed to guarantee O. & Co. against such other claims. A few days before such correspondence, H. had transmitted to O. & Co. a letter of authority resembling that afterwards sent, & had seen a draft of a letter from them to R. & Co., like that afterwards sent by O. & Co. to R. & Co., claiming a guarantee as above, but such first authority was revoked, &

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6208 i. *Direction to agent to deliver goods to creditor.*]—Pltfs. purchased, on Dec. 22, 1878, from L., for R4,000, a jokhmi hundi, drawn in favour of pltfs. by L. upon his firm in Bombay. The hundi contained a statement that it was "drawn against" twenty-nine bales of wool shipped at Tuna, & it was made payable eight days after the safe arrival of the ship at Bombay. Pltfs. obtained from L., at the same time, a letter addressed by him to his firm at Bombay, which contained the following passage: "Upon you a jokhmi hundi is drawn, the particulars whereof are as follows: (R4,000). The value having been received from J., hundis for R4,000 drawn against twenty-nine bags of sheep's wool shipped on board the 'H,' from the seaport town of Tuna. . . . On the safe arrival of the vessel do you be good enough to land the goods & deliver same to J., & as to the jokhmi hundis drawn before, if in respect thereof any money has to be paid to J., do you be good enough to pay same." At the time pltfs. obtained the hundi & the letter, the goods referred to had been already shipped. On Jan. 1, 1879, the firm of L. was adjudicated insolvent by the High Ct. of Bombay. On Jan. 5, the ship arrived at Bombay with the goods on board:—*Held:* the letter of Dec. 22, 1878 operated as an equitable assignment of the wool to pltfs., on the safe arrival of the vessel, as a security for the payment of the hundi, & pltfs. were entitled to obtain possession of the wool.—JADOWJI GOPAJI *v.* JETHA SHAMJI (1879), I. L. R. 4 Bom. 333.—**IND.**

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never acted upon. In 1833 H. became bkpt. The assignees gave O. & Co. notice not to make any payments out of H.'s effects, except to them. Afterwards O. & Co. received proceeds of sales from the houses abroad, & paid them over to R. & Co., according to the authority given by H. The assignees sued O. & Co. for the amount as money had & received to their use:—*Held:* the transaction between H., O. & Co., & R. & Co., was either a valid appropriation, or equitable assignment of funds to the amount of £5,000 in favour of R. & Co., & was not revoked by H.'s bkpcy.—HUTCHINSON *v.* HEYWORTH (1838), 9 Ad. & El. 375; 1 Per. & Dav. 266; 1 Will. Woll. & H. 730; 8 L. J. Q. B. 17; 112 E. R. 1254.

Annotation:—**Consd.** Belcher *v.* Capper (1842), 4 Man. & G. 502.

6211. Authority to pay money.]—A legacy of £100 having been bequeathed to the wife of A., & A. being indebted to B. in £150, A. sent B. the following document, signed by himself & wife:—"We hereby authorise the exor. of the late . . . to pay to you any legacy or money that he may have bequeathed to us or either of us, in part payment of the various sums you have so kindly lent us, & your receipt shall be to them a sufficient discharge for same. There appears to be about £150 due to you." B. communicated to the exor. that he had a claim on the legacy, but the exor. said he would pay it to Mrs. A. After that communication had been made, A., in Jan., 1832, went to prison, & on Feb. 29 petitioned for his discharge under Insolvent Debtors Act, & executed an assignment to the assignee, & on May 16, 1832, he obtained his discharge. On Apr. 3, 1832, the exor. paid Mrs. A. the amount of the legacy, which she immediately paid over to B., under the authority before mentioned:—*Held:* the property in the legacy passed to A.'s assignee under Insolvent Debtors Act.—BEST *v.* ARGLES (1834), 2 Cr. & M. 394; 4 Tyr. 256; 3 L. J. Ex. 117; 149 E. R. 813.

Annotations:—**Refd.** Tibbits *v.* George (1836), 5 Ad. & El. 107; Burn *v.* Carvalho (1839), 4 My. & Cr. 690. **Mentd.** Burn *v.* Carvalho (1834), 1 Ad. & El. 883; Vanderstegen *v.* Witham (1840), 6 M. & W. 457; Liversidge *v.* Broadbelt (1859), 28 L. J. Ex. 332.

6212. Authority to keep chattels & place to credit of account.]—D. being captain of a ship bound to the East Indies, & proprietor of the cabin furniture, deserted the ship, & the command was taken by the mate, who was afterwards confirmed therein by the owner of the ship. On Oct. 18, while the ship was on her voyage home, D., being indebted to the owner gave him a written order as follows:—"I hereby authorise you to keep possession of my cabin furniture when the ship arrives, & to place the value of same to the credit of my account with you." The ship arrived on Dec. 5, & a fiat in bkpcy. was issued against D. on the 18th, on an act of bkpcy. committed on the 2nd:—*Held:* the letter was equivalent to an equitable assignment, & gave an equitable lien to the ship owner on the goods in his possession through the mate, who was the agent of the ship owner & not of bkpt., & the goods could not be recovered by the assignees.—BELCHER *v.* OLDFIELD (1839), 6 Bing. N. C. 102; 8 Scott, 221; 9 L. J. C. P. 34; 3 Jur. 1194; 133 E. R. 40.

6213. Charter-party—Agreement to deliver bill of lading—Freight to be paid out of proceeds.]—By charter-party, the owner agreed to let, & the charterer to hire, the vessel for six months. The owner gave the charterer the power of appointing his own master, & required him to be responsible for his conduct, & the charterer appointed a master. The freight on the goods was to be paid, according to the bills of lading, to the master, without any stipulation that it should be applied in payment of the price of the hire of the vessel. The charterer agreed to pay at the rate of 22*s.* per ton per month, for so long as she should be employed by him, such payments to be made from month to month, leaving one month's pay in abeyance, & the balance in cash on her final discharge. In an action upon the charter-party, by the assignees of the charterer, who had become bkpt., against the owner, for refusing to permit the master to deliver the cargo, deft. pleaded that bkpt., before his bkpcy., had agreed with C., the agent of deft., to deliver to him the bills of lading of the homeward cargo, & that C. should receive the proceeds thereof for the purpose of paying the freight due to deft. on the charter-party:—*Held:* as to such goods as were on board the vessel at the time of such agreement, or such as were specifically set apart as the homeward cargo, this was an equitable assignment to C., though no bill of lading was ever handed over to him.—BELCHER *v.* CAPPER (1842), 4 Man. & G. 502; 5 Scott, N. R. 257; 11 L. J. C. P. 274; 134 E. R. 207.

6214. Undertaking to pay over dividends.]—A., for good consideration, gave B. a written undertaking to "pay over" to him all dividends that he should receive on his proof against bkpt.'s estate. A. became bkpt. & B. then gave notice of his claim to the trustees in the first bkpcy.:—*Held:* there was a good equitable assignment of the dividends, & B. was entitled as against A.'s trustee in bkpcy.—*Re* IRVING, *Ex p.* BRETT (1877), 7 Ch. D. 419; 37 L. T. 507; 26 W. R. 376; *sub nom. Re* IRVING, *Ex p.* BUSHBY, 47 L. J. Bcy. 38.

Annotation:—**Refd.** West & Wright *v.* Newing (1900), 82 L. T. 260.

6215. Instruction to agent to sell goods & pay proceeds to creditor.]—Merchants in South America, being indebted to pltf., consigned ores to defts., their agents in England, & instructed them by letter to sell the ores & to pay to pltf. the balance of the proceeds remaining after payment of a specified sum to another creditor; they also wrote to pltf. advising him of what they had done. Before the letters arrived in England the firm in South America became bkpts., & the syndic in the bkpcy. telegraphed instructions to defts., which amounted to a revocation of the directions given in the letter of the consignors as to the disposal of the proceeds of the sale of the cargo:—*Held:* upon the posting of the letters in South America there was a binding equitable assignment of the balance of the proceeds to pltf., which remained unaffected by the supervening bkpcy. of the consignors.—ALEXANDER *v.* STEINHARDT

s. *Order on building owner to pay sub-contractor.*]—A. contracted with defts. to find materials & labour to erect a building to the satisfaction of the architect. For the plumbing work in connection with the building A. accepted the tender of pltf. for £80, & gave him a written order, dated Jan. 9, 1905, on defts. for that amount. The order was handed by pltf. to one of defts., & verbally accepted. Subsequently another of defts. promised that the order would be paid. On Jan. 20, A. filed a petition for liquidation of his affairs, & a receiver was appointed, who continued work under the contract until the appointment of a trustee, who completed the contract. Pltf. completed the plumbing work on Feb. 1, & received from the architect an order on defts. in the following terms:—"Please pay [pltf.] the sum of £80 on account of ambulance contract for the completion of plumbing work, which has been completed in a satisfactory manner":—*Held:* there was an equitable assignment to pltf. of part of a specified fund belonging to debtor in the hands of defts., which was valid as against the trustee.—ROBINSON *v.* PODOSKY, LENNON CLAIMANT, [1905] S. R. Q. 118.—AUS.

WALKER & Co., [1903] 2 K. B. 208 ; 72 L. J. K. B. 490 ; 8 Com. Cas. 209 ; 10 Mans. 258.

6216. Request to pay out of specific fund.]—A letter was written by a trader to resp., one of his debtors, asking him to pay a sum of money to a third party "out of the balance of our account with you." The trader subsequently became bkpt. The letter was written before the act of bkpcy. on which the receiving order was made, & when resp. had no notice of any available act of bkpcy. :—*Held :* the letter was a good equitable assignment as it specified a fund, out of which the payment was to be made, & was an assignment valid against the trustee within 1914 Act, s. 45. —*Re* GUNSBOURG, *Ex p.* TRUSTEE (1919), 88 L. J. K. B. 479 ; [1918–19] B. & C. R. 99, C. A.

6217. —— No such fund.]—A letter was written by a trader to resp., one of his debtors, asking him to pay a sum of money to a third party, & saying simply "& debit our account." There was no evidence as to the state of the account between the trader & resp. although resp. admitted he was a debtor to the trader. The trader subsequently became bkpt. The letter was written before the act of bkpcy. on which the receiving order was made, & when resp. had no notice of any available act of bkpcy. HORRIDGE, J., having held the letter was not a good equitable assignment, as it was a mere request to pay & specified no fund, out of which the payment was to be made : —*Held :* the letter was not a good equitable assignment, as it was a mere request to pay & there being no evidence of the state of account there was no subject matter to be assigned, & the letter was not an assignment valid against the trustee within 1914 Act, s. 45.—*Re* GUNSBOURG, *Ex p.* TRUSTEE (1919), 88 L. J. K. B. 479 ; [1918–19] B. & C. R. 99, C. A.

D. Property appropriated to meet Bills of Exchange—Rule in Waring's Case.

6218. Statement of rule.]—When both drawer & acceptor of a bill become bkpt., & securities have been remitted by the drawer to the acceptor to cover his liability, the billholder, though neither party nor privy to the contract, is entitled to have the securities applied in or towards payment of the bill.—*Re* BRICKWOOD, *Ex p.* WARING, *Re* BRACKEN, *Ex p.* INGLIS (1815), 19 Ves. 345 ; 2 Rose, 182 ; 2 Gl. & J. 404 ; 34 E. R. 546, L. C.

Annotations :—**Expld.** *Re* Neville, *Ex p.* Perfect (1830), 1 Mont. 25. **Distd.** *Re* Mildred, *Ex p.* Copeland (1833), 3 L. J. Bcy. 15, Ct. of R. **Expld.** *Re* Thompson, *Ex p.* Prescott (1834), 3 Deac. & Ch. 218, Ct. of R. **Apld.** *Re* Mundy, *Ex p.* Hobhouse, *Ex p.* Gower (1837), 2 Deac. 291, Ct. of R. ; *Re* Warwick, *Ex p.* Brown (1838), 2 Jur. 82. **Consd.** Laycock *v.* Johnson (1847), 6 Hare, 199. **Apld.** Powles *v.* Hargreaves (1853), 17 Jur. 614. **Consd.** Powles *v.* Hargreaves (1853), 17 Jur. 1083, L. C. & L. JJ. ; *Re* New Zealand Banking Corpn., Hickie's Case (1867), L. R. 4 Eq. 226 ; *Re* Joint Stock Discount Co., Loder's Case (1868), L. R. 6 Eq. 491. **Apld.** Trimingham *v.* Maud (1868), L. R. 7 Eq. 201. **Consd.** *Re* General Rolling Stock Co., *Ex p.* Alliance Bank (1869), 4 Ch. App. 423, L. JJ. **Distd.** *Re* New Zealand Banking Corpn., Levi's Case (1869), L. R. 7 Eq. 449. **Consd.** City Bank *v.* Luckie (1870), 5 Ch. App. 773, L. C. ; Bank of Ireland *v.* Perry (1871), L. R. 7 Exch. 14 ; Banner *v.* Johnston (1871), L. R. 5 H. L. 157, H. L. ; *Re* Richardson, *Ex p.* Smart (1872), 8 Ch. App. 220, L. JJ. **Apld.** *Re* Leggatt, *Re* Gledstanes, *Ex p.* Dewhurst (1873), 8 Ch. App. 965, L. JJ. **Consd.** *Re* Adansonia Fibre Co., Miles' Claim (1874), 9 Ch. App. 637, n. **Distd.** Vaughan *v.* Halliday (1874), 9 Ch. App. 561, L. JJ. **Consd.** *Re* Barned's Banking Co., *Ex p.* Joint Stock Discount Co. (1874), L. R. 19 Eq. 1, where the order as drawn up in *Waring's Case* was sent for & examined ; *Re* Barned's Banking Co., *Ex p.* Joint Stock Discount Co. (1875), 10 Ch. App. 198, L. JJ. ; General South American Co. *v.* Yglesias (1875), 23 W. R. 843, L. JJ. **Distd.** *Re* Lindsay, *Ex p.* Lambton (1875), 10 Ch. App. 405, L. JJ. **Consd.** *Re* Yglesias, *Ex p.* General South American Co. (1875), 10 Ch. App. 635, L. JJ. ; *Re* Tappenbeck, *Ex p.* Banner (1876), 2 Ch. D. 278, C. A. ; *Re* Pollard, *Ex p.* Dickin (1878), 8 Ch. D. 377, C. A. **Expld.** *Re* Mellor, *Ex p.* Manchester Bank (1879), 12 Ch. D. 917. **Consd.** Royal Bank of Scotland *v.* Commercial Bank of Scotland (1882), 7 App. Cas. 366, H. L. ; *Re* Suse, *Ex. p.* Dever (1885), 14 Q. B. D. 611, C. A. **Refd.** *Re* Manning, *Ex p.* Smith (1834), 4 Deac. & Ch. 579, Ct. of R. ; *Re* Thompson & Mildred, *Ex p.* Prescott (1834), 4 Deac. & Ch. 23, Ct. of R. ; *Re* Geering, *Ex p.* Sparks (1850), 14 L. T. O. S. 548 ; *Re* Harrison, *Ex p.* Carrick (1858), 2 De G. & J. 208, L. JJ. ; Inman *v.* Clare (1858), John. 769 ; *Re* Cheesebrough, *Ex p.* Ackroyd (1860), 3 De G. F. & J. 726, L. JJ. ; *Re* Streatfeild, Laurence & Mortimore, *Ex p.* Cunliffe (1862), 6 L. T. 695 ; *Re* Barned's Banking Co., *Ex p.* Stephens (1868), 3 Ch. App. 753, L. JJ. ; *Re* Childs (1874), 9 Ch. App. 508, L. JJ. ; *Re* Yglesias, *Ex p.* Gomez (1875), 10 Ch. App. 639, L. JJ. ; *Re* Wood, *Ex p.* Musgrave (1878), 10 Ch. D. 94, C. A. ; *Re* Walker, Sheffield Banking Co. *v.* Clayton, [1892] 1 Ch. 621. **Mentd.** *Re* Brickwood, *Ex p.* Parr (1818), Buck, 191 ; Ebsworth *v.* Alliance Marine Insce. (1873), 42 L. J. C. P. 305 ; Engelback *v.* Nixon (1875), L. R. 10 C. P. 645.

6219. Application of rule—To administration of estate in bankruptcy—To administration of trust in equity.]—*Held :* the rule established a special mode for the payment of creditors applicable to the administration of an estate in bkpcy. but not to the administration of a trust in equity.—LAYCOCK *v.* JOHNSON (1847), 6 Hare, 199 ; 16 L. J. Ch. 350 ; 11 Jur. 688 ; 67 E. R. 1139.

6220. —— Not restricted to judicial insolvency—One estate bankrupt & one insolvent administered in chancery—Composition deed providing for application of bankruptcy rules.]—The principle established in *Waring's Case* is not to be restricted to cases of judicial insolvency.

According to the dealing between a mercantile firm & a customer, it was the practice of the former to buy goods in England on account of the customer (he giving his acceptances for their price), & to remit the goods to the firm abroad, who were to sell the goods & invest the proceeds in return consignments, which were to be applied in keeping the customer out of cash advances in respect of his acceptances. The mercantile firm became bkpts., but afterwards they entered into an arrangement with their creditors, & the bkpcy. was superseded & a composition deed executed, whereby it was provided that all claims of the holders of bills upon any goods in the hands of the firm should be reserved, & that all questions as to their rights should be decided according to the laws in bkpcy. The customer died insolvent without having paid the bills. The return consignments came to the hands of the trustees under the composition deed. Several of the bills were in the hands of third parties, by whom they had been discounted. In a suit instituted by them on behalf of themselves & all the other bill-holders :—*Held :* they were entitled to participate ratably in the sum realised by the return consignments without prejudice to their rights to prove for the difference under the trust deed. *Qu. :* whether, in the absence of the provision in the deed of composition that all questions as to the rights of the creditors were to be decided according to the bkpt. laws, the bill-holders as such would have been entitled by a suit in equity to the same relief (TURNER, L.J.).—POWLES *v.* HARGREAVES (1853), 3 De G. M. & G. 430 ; 2 Eq. Rep. 162 ; 23 L. J. Ch.

PART XX. SECT. 5, SUB-SECT. 3.—D.

6219 i. *Application of rule.*]—M. borrowed $1,500 from M. & Co., giving them as security a chattel mtge., & his promissory note at three months, which they discounted at a bank. No assignment of the mtge. was ever made to the bank, nor did they deal with M. & Co. in reliance on it. When the note became due M. & Co. paid $600, & renewed for $900. Shortly afterwards, both M. & M. & Co. became insolvent, & the bank claimed the benefit of the mtge. :—*Held :* the bank was not entitled to a prior claim upon the security over the assignee of M. & Co., in respect of the $600 & the rule in *Waring's Case*, gave them no assistance.—*Re* MORTON, MOLSONS BANK *v.* MACCRAE (1878), 3 A. R. 202. —CAN.

Sect. 5.—" Property held by the bankrupt on trust for any other person " : Sub-sect. 3, D.]

1 ; 22 L. T. O. S. 137 ; 17 Jur. 1083 ; 2 W. R. 21 ; 43 E. R. 169, L. C. & L. JJ.

Annotations :—**Consd.** *Re* Houghton, *Ex p.* Taylor (1857), 26 L. J. Bcy. 59, n., L. JJ. ; Inman *v.* Clare (1858), John. 769 ; *Re* New Zealand Banking Corpn., Hickie's Case (1867), L. R. 4 Eq. 226. **Distd.** *Re* General Rolling Stock Co., *Ex p.* Alliance Bank (1868), 38 L. J. Ch. 151. **Consd. & Apld.** *Re* General Rolling Stock Co., *Ex p.* Alliance Bank (1869), 4 Ch. App. 423, L. JJ. **Consd.** City Bank *v.* Luckie (1870), 5 Ch. App. 773, L. C. ; Bank of Ireland *v.* Perry (1871), L. R. 7 Exch. 14 ; *Re* Adansonia Fibre Co., Miles' Claim (1874), 9 Ch. App. 737, n. ; *Re* Barned's Banking Co., *Ex p.* Joint Stock Discount Co. (1874), L. R. 19 Eq. 1 ; Royal Bank of Scotland *v.* Commercial Bank of Scotland (1882), 7 App. Cas. 366, H. L. **Refd.** Trimingham *v.* Maud (1868), 38 L. J. Ch. 207 ; *Re* Richardson, *Ex p.* Smart (1872), 8 Ch. App. 220, L. JJ. ; Vaughan *v.* Halliday (1874), 9 Ch. App. 563, n. ; *Re* Yglesias, *Ex p.* Gomez (1875), 10 Ch. App. 639 ; *Re* Pollard, *Ex p.* Dickin (1878), 8 Ch. D. 377, C. A.

6221. —— —— Acceptors in liquidation—Drawers in partnership of whom one insane & one insolvent.]—Bankers in London granted to merchants in Ceylon a letter of credit, authorising them to draw for sums not exceeding £10,000 at one time, the drafts to be covered by remittances on good London houses. The bankers agreed also, as a separate engagement, with the *bonâ fide* holders of the bills, that the bills should be accepted on presentation, & paid at maturity. The course of dealing between the parties was as follows :—If the remittances sent as cover for the merchants' drafts matured later than the drafts accepted, interest was debited by the bankers against the merchants from the date of the maturity of the acceptances to that of the maturity of the remittances, while, if the remittances matured earlier than the acceptances, interest was credited to the merchants. The bankers dealt with the remittances as they thought expedient, & the proceeds were paid into the general banking account of their firm. Under the letter of credit bills were drawn by the merchants on the bankers, & were accepted by them, & other bills were remitted by the merchants to cover the acceptances, the letters which accompanied the remittances always describing them as sent to cover particular drafts which were specified. The bankers filed a petition, under which a trustee was appointed. The merchants also stopped payment. At the date of the petition acceptances under the letter of credit to the amount of £11,535 were outstanding, to meet which the bankers had received from the merchants remittances to the amount of £3,009, of which two bills remained in specie in the hands of the bankers, the others having been converted by them into cash. After the filing of the petition two other bills, which had been posted by the merchants before they knew of the stoppage of the bankers, came into the hands of the receiver under the petition. The merchants' firm consisted of two partners, one of whom was insane, & resident in Germany. The same partner procured an adjudication of insolvency against himself in Ceylon, & under that insolvency an assignee was appointed. The sane partner deposed that " under this insolvency my estate, & also the estate of my firm, so far as legally can be, is now being administered," & such evidence was not contradicted :—*Held :* the joint estate of the merchants, as well as that of the bankers, was under a forced administration, & the rule applied.

I will deal with the objection, that the estate of the drawers & the acceptors of the bills are not both being judicially administered, one of the partners in the drawers' firm being solvent, & residing in Germany. That difficulty has been satisfactorily explained. The partner, who is resident in Germany, is of unsound mind, & the business of the partnership has been carried on under a power of attorney, which was given when he was of sound mind, & the affidavit of the other partner states that the joint estate is, so far as the law will allow, being administered under the insolvency in Ceylon, & this is not contradicted. We must take it that the joint estate is being administered just as it would be in similar circumstances in England (COTTON, L.J.).—*Re* SUSE, *Ex p.* DEVER (1885), 14 Q. B. D. 611 ; 54 L. J. Q. B. 390 ; 53 L. T. 131 ; 33 W. R. 625, C. A.

6222. —— Restricted to insolvency subject to jurisdiction of court—Drawer insolvent but liable to be sued.]—M., a foreigner, drew a bill on Y., which was accepted, & remitted a bill of exchange to cover it. Before the acceptance became payable, Y. filed a petition, & the remittance came in specie to the hands of the receiver appointed in the liquidation. A composition was afterwards accepted. M. was also insolvent, & had, since making the remittance, entered into a composition with some of his creditors, but had not made any cession of his property, & remained liable to be sued on the bills :—*Held :* as M., though unable to pay his debts, was liable to be sued, was free to deal with his property as he pleased, & was not subject to the jurisdiction of any ct., the rule did not apply, & the holder of Y.'s acceptance could not claim payment out of the remittance, as both insolvencies must be of a judicial or *quasi*-judicial character.—*Re* YGLESIAS & Co., *Ex p.* GENERAL SOUTH AMERICAN Co. (1875), 10 Ch. App. 635 ; 45 L. J. Bcy. 54 ; 33 L. T. 112 ; 23 W. R. 843, L. JJ.

6223. —— Drawer or acceptor being company ordered to be wound up—Not actually insolvent.]—The principle established in *Waring's Case* does not apply where the acceptor or drawer is a joint stock co. which has been ordered to be wound up, unless it be shown that the co. is actually insolvent.—*Re* NEW ZEALAND BANKING CORPN., HICKIE & Co.'S CASE (1867), L. R. 4 Eq. 226 ; *sub nom. Re* NEW ZEALAND BANKING CORPN., *Ex p.* BANK OF HINDUSTAN, 36 L. J. Ch. 807 ; 16 L. T. 654 ; 15 W. R. 954.

6224. —— Bills accepted for accommodation.]—L. deposited securities with a co., upon an agreement that the co. might sell them & apply the proceeds in reimbursing themselves any money owing by L. to them. The co. accepted bills for L.'s accommodation, & before they were paid, went into liquidation, & L. made an assignment for the benefit of his creditors. The only liability of L. to the co. was in respect of the bills :—*Held :* the rule did not apply & neither the bill holders nor L. were entitled to have the proceeds of the sale of the securities applied in payment of the bills.—*Re* NEW ZEALAND BANKING CORPN., LEVI & Co.'S CASE (1869), L. R. 7 Eq. 449 ; 17 W. R. 565 ; *sub nom. Re* NEW ZEALAND BANKING CORPN., *Ex p.* OVEREND GURNEY & Co., LTD., & LEVI & Co., 20 L. T. 296.

6225. —— Party remitting not drawer or indorser—Bills drawn in respect of transaction in which he is liable.]—It is no objection to the application of the rule that the party sending the remittance was not a party to the bills as drawer or indorser, provided the bills were drawn in respect of a transaction in which he is liable.—*Re* RICHARDSON, *Ex p.* SMART (1872), 8 Ch. App. 220 ; 42 L. J. Bcy. 22 ; 28 L. T. 146 ; 21 W. R. 237, L. JJ.

Annotations :—**Distd.** Vaughan *v.* Halliday (1874), 9 Ch. App. 561, L. JJ. **Refd.** Royal Bank of Scotland *v.* Commercial Bank of Scotland (1882), 7 App. Cas. 366, H. L. **Mentd.** Ebsworth *v.* Alliance Marine Insce. (1873), L. R. 8 C. P. 596.

6226. —— Bills not accepted—Holder with no right of double proof against both insolvent parties.]—The rule does not apply to a case where the bills drawn by one of the insolvent firms on the other have not been accepted, nor in any other case, in which the holder of the bills has no right of double proof against the two firms.

R. & Co. of Brazil drew bills on A. in England for £2,000, which they sold to pltf., & transmitted to A. acceptances of another house for £1,900 to cover the bills drawn. Before the covering remittances reached England, R. & Co. stopped payment & presented a petition for liquidation. A. being also in difficulties, refused to accept the bills drawn on him, & also became a liquidating debtor. Pltf., as holder of the dishonoured bills, filed a bill against the trustees of the estates of R. & Co. & A., praying that the remittances might be applied in payment of the bills:—*Held:* pltf. was not entitled to have the bills remitted to A. appropriated to meet the dishonoured bills held by him.—VAUGHAN *v.* HALLIDAY (1874), 9 Ch. App. 561; 30 L. T. 741; 22 W. R. 886, L. JJ.

6227. —— Bills drawn against work done—Work abandoned.]—Where an insolvent purchaser abandons a contract for the construction of a chattel, under which the purchase-money is to be paid by instalments during the progress of the work, having previously given acceptances for the instalments due, the holder of such acceptances, in the event of the subsequent insolvency of the vendor, will have no right, under the rule, to have the chattel sold, & the proceeds applied in discharge of the acceptances.—*Re* LINDSAY, *Ex p.* LAMBTON (1875), 10 Ch. App. 405; 32 L. T. 380; 23 W. R. 602; 2 Asp. M. L. C. 525; *sub nom. Re* LINDSAY, *Ex p.* GREENER, 44 L. J. Bcy. 81, L. JJ.

Annotation:—**Mentd.** Banbury & Cheltenham Direct Ry. Co. *v.* Daniel (1884), 54 L. J. Ch. 265.

6228. —— In Scotland.]—Assuming that the positive rule of administration, which has been accepted as the law in England since the rule in *Waring's Case* was made, must be understood in accordance with the determination in *Powles* v. *Hargreaves*, No. 6220, *ante*, still so far as it is a positive rule, & not the necessary result of equitable principles, it cannot be held to be of force in Scotland, merely because it is so in England (LORD SELBORNE, C.).—ROYAL BANK OF SCOTLAND *v.* COMMERCIAL BANK OF SCOTLAND (1882), 7 App. Cas. 366; 47 L. T. 360; 31 W. R. 49, H. L.

6229. Acceptor of bills holding security—Drawer & acceptor both bankrupt—Whether securities available to holders.]—Country bankers were in the habit of drawing upon their London bankers & remitting to them cash & bills to meet their liability. Both became bkpt. At the date of their bkpcy. the London bankers had accepted bills drawn by the country bankers, which remained unpaid, & had been proved under both commissions, & they were indebted to the country bankers in cash & short bills, & had security which was realised. In the result they were indebted to the country bankers for a large amount. The holders of the outstanding acceptances applied that the proceeds of the short bills & of the security should be applied by the assignees of the London bankers to the payment of the acceptances, & that the bills not converted should be delivered to petitioners towards the payment due on the acceptances, as far as the same should extend:—*Held:* the securities were available to the holders in discharge of the acceptances, not directly, but as the true way of arranging the equities between the two estates.—*Re* BRICKWOOD, *Ex p.* WARING, *Re* BRACKEN, *Ex p.* INGLIS (1815), 2 Rose, 182; 2 Gl. & J. 404; 19 Ves. 345; 34 E. R. 546, L. C.

Annotations:—**Expld.** *Re* Neville, *Ex p.* Perfect (1830), 1 Mont. 25. **Distd.** *Re* Mildred, *Ex p.* Copeland (1833), 3 L. J. Bcy. 15; *Re* Thompson, *Ex p.* Copeland (1833), 2 Mont. & A. 177, Ct. of R. **Expld.** *Re* Thompson, *Ex p.* Prescott (1834), 3 Deac. & Ch. 218, Ct. of R. **Consd.** *Re* Mundy, *Ex p.* Hophouse, *Ex p.* Gower (1837), 2 Deac. 291, Ct. of R. **Apld.** *Re* Warwick, *Ex p.* Brown (1838), 2 Jur. 82. **Consd.** Laycock *v.* Johnson (1847), 6 Hare, 199. **Apld.** Powles *v.* Hargreaves (1853), 17 Jur. 614. **Consd.** Powles *v.* Hargreaves (1853), 3 De G. M. & G. 430, L. C. & L. JJ.; *Re* New Zealand Banking Corpn., *Ex p.* Bank of Hindustan (1867), 16 L. T. 654; *Re* Joint Discount Co., Loder's Case (1868), L. R. 6 Eq. 491. **Apld.** Trimingham *v.* Maud (1868), L. R. 7 Eq. 201. **Distd.** *Re* New Zealand Banking Corpn., Levi's Case (1869), L. R. 7 Eq. 449. **Consd.** *Re* General Rolling Stock Co., *Ex p.* Alliance Bank (1869), 4 Ch. App. 423, L. JJ.; City Bank *v.* Luckie (1870), 5 Ch. App. 773, L. C.; Bank of Ireland *v.* Perry (1871), L. R. 7 Exch. 14; Banner *v.* Johnston (1871), L. R. 5 H. L. 157, H. L.; *Re* Richardson, *Ex p.* Smart (1872), 8 Ch. App. 220, L. JJ.; *Re* Leggatt, *Re* Gledstanes, *Ex p.* Dewhurst (1873), 8 Ch. App. 965, L. JJ.; *Re* Adansonia Fibre Co., Miles' Claim (1874), 9 Ch. App. 637, n. **Distd.** Vaughan *v.* Halliday (1874), 9 Ch. App. 561, L. JJ. **Consd.** *Re* Barned's Banking Co., *Ex p.* Joint Stock Discount Co. (1874), L. R. 19 Eq. 1, where the order as drawn up in *Waring's Case* was sent for & examined; *Re* Barned's Banking Co., *Ex p.* Joint Stock Discount Co. (1875), 10 Ch. App. 198, L. JJ.; General South American Co. *v.* Yglesias (1875), 23 W. R. 843, L. JJ.; *Re* Yglesias, *Ex p.* General South American Co. (1875), 10 Ch. App. 635, L. JJ. **Distd.** *Re* Lindsay, *Ex p.* Greener (1875), 44 L. J. Bcy. 81, L. JJ. **Consd.** *Re* Pollard, *Ex p.* Dickin (1878), 8 Ch. D. 377, C. A.; *Re* Tappenbeck, *Ex p.* Banner (1876), 2 Ch. D. 278, C. A. **Expld.** *Re* Mellor, *Ex p.* Manchester Bank (1879), 12 Ch. D. 917. **Consd.** Royal Bank of Scotland *v.* Commercial Bank of Scotland (1882), 7 App. Cas. 366. H. L. **Apld.** *Re* Suse, *Ex p.* Chartered Mercantile Bank of India & Comptior D'Escompte de Paris (1885), 1 T. L. R. 248, C. A. **Refd.** *Re* Thompson, *Ex p.* Copeland (1833), 3 Deac. & Ch. 199, Ct. of R.; *Re* Thompson & Mildred, *Ex p.* Prescott (1834), 4 Deac. & Ch. 23, Ct. of R.; *Re* Geering, *Ex p.* Sparks (1850), 14 L. T. O.S. 548; *Re* Harrison, *Ex p.* Carrick (1858), 2 De G. & J. 208, L. JJ.; Inman *v.* Clare (1858), John. 769; *Re* Cheesebrough, *Ex p.* Ackroyd (1860), 3 De G. F. & J. 726, L. JJ.; *Re* Streatfeild, Laurence & Mortimore, *Ex p.* Cunliffe (1862), 6 L. T. 695: *Re* Barned's Banking Co., *Ex p.* Stephens (1868), 3 Ch. App. 753, L. JJ.; *Re* Childs (1874), 9 Ch. App. 508, L. JJ.; *Re* Wood, *Ex p.* Musgrave (1878), 10 Ch. D. 94, C. A.; *Re* Walker, Sheffield Banking Co., *v.* Clayton, [1892] 1 Ch. 621. **Mentd.** *Re* Brickwood, *Ex p.* Parr (1818), Buck, 191; Ebsworth *v.* Alliance Marine Insce. (1873), 42 L. J. C. P. 305; **Engelback** *v.* Nixon (1875), L. R. 10 C. P. 645.

6229 i. *Acceptor of bills holding security—Drawer & acceptor both bankrupt—Whether securities available to holder.*]—Where B. accepts bills drawn by A. against goods left in B.'s hands as security, if both become bkpt. the bill-holder can rank on the estate of each for the amount of the bills to the effect of recovering full payment, but B.'s estate is entitled to be indemnified for any dividends which his estate may be required to pay in respect of the bills, A.'s estate having a right to the balance of the proceeds of the goods, after such indemnity has been given.

By agreement between A. & B., the latter undertook to employ his works in heckling & spinning yarns at a specific rate. By art. 8 of the agreement it was provided that all material & yarn at B.'s works should continue to be the sole property of A., subject only to the lien of B. for the cost of manufacture & for advances made by him, or other debts due to him by A. By art. 9 B. became bound to give his acceptances for a sum not exceeding three-fourths of the value of the raw material & yarn held by him on A.'s account, & should be entitled to "a right of lien or retention of goods to a value sufficient to cover such acceptances." Both A. & B. became bkpt. At the date of the bkpcy. B. was liable as acceptor on bills drawn by A. to the amount of £16,000, & he held goods belonging to A., afterwards sold for £4,025 14*s.* 2*d.*, on which he had a right of lien or retention to indemnify him from that liability. The holders of the bills claimed to have the whole proceeds applied, in the first place in payment of the bills, as far as they would extend, so as to reduce their amount of proof against the two estates to about £12,000 instead of £16,000. B.'s trustees maintained that the bill-holders must continue to rank on both bkpt. estates for the full amount of the bills, & claimed that all dividends paid by them to the bill-holders out of B.'s estate should be repaid to them from the fund *in medio*:—*Held:* B.'s trustees were entitled to the fund *in medio*, in order that they might apply it towards their relief from the payments which they were liable to make in the shape of the dividends to the holders of the bills; (2) the balance of the fund, if any, was payable to A.'s trustee.—ROYAL BANK OF SCOTLAND *v.* COMMERCIAL BANK OF SCOTLAND (1882), 7 App. Cas. 366; 47 L. T. 360; 31 W. R. 49, H. L.—**SCOT.**

Sect. 5.—"*Property held by the bankrupt on trust for any other person*": *Sub-sect.* 3, *D.*]

6230. —— —— —— To extent of acceptor's lien at time of bankruptcy.]—The drawer of bills of exchange deposited short bills with the acceptor to cover his drawing account. The drawer & acceptor became bkpt.:—*Held:* the holder of the acceptances could call upon the assignees of the acceptor to apply the short bills in discharge of the acceptances to the extent of the lien (to be ascertained by inquiry), which the acceptor had upon them at the time of his bkpcy.—*Re* BRICKWOOD & Co., *Re* LEIGH, *Ex p.* PARR (1818), Buck, 191.

Annotations:—**Expld. & Apld.** *Re* Neville, *Re* Bowes, *Ex p.* Perfect (1830), Mont. 25. **Consd.** Inman *v.* Clare (1858), John. 769. **Refd.** *Re* Thompson & Mildred, *Ex p.* Prescott (1834), 3 Deac. & Ch. 210.; *Re* Mundy, *Ex p.* Hobhouse, *Ex p.* Gower (1837), 2 Deac. 291, Ct. of R.

6231. —— —— ——.]—B. sent yarn to N. to be bleached, & drew bills on N., which N. accepted, subject to holding the yarn as security against the bills. The yarn was invoiced to N., & the bills were expressed to be for value received in yarn. The bills were dishonoured, & both B. & N. became bkpts. B. was indebted to his bankers, to whom the bills had been indorsed, beyond the amount of the bills. N.'s assignees possessed themselves of the yarn, & B.'s bankers sought to have it sold, & the proceeds applied in payment of the amount due on the bills, with liberty to prove for any deficiency against the estates of B. & N.:—*Held:* the bankers were entitled to the relief claimed.—*Re* NEVILLE, *Re* BOWES, *Ex p.* PERFECT (1830), Mont. 25.

Annotations:—**Distd.** *Re* Thompson & Mildred, *Ex p.* Prescott (1834), 3 Deac. & Ch. 218, Ct. of R. **Refd.** *Re* Mundy, *Ex p.* Hobhouse, *Ex p.* Gower (1837), 2 Deac. 291, Ct. of R.

6232. —— —— —— Holders paid more than amount of security.]—Co. A. guaranteed bills for £35,000 accepted by co. B., & co. B. assigned to co. A. property as security for the payment of the bills. Both cos. were wound up by the ct., & the holders of the bills, who had no notice of the security, proved against both estates for the whole amount of the bills, & recovered from co. A. £21,000, & from co. B. £5,250. Afterwards the security was realised, & produced £23,500:—*Held:* the proceeds of the security were part of the estate of co. A., & were divisible among its creditors.

The holders of these bills of exchange are not entitled to have the benefit of this security in the way in which they ask for it. There has been more paid to the bill-holders than the amount of their security, which really disposes of the whole matter, & they are entitled to nothing more (LORD ROMILLY, M.R.).—*Re* JOINT STOCK DISCOUNT CO., LODER'S CASE (1868), L. R. 6 Eq. 491; 37 L. J. Ch. 846; 16 W. R. 1076.

6233. —— —— —— Bills substituted for those to which securities appropriated.]—M. borrowed money from the R. co., for which he accepted & gave to them bills of exchange, & deposited shares as a collateral security. When the bills became due M. wished the loan continued, & the managing director of the co. sent him for acceptance fresh bills, with a letter stating them to be in place of those falling due. M. accepted the new set of bills on that footing. Afterwards M. died insolvent, & the co. was ordered to be wound up, & was admitted to be utterly insolvent. Both sets of bills had been negotiated, & were outstanding. The holders of the first set of bills having applied to have such first set paid by means of the deposited shares:—*Held:* the rule did not apply in favour of the holders of the first set of bills, for the co., after receiving the new bills in place of the old ones, were bound to indemnify M. against the old ones, & had no right to apply his shares in payment of them. *Qu.:* whether the rule was not applicable in favour of the holders of the new bills.—*Re* GENERAL ROLLING STOCK CO., *Ex p.* ALLIANCE BANK (1869), 4 Ch. App. 423; 38 L. J. Ch. 714; 20 L. T. 685; 17 W. R. 631, L. JJ.

Annotation:—**Consd.** Bank of Ireland *v.* Perry (1871), L. R. 7 Exch. 14.

6234. —— —— —— Securities not appropriated to particular bills.]—K. accepted bills for L., & L. mortgaged to K. an estate in Guiana to secure a cash credit, granted by K. There was a general current account between the two firms. K. & L. each became insolvent:—*Held:* in the circumstances the mtge. was a security for money advanced to meet the bills, & the holders of the bills were entitled to the benefit of the mtge. securities, & to have the money received from the mtge. security applied *pro ratâ* in payment of the bills.—CITY BANK *v.* LUCKIE (1870), 5 Ch. App. 773; 23 L. T. 376; 18 W. R. 1181, L. C.

6235. —— —— —— ——.]—If there has been a general appropriation of securities to meet the bills drawn by A. upon B., the securities must be applied in accordance with the rule (COTTON, L.J.).—*Re* SUSE, *Ex p.* DEVER (1885), 14 Q. B. D. 611; 54 L. J. Q. B. 390; 53 L. T. 131; 33 W. R. 625, C. A.

6236. —— —— —— Holders' proof reduced by amount realised from securities.]—All the parties to certain bills of exchange, the payment of which was secured as between some of them, became insolvent, one of them, a co., being ordered to be wound up. The securities were realised, & the proceeds paid to the bill-holders. After the bills had matured, but before the securities were realised, the holders had proved against the co. for the full amount:—*Held:* the proof must be reduced by the amounts received by the bill-holders from the securities, & any dividends received on the excess of the original over the reduced proof must be refunded.—*Re* BARNED'S BANKING CO., *Ex p.* JOINT STOCK DISCOUNT CO. (1875), 10 Ch. App. 198; 44 L. J. Ch. 494; 31 L. T. 862; 23 W. R. 281, L. JJ.

6237. —— —— —— Securities insufficient to cover acceptances.]—Where the securities are in sufficient to cover the whole amount of the acceptances, the rule confers a benefit upon the bill-holders to which they are not entitled, at the expense of the acceptors, which is inequitable, nor can it be reconciled with the reasons of Lord Eldon's judgment in *Waring's Case*.

The reasons assigned by Lord Cranworth in *Powles* v. *Hargreaves*, No. 6220, *ante*, to justify the extension of *Waring's Case* to the case of a deficient security overlook the fact that, when the whole benefit of a deficient security is given to the bill-holder, the estate of bkpt. acceptor may lose some part of the indemnity to which, by the contract, he is entitled (LORD SELBORNE, C.).—ROYAL BANK OF SCOTLAND *v.* COMMERCIAL BANK

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v. *Bills accepted to be paid for out of proceeds of property assigned—Indorsers bankrupt—Right of holders.*]—In Feb., 1858, S. & B. & E. became accommodation indorsers for A. for $15,000, & E. alone indorsed for an additional sum of $5,000, A. giving a chattel mtge. on his personal effects, including certain bills, notes, & overdue accounts, as security against their liability as indorsers. At the same time, E. executed to S. & B. a mtge. on his farm to secure them to the extent of $5,000 or so much as might remain unpaid of such $15,000 after applying the proceeds of the chattel property so mortgaged in payment thereof. In July following, A. executed another indenture or trust deed, reciting such mtge., & he thereby assigned all outstanding debts due or owing to him,

OF SCOTLAND (1882), 7 App. Cas. 366; 46 L. T. 360; 31 W. R. 49, H. L.

6238. ——————————.]—Bankers in London granted merchants in Ceylon letters of credit, authorising them to draw for any sums not exceeding £10,000 at one time. The bankers filed a liquidation petition, at which date there were outstanding acceptances for £11,535 against remittances for £3,009. The drawers were judicially insolvent:—*Held:* the rule applied.

It is said that the securities were sent to cover the whole of the bills drawn under the letter of credit. If that were so, the rule would still apply, but it would apply in favour of all the holders of acceptances (BRETT, M.R.).—*Re* SUSE, *Ex p.* DEVER (1885), 14 Q. B. D. 611; 54 L. J. Q. B. 390; 53 L. T. 131; 33 W. R. 625, C. A.

6239. —— —— —— **Rescission of agreement between drawer & acceptor before holders' application.**]—A contract for building a ship provided that the purchase-money was to be paid by instalments, partly in cash, & partly by means of bills of exchange, to be paid & given at specified stages of the progress of the construction, the balance being paid on completion by a bill. The ship was from the time of paying or giving the first instalment to be the absolute property of the purchaser to the extent of his advances, subject, nevertheless, to the builder's lien for any unpaid instalments. Any bills given during construction were to be retired by the purchaser at completion & transfer. As the construction of the ship went on, the vendor drew bills upon the purchaser, which he accepted, for the instalments of purchase-money. The bills were negotiated, but before any of them became due, the purchaser took proceedings for liquidation, including his liability on the bills among his debts, & his creditors passed a resolution to accept a composition. The bill-holders refused to accept the amount of composition when tendered. The purchaser shortly after the resolution gave notice to the vendor to rescind the contract. The vendor afterwards became bkpt., & the ship was completed by his trustee. The bill-holders claimed a lien on the ship:—*Held:* the principle of *Waring's Case* was not applicable, & the bill-holders had no lien on the ship.

The bill-holders never, either by contract or the conduct of anybody, acquired or had any charge whatever, direct or indirect, upon this thing which was to have been a ship, & which has now become a ship (JAMES, L.J.).

The rule only applies either where the property of the acceptor has been pledged with the drawer, or the property of the drawer has been pledged with the acceptor, & not where the property is exclusively the property of one of the parties (MELLISH, L.J.).—*Re* LINDSAY, *Ex p.* LAMBTON (1875), 10 Ch. App. 405; 32 L. T. 380; 23 W. R. 602; 2 Asp. M. L. C. 525; *sub nom. Re* LINDSAY, *Ex p.* GREENER, 44 L. J. Bcy., 81, L. JJ.

Annotation:—**Mentd.** Banbury & Cheltenham Direct Ry. Co. *v.* Daniel (1884), 54 L. J. Ch. 265.

6240. —— **Whether securities available—Available to holders—Acceptor applying securities to own use.**]—B. was in the habit of drawing bills on H. & Co., bankers, & of remitting bills to them to an amount fully sufficient to meet their acceptances. H. & Co. became bkpt. At that time there were in the hands of holders for value undue bills to a large amount drawn by B. upon H. & Co., & accepted by them, but H. & Co. had misappropriated the greater part of the bills remitted to meet them:—*Held:* B. could not claim to have returned to him such of the remitted bills as remained in the hands of H. & Co. at the time of their bkpcy., but they must be applied so far as they would extend in payment of the bills accepted by H. & Co.—*Re* HARRISON, *Ex p.* CARRICK (1858), 2 De G. & J. 208; 44 E. R. 968, L. JJ.

Annotation:—**Refd.** Frith *v.* Forbes (1862), 6 L. T. 847.

6241. —— —— **Acceptor having general lien on securities deposited.**]—*Semble:* the rule does not apply where the acceptors are creditors of the drawers to an amount exceeding that due on the bills, at least if the acceptors have a general lien on securities deposited with them.—*Re* NEW ZEALAND BANKING CORPN., HICKIE & CO.'S CASE (1867), L. R. 4 Eq. 226; *sub nom. Re* NEW ZEALAND BANKING CORPN., *Ex p.* BANK OF HINDUSTAN, 36 L. J. Ch. 807; 16 L. T. 654; 15 W. R. 954.

6242. Bills accepted to be paid for out of proceeds of goods—Acceptor bankrupt—Right of holders to payment out of proceeds of goods.]—If bills are taken for the price of goods & it is agreed that the bills are to be paid for out of the proceeds, & the acceptor becomes bkpt., the indorsees of the bills without notice of the agreement are entitled to its benefit.

E., a factor, was engaged with T. & M. in shipments at their joint risk. E. supplied the goods & T. & M. accepted bills for their price. E. wrote the following letter to T. & M.:—"Having sent you an invoice for goods & you having shipped same, I hereby agree to be responsible to you for half the loss that may arise on them, & having drawn bills on you for the whole amount, I engage to renew same, until funds come round, without any charge. Should any profit arise, I shall look to you for my half share." E. & T. & M. both became bkpt., before which petitioners had discounted the bills without any notice of the circumstances in which they were given, or of E.'s lien on the proceeds of the shipment:—*Held:* accounts of the shipment were to be taken, & the joint creditors of E. & T. & M. might prove, & the surplus applied in payment of petitioners, & the surplus, if any, paid to the separate estates of bkpts.—*Re* THOMPSON & MILDRED, *Re* EVANS, *Ex p.* PRESCOTT (1834), 1 Mont. & A. 316; 3 Deac. & Ch. 218, Ct. of R.; *subsequent proceedings*, 4 Deac. & Ch. 23, Ct. of R.

Annotation:—**Apld.** *Re* Leggatt, *Re* Gledstanes, *Ex p.* Dewhurst (1873), 21 W. R. 874, L. JJ.

6243. —— —— **Lien of holders.**]—A. at Liverpool, wished to obtain consignments from P. & Co., cotton merchants at Pernambuco, who desired security other than his own. A. obtained from a bank a letter of credit, by which the bankers authorised P. & Co. to draw on them "against cotton purchased in conformity with instructions." The drafts were to be "covered by shipping documents, say invoices & bills of lading of cotton addressed to this co., & forwarded under separate cover by same mail which brings the drafts for acceptance, on receipt of which documents we engage to honour such drafts." Some shipping documents were sent, & some bills were accepted; one bill was accepted without any shipping documents; before any bills were due, the bankers became bkpt., & bills ar iving immediately afterwards were left unaccepted. On a winding-up

including all bills, notes, judgments, & book accounts, to enable the indorsers "to pay, satisfy, & discharge the accommodation paper so indorsed by them as aforesaid." In 1862, the indorsers, who had the management of the securities, had reduced the $20,000 indebtedness to about $6,900, when E.'s farm was sold & the sum of $5,000 secured thereon was paid to the banks who held the accommodation paper, thus reducing the claim of the banks to $1,900 for which they accepted the composition notes of S. & B. at 8*s.* 9*d.* in the pound, they having about that time made a composition with their creditors. Nearly all the composition notes S. & B. subsequently paid.

Sect. 5.—"Property held by the bankrupt on trust for any other person": Sub-sect. 3, D.]

order, issued in the matter of the bank, J., who was the agent of & also a partner in P. & Co., claimed to prove against the bankers for the whole amount of the bills, without bringing into account the value of the cotton which had been sold, or which remained in hand:—*Held:* the bill-holders had no lien over the goods in the hands of the bankers, so as to enable them to treat the bankers as trustees, who were only debtors to the bill-holders for the surplus remaining after the goods consigned had been applied to satisfy the acceptances.—*Re* BARNED'S BANKING CO., BANNER *v.* JOHNSTON (1871), L. R. 5 H. L. 157; 40 L. J. Ch. 730; *sub nom.* BARNED'S BANKING CO. *v.* JOHNSTON, 24 L. T. 542, H. L.

Annotations:—**Distd.** *Re* Barned's Banking Co., *Ex p.* Joint Stock Discount Co. (1874), L. R. 19 Eq. 1. **Consd.** *Re* Suse, *Ex p.* Dever (1884), 13 Q. B. D. 766, C. A. **Refd.** Royal Bank of Scotland *v.* Commercial Bank of Scotland (1882), 7 App. Cas. 366, H. L. **Mentd.** *Re* Jones, *Ex p.* Lovering (1874), 9 Ch. App. 586, L. JJ.; Fraser *v.* Province of Brescia Steam Tram. Co. (1887), 56 L. T. 771.

6244. —— **Drawer & acceptor both bankrupt—Goods shipped on joint account—Right of holders to proceeds of goods.**]—There was an agreement between partners whereby A. delivered goods to B. & C., drawing on them for the amount, & they accepting, the goods being shipped on joint account. Certain of the bills were indorsed to P., who discounted them with notice of the agreement. All the parties became bkpt. Goods, against which the bills were drawn, having been sold by the assignees of B. & C., the assignee of P. claimed to be entitled to £984 4*s.* 7*d.*, the proceeds of the sale:—*Held:* he was entitled to it, there being no joint creditors of all three partners.—*Re* THOMPSON, *Ex p.* COPELAND (1833), 2 Mont. & A. 177; 3 Deac. & Ch. 199; *sub nom. Re* MILDRED, *Ex p.* COPELAND, 3 L. J. Bcy. 15, Ct. of R.

Annotations:—**Folld.** *Re* Thompson, *Ex p.* Prescott (1834), 3 Deac. & Ch. 218, Ct. of R. **Apld.** *Re* Warwick, *Ex p.* Brown (1838), 3 Deac. 91, Ct. of R. **Folld.** *Re* Leggatt, *Re* Gledstanes, *Ex p.* Dewhurst (1873), 8 Ch. App. 965, L. J. **Refd.** *Re* Manning, *Ex p.* Smith (1834), 4 Deac. & Ch. 579, Ct. of R.

6245. —— —— —— ——.]—Two firms, L. & Co., of Bombay, & G. & Co., of London, engaged in a joint adventure for buying & selling goods in England & India. The course of business as to the homeward shipments was that L. & Co. drew bills on G. & Co., which they discounted in India, & with the proceeds purchased cotton, which they consigned to G. & Co. specially to meet the acceptances. Both firms stopped payment, & went into liquidation. The holders of unpaid acceptances of G. & Co., which had been drawn in such way, claimed to have the proceeds of certain shipments of cotton specially appropriated to meet the acceptances:—*Held:* the bill-holders were entitled to have the cotton specially appropriated, but subject to the rights of the creditors, if any, of the aggregate firms to have the cotton applied as part of the aggregate assets.—*Re* LEGGATT, *Re* GLEDSTANES, *Ex p.* DEWHURST (1873), 8 Ch. App. 965; 42 L. J. Bcy. 87; 29 L. T. 125; 21 W. R. 874, L. J.

6246. —— —— **Right of holders to payment out of proceeds of goods.**]—Merchants consigned goods to a factor, & agreed that he should have a lien on them & their proceeds, for the payment of the factor's acceptances in their favour. The merchants & the factor became bkpt. Prior to the bkptcies., the factor had received out of the proceeds of the goods £5,867, & his assignees afterwards received £3,150 from the proceeds of those remaining unsold at the factor's bkpcy., at which time acceptances for £9,017 on bills drawn by the merchants were undue & unpaid. The merchant's bankers & the holders of the bills to the amount of £5,837, had proved for their cash balance against the merchants' estate, & for the bills they held against the factor's estate, & claimed a portion of the £3,150 towards the payment of the bills:—*Held:* the factor's right against the property was merely to protect himself against his acceptances in favour of the merchants, & the £3,150 must be applied towards the payment of the bills held by the bankers & other bill-holders, & the proofs against both estates must be proportionately reduced.—*Re* MUNDY, *Re* GLASS, *Ex p.* HOBHOUSE, *Ex p.* GOWER (1837), 2 Deac. 291; 6 L. J. Bcy. 76, Ct. of R.

6247. —— —— ——.]—R. & Co. of America, according to previous agreement, purchased shares of a bank, on the joint account of themselves & W. & Co., an English house, & transmitted the certificates of the shares to W. & Co., R. & Co. advancing the purchase-money, & drawing bills to that amount on the English house. The bills were negotiated by R. & Co., in America, who advised the English house that they had drawn such bills against the shares. The certificates, arriving after the bkpcy. of the English house, came into the hands of the official assignee, & shortly afterwards R. & Co. stopped payment. On the petition of the bill-holders:—*Held:* the American estate had a right to insist that the bills should be paid out of the proceeds of the shares, & such proceeds, *pro ratâ*, should be applied in payment of all the bills so drawn against them.—*Re* WARWICK & CLAGETT, *Ex p.* BROWN (1838), 3 Deac. 91; 3 Mont. & A. 471; 7 L. J. Bcy. 29; 2 Jur. 82, Ct. of R.

6248. —— —— ——.]—The holders of bills of exchange, which are drawn against consignments, are entitled to have the proceeds of the consignments applied in liquidation of their claims in respect of the bills.—*Re* STREATFEILD, LAURENCE & MORTIMORE, *Ex p.* CUNLIFFE & CO. (1862), 6 L. T. 695.

6249. —— —— —— **No specific appropriation.**]—Merchants in England employed a firm in America as their agents to purchase goods & send them to England. The foreign firm drew bills on the English firm & sold them in America, & with the proceeds purchased goods which they shipped to England, sending the bills of lading directly to the English firm, & at the same time advising them of the drawing of the bills, by means of which they had purchased the goods, & requesting them to carry the invoice price of the goods to their account. The English firm went into liquidation, & the foreign firm also became bkpt. When the English firm stopped payment, a cargo of goods was *in transitu*, & some of the bills drawn for purchasing them had been accepted by the English firm, but not paid, & others had not been accepted. The trustee in the liquidation took possession of the cargo on its arrival. The creditors of the foreign firm claimed to have the

Some time afterwards & before default in payment of any of the composition notes, S. & B. became insolvent, & an assignee of their estate was duly appointed, & the banks proved upon their estate for the unpaid composition notes. About a month afterwards A. became insolvent, & E. had also become insolvent. Amongst the effects so assigned by the deed of July was a judgment against defts. recovered against them by A. which together with one recovered against them in the names of S. & B. & E. was compromised at $1,500:—*Held:* the only right was to rank upon the estate of S. & B. for the composition notes remaining in their hands.—ALLCHIN *v.* BUFFALO & LAKE HURON RY. CO. (1876), 23 Gr. 411.—CAN.

goods appropriated to meet the bills drawn in respect of them :—*Held :* the foreign firm, whether regarded as the agents of the English firm or as vendors, had parted with all property in the goods, & had no power to direct the appropriation of the proceeds, & no equity arose on the insolvency of the two firms in favour of the holders of the bills to have the proceeds applied in payment of the bills under the doctrine of *Waring's Case.*

A direction by consignor to consignee to place the invoice price of goods to his credit & the bills drawn against them to his debit does not amount to an appropriation of the goods to protect the bills.—*Re* TAPPENBECK, *Ex p.* BANNER (1876), 2 Ch. D. 278 ; 45 L. J. Bcy. 73 ; 34 L. T. 199 ; 24 W. R. 476, C. A.

Annotations :—**Folld.** Phelps, Stokes *v.* Comber (1884), 26 Ch. D. 755. **Refd.** König *v.* Brandt (1901), 84 L. T. 748, C. A.

See, also, Nos. 6255 *et seq., post.*

6250. —— —— Right of holders to balance of proceeds of goods.]—In the ordinary course of business between P. & Co. & deft., P. & Co. bought, on Sept. 14, 1869, a cargo of maize afloat from H., & resold it to deft. on same day. On Oct. 4 they paid H. a deposit of £883 15*s.*, & drew a bill on deft. for that amount. The bill having been duly accepted, was discounted by pltfs. As between deft. & P. & Co. the bill was drawn & accepted, on the terms that the proceeds of the cargo should be applied to take it up when due. Deft., on the cargo arriving, sold it through P. & Co. to C., who closed the sale at their request by paying H. what remained due to him, & taking up directly from him the shipping documents, which had been retained by him. After making such payment a balance of £415 10*s.* remained in C.'s hands. On Dec. 2 P. & Co. suspended payment & executed an inspectorship deed, to which pltfs. assented, & under which they proved. On Dec. 20 deft. executed a composition deed, to which pltfs. assented, reserving their rights in respect of the above-mentioned balance. Had P. & Co. not suspended payment, they would have been entitled according to the custom of dealing applicable to the sale of the cargo, & it would have been their duty to have specifically applied the balance to taking up the bill. Deft. having commenced an action against C. to recover such balance, an interpleader issue was directed between pltfs., who also claimed it, & deft. Neither P. & Co. nor their trustees claimed any interest for themselves in the fund in dispute :—*Held :* pltfs. were entitled to have the sum in C.'s hands applied *pro tanto* to discharging the bill which they had discounted.—BANK OF IRELAND *v.* PERRY (1871), L. R. 7 Exch. 14 ; 41 L. J. Ex. 9 ; 25 L. T. 845 ; 20 W. R. 300.

Annotations :—**Consd.** Engelback *v.* Nixon (1875), L. R. 10 C. P. 645. **Refd.** Ebsworth *v.* Alliance Marine Insce. (1873), L. R. 8 C. P. 596 ; Duncan *v.* Cashim (1875), L. R. 10 C. P. 554.

6251. —— —— ——.]—R., the factor of W., of W. & K., of W., K. & P., of W., P. & C., & of W. & B., accepted bills drawn on him by W. & P., they agreeing that all the goods in R.'s hands, consigned to him by W. & P., either solely or jointly, should be security to R. for the amount of his acceptances. R. sold the goods in his own name. W. afterwards became bkpt., & the assignees of W. gave notice to the buyers of the goods not to pay R. the money due in respect of such sale. All the debts owing for the goods were afterwards, by indenture, to which R. & the assignees of W. were parties, assigned to trustees, upon trust to apply same as R. might legally do if the assignment had not been made. R. afterwards became bkpt. The trustees having received the proceeds of the goods filed their bill against the assignees of W. & of R., for the direction of the ct. in the execution of the trust. By the decree the master was directed to state what bills of exchange had been accepted against the goods, & the amount & particulars of such acceptances, & the amount unpaid, & for that purpose he was at liberty to publish advertisements. Under such advertisements several claims were made before the master by K., & by other holders of the bills accepted by R. On further directions :—*Held :* (1) the bill-holders had no interest in the proceeds of the goods, except that which might arise from the result of the contract between R. & W. & P. ; (2) if there had been no bkpcy., the bill-holders could not have sustained a suit to have the proceeds of the goods applied for their benefit, & the happening of the bkpcies. did not affect the equitable rights of the parties ; (3) the general account as between the estates of W. & of R. being waived by the respective assignees, the assignees of R. were entitled to recover the trust fund, & to administer it in that bkpcy.—LAYCOCK *v.* JOHNSON (1847), 6 Hare, 199 ; 16 L. J. Ch. 350 ; 11 Jur. 688 ; 67 E. R. 1139.

6252. —— —— ——.]—POWLES *v.* HARGREAVES, No. 6220, *ante.*

6253. —— —— ——.]—A trader & a firm of traders having agreed to assist one another by mutual advances, the following dealings took place between them. The trader delivered to the firm acceptances & a quantity of wool, & procured bills drawn by the firm to be accepted by strangers on the trader's indemnity. He also made payments on account of the firm. The firm on their part advanced to him cash to the amount of £5,000, & delivered to him several acceptances, exceeding the amount of the acceptances delivered & procured by the trader as above mentioned. By a contemporaneous memorandum, signed by the trader, he stated that he had consigned the wool in consideration of the advance of £5,000, & that the firm were to be at liberty to sell it if he should not, when called upon, reimburse their "advances." The acceptances were chiefly those of strangers. The wool was deposited in pursuance of an agreement that it was to be a security for all the advances made by the firm, & the evidence did not show that the cash received by the firm upon the discount of the acceptances received by them from & on the indemnity of the trader did not exceed the cash advance of £5,000. On the affairs of the firm & of the trader being wound up, under arrangements analogous to the Bkpcy. Law :—*Held :* the holders of the bills delivered by the firm to the trader were entitled ratably to the proceeds of the wool.—*Re* CHEESEBROUGH, *Ex p.* ACKROYD (1860), 3 De G. F. & J. 726 ; 45 E. R. 1060, L. JJ.

6254. Bills accepted to be paid for out of proceeds of goods consigned to third party—Short bills sent by third party to acceptor to cover acceptances—Bankruptcy of third party & of acceptor—Right of holders to bills so remitted.]—L. & Co. employed S. & Co. as their correspondents at Havannah, & R. as their correspondent in London. They consigned cargoes to S. & Co., at the same time informing them that they would draw bills on R. for the value. That they did, & the bills were accepted by R. Before the bills came to maturity S. & Co. sent remittances in short bills to R. to cover the amount of the bills, telling him to take them "against the acceptance." R. became bkpt., & the acceptances were not paid, & soon after S. & Co. became insolvent :—*Held :* the

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remittances must be applied to meet the acceptances.—*Re* RICHARDSON, *Ex p.* SMART (1872), 8 Ch. App. 220; 42 L. J. Bcy. 22; 28 L. T. 146; 21 W. R. 237, L. JJ.

Annotations :—**Distd.** Vaughan *v.* Halliday (1874), 9 Ch. App. 561, L. JJ. **Refd.** Ebsworth *v.* Alliance Marine Insce. (1873), L. R. 8 C. P. 596; Royal Bank of Scotland *v.* Commercial Bank of Scotland (1882), 7 App. Cas. 366, H. L.

6255. Bills accepted to be paid for out of proceeds of other bills—Drawer & acceptor both bankrupt—Holders paid in full—Right of trustee of acceptor to stand in place of holders.]—B. & Co. drew bills on K. & Co., which K. & Co. accepted for the accommodation of B. & Co., & in order to provide for the payment of the acceptances B. & Co. remitted to K. & Co. cash & deposited with them bills payable to B. & Co., & the amount of those bills was received by K. & Co. & placed by them to the credit of B. & Co.'s cash account. Both firms became bkpt., K. & Co. in July, 1812, & B. & Co. in Aug., there was then a large balance owing by B. & Co. to K. & Co. on the cash account, K. & Co. being also liable to a large amount upon bills accepted by them for the accommodation of B. & Co. & having in their hands bills, also to a large amount, deposited with them by B. & Co. to provide for the payment of such acceptances. Before any dividend was declared upon the estate of K. & Co. their assignees realised from the deposited bills more than sufficient to liquidate the cash balance due from B. & Co. The holders of the accommodation bills proved against both estates & were fully paid, receiving from each estate at different times dividends to the amount of 10*s.* in the pound, & the sum thus paid in dividends by the estate of K. & Co. exceeded by above £6,000 the total sum realised from the deposited bills. No debt was proved or attempted to be proved by the estate of K. & Co. against the estate of B. & Co. until 1847, when a further portion of the outstanding estate of B. & Co. was realised but to an amount insufficient to complete a payment of 20*s.* in the pound to their creditors exclusively of K. & Co. :—*Held* : (1) the assignees of K. & Co. were entitled to prove as a debt due from the estate of B. & Co. the amount of the cash balance & also the £6,000, & in respect of the £6,000 & until thereby same was repaid, they were entitled to the benefit as to any future dividends of the proofs made against the estate of B. & Co. by the accommodation bill-holders; (2) the cash balance was not liquidated by the receipt of the larger sum from the deposited securities by the assignees of K. & Co. previously to the declaration of the first dividend, they being entitled in the circumstances to appropriate the sum so received in the way they considered most beneficial to their estate, & as to the right of the assignees of K. & Co. to stand in the place of the bill-holders, the case fell within 49 Geo. 3, c. 121.—*Re* BULMER, *Ex p.* JOHNSON (1853), 3 De G. M. & G. 218; 22 L. J. Bcy. 65; 21 L. T. O. S. 109; 1 W. R. 341; 43 E. R. 86, L. C.

Annotation :—**Mentd.** *Re* Foster & Hinings, *Ex p.* Dickin (1875), 24 W. R. 221.

6256. —— —— What amounts to specific appropriation.]—L. & Co., of Barbados, were in the habit of buying sugar & consigning it to R. & Co. of London, paying for it in drafts upon R. & Co., indorsed over to the planters. By an unwritten agreement L. & Co. were also in the habit of drawing bills upon R. & Co., & selling the drafts to bankers & others, & then of buying bills & remitting them to London to keep R. & Co. in funds to meet their acceptances of the drafts so drawn upon them, the amounts being carried into general account. R. & Co. stopped payment. At the time, undue acceptances of theirs were running to the extent of about £25,000. L. & Co. also stopped payment, & were made insolvent according to the law of the island. After the stoppage of the London firm, drafts arrived in London for acceptance to the amount of about £16,000, which were dishonoured, & remittances arrived to the amount of nearly £12,000. R. & Co. were afterwards made bkpt. :—*Held* : (1) there was no specific appropriation of the remittances to cover the drafts sent home by the said mails for acceptance; (2) the remittances must be carried into general account between the firms, & so far as they were in specie, or to be treated as in specie, at the time of the bkpcy. the principle of *Waring's Case* and *Powles* v. *Hargreaves*, No. 6220, *ante*, must apply.—TRIMINGHAM *v.* MAUD (1868), L. R. 7 Eq. 201; 38 L. J. Ch. 207; 19 L. T. 554; 17 W. R. 313.

Annotation :—**Dbtd.** *Re* Yglesias, *Ex p.* Gomez (1875), 10 Ch. App. 639, L. JJ.

6257. —— —— ——.]—G. was in the habit of drawing bills on Y., & of sending him bills to put him in funds to meet them. A separate account of the transactions was kept, styled "No. 1 account," & the letters inclosing the remittances directed them to be placed to G.'s credit in account No. 1. Accounts were made out half-yearly. Each remittance was entered under the date when the bill came to hand, but if it became payable before the close of the account, G. was credited with interest for the interval between the day of its falling due & the close of the account. If it fell due after the close of the account, he was debited with interest for that period. If a remitted bill was dishonoured, G. was debited with the costs, & entries of principal & interest were made on the opposite side of the account so as virtually to strike the bill out of the account. Y. stopped payment & made a statutory composition of 3*s.* 4*d.* in the pound with his creditors, including the holders of his outstanding acceptances for G. At the time of the stoppage if he was credited with only 3*s.* 4*d.* in the pound on these acceptances, the balance was in favour of G. without taking into account a number of bills remitted by G. & still remaining in specie. G., who was domiciled in Spain, shortly afterwards entered into some composition with his creditors, but its nature did not appear :—*Held* : the remittances were appropriated to No. 1 account, & as Y. had been fully reimbursed all that he had paid or was liable to pay for G. on that account, the remittances remaining in specie belonged to G. —*Re* YGLESIAS, *Ex p.* GOMEZ (1875), 10 Ch. App. 639; 32 L. T. 677; 23 W. R. 780, L. JJ.

Annotations :—**Folld.** *Re* Gothenburg Commercial Co. (1880), 42 L. T. 174. **Refd.** *Re* Broad, *Ex p.* Neck (1884), 13 Q. B. D. 740, C. A.

6258. —— —— ——.]—Bankers in London granted to merchants in Ceylon a letter of credit, authorising them to draw for sums not exceeding £10,000 at one time, the drafts to be covered by remittances on good London houses. The bankers agreed also, as a separate engagement, with the *bonâ fide* holders of the bills, that the bills should be accepted on presentation, & paid at maturity. The course of dealing between the parties was as follows :—If the remittances sent as cover for the merchants' drafts matured later than the drafts accepted, interest was debited by the bankers against the merchants from the date of the maturity of the acceptances to that of the maturity of the

remittances, while, if the remittances matured earlier than the acceptances, interest was credited to the merchants. The bankers dealt with the remittances as they thought expedient, & the proceeds were paid into the general banking account of their firm. Under the letter of credit bills were drawn by the merchants on the bankers, & were accepted by them, & other bills were remitted by the merchants to cover the acceptances, the letters which accompanied the remittances always describing them as sent to cover particular drafts which were specified. The bankers filed a petition, under which a trustee was appointed. The merchants also stopped payment. At the date of the petition acceptances under the letter of credit to the amount of £11,535 were outstanding, to meet which the bankers had received from the merchants remittances to the amount of £3,009, of which two bills remained in specie in the hands of the bankers, the others having been converted by them into cash. After the filing of the petition two other bills, which had been posted by the merchants before they knew of the stoppage of the bankers, came into the hands of the receiver under the petition. The estate of the merchants was being administered in insolvency:—*Held:* the proceeds of the four remitted bills which were in specie at the commencement of the liquidation must be applied, not in paying the whole of the acceptances ratably, nor in paying ratably all those acceptances to meet which remittances had been sent before the filing of the liquidation petition, but in paying those acceptances to meet which the four bills had been appropriated by the letters with which they were sent.

When remittances are sent in such circumstances to cover drafts of the remitter accepted by the remittee, the remittee may, so long as he is solvent, be entitled, by mercantile usage or the course of dealing between the parties, to deal with the remittances as he pleases, but, so soon as he becomes insolvent, the remitter is entitled to insist on having the remittances applied in paying the acceptances, & that right is the foundation of the rule, but the right extends only to those remittances which remain in specie at the date of the insolvency.—*Re* SUSE, *Ex p.* DEVER (1885), 14 Q. B. D. 611; 54 L. J. Q. B. 390; 53 L. T. 131; 33 W. R. 625, C. A.

6259. —— Acceptor bankrupt—Right of holder—Where Crown is holder.]—A. & B., bankers in London, had, at the time of their bkpcy., cash & short bills belonging to C. & D., bankers in the country. The cash was the excise duties, received & remitted by the country to the London bankers, & against which they had given to the comrs. the latter's acceptances, & in respect of which an extent had issued:—*Held:* the Crown had a right to elect against what securities they would go, & on the consent of the Attorney-General, the short bills should be ordered to be delivered up.—*Re* BRICKWOOD, *Ex p.* ROWTON (1810), 1 Rose, 15, L. C.

See 1914 Act, s. 151.

6260. —— Acceptor bankrupt—Drawer insolvent abroad but liable to be sued—Right of holder to claim payment out of remittance.]—*Re* YGLESIAS & Co., *Ex p.* GENERAL SOUTH AMERICAN CO., No. 6222, *ante*.

SUB-SECT. 4.—RIGHT TO FOLLOW TRUST PROPERTY.

A. In General.

6261. General rule—Fund undistinguishable.]—Trust money cannot be followed unless clearly identified.

A solr., having trust money in his hands, paid certain sums, part of such money, into his banking account without distinguishing them as trust money, & subsequently filed a liquidation petition:—*Held:* the trustee in the liquidation was entitled to the balance of the money in the hands of the bank as against the persons claiming to be entitled as trustees of the alleged trust funds under the marriage settlement of bkpt.—*Re* MAWSON, *Ex p.* HARDCASTLE (1881), 44 L. T. 523; 29 W. R. 615.

6262. —— Fund distinguishable.]—Money had been advanced by pltf. to deft. for the purpose of purchasing a business, & on an undertaking of deft. so to apply it. Deft. spent some of it in paying debts of his own. He then became bkpt. Pltf. was able to trace the remainder of the money advanced by him:—*Held:* a duty had been imposed on deft. of applying the money in a particular way, & a fiduciary relation created, so that, the money not having been applied in the specified way, pltf. could recover so much as remained of it in full from deft.'s trustee in bkpcy.—GIBERT *v.* GONARD (1884), 54 L. J. Ch. 439; 52 L. T. 54; 33 W. R. 302; 1 T. L. R. 91.

Annotation:—**Mentd.** Chelsham & Woldingham Assocn. *v.* Hayward (1911), 76 J. P. 52.

6263. Agent to buy bills—Right to bills purchased.]—A draft for money was entrusted to a broker to buy Exchequer bills for his principal, & the broker received the money & misapplied it by purchasing American stock & bullion, intending to abscond with it & go to America. The broker did abscond, but was taken before he quitted England, & thereupon surrendered to the principal the securities for the American stock & the bullion, who sold the whole & received the proceeds:—*Held:* the principal was entitled to withhold the proceeds from the assignees of the broker, who became bkpt. on the day on which he so received & misapplied the money, an abuse of trust conferring no right on the party abusing it, nor on those who claimed in privity with him.—TAYLOR *v.* PLUMER (1815), 3 M. & S. 562; 2 Rose, 457; 105 E. R. 721.

Annotations:—**Follid.** *Re* Strachan, *Ex p.* Cooke (1876), 4 Ch. D. 123, C. A. **Consd.** Birt *v.* Burt (1877), 36 L. T. 943; *Re* Hallett's Estate, Knatchbull *v.* Hallett (1880), 13 Ch. D. 696, C. A.; Collins *v.* Stimson (1883), 52 L. J. Q. B. 440, D. C. **Refd.** Harris *v.* Truman (1881), 7 Q. B. D. 340; King *v.* Hutton, [1899] 2 Q. B. 555. **Mentd.** Twiss *v.* White (1826), 3 Bing. 486; Small *v.* Attwood (1832), You. 407; Sheppard *v.* Shoolbred (1841), Car. & M. 61; Neate *v.* Harding (1851), 6 Exch. 349; Muttyloll Seal *v.* Dent (1853), 5 Moo. Ind. App. 328; Walshe *v.* Provan (1853), 1 C. L. R. 823; Ashmall *v.* Wood (1856), 28 L. T. O. S. 30; R. *v.* Bunkall (1864), 3 New Rep. 492, C. C. R.; *Re* West of England & South Wales District Bank, *Ex p.* Dale (1879), 11 Ch. D. 772; Crowther *v.* Elgood (1887), 56 L. J. Ch. 416, C. A.; Patten *v.* Bond (1889), 60 L. T. 583; Lister *v.* Stubbs (1890), 45 Ch. D. 1, C. A.; Moss *v.* Hancock, [1899] 2 Q. B. 111, D. C.; Sinclair *v.* Brougham, [1914] A. C. 398, H. L.

6264. Agent to buy shares—Right to shares purchased.]—Bkpts. were stockbrokers, who had been employed by applicant to buy specific shares for him, & had received payment for same. The shares, with others, were deposited by bkpts. with B. & Co. as security for an advance. When the bkpcy. became known B. & Co. sold the shares, reimbursed themselves, & handed over the balance

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PART XX. SECT. 5, SUB-SECT. 4.—A.

w. *Agent to manufacture extract from bark—Right to extract manufactured.*]—Applts. entered into an agreement with M. that he should manufacture extract from their bark piled on M.'s premises. M. proceeded to do so, but used indiscriminately bark belonging to applts. & other parties:—*Held:* it being impossible to identify the extract manufactured from applt.'s bark, they were not entitled to revendicate any portion of the extract from the curator.—CHURCH *v.* BERNIER (1892), Q. R. 1 Q. B. 257.—CAN.

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to the trustee. Upon appct. sending in a claim for the balance another claimant retired:—*Held:* (1) the money might be paid over to appct. on the terms that his solr. would give a personal undertaking to repay so much as the ct. might order at any time within three years; (2) the costs of the appct. must be borne by him, since it would be unjust that the expense of enforcing his claim should be borne by the general body of the creditors.—*Re* BLAKEWAY & THOMAS, *Ex p.* RANKART (1885), 52 L. T. 630.

6265. —— ——.]—A solr. had in his hands money of a client to invest. The client made no inquiry as to how he had invested it, nor did the solr. furnish any statement as to the mode of investment, but paid his client interest until he absconded. It then turned out that only part had been invested at all, & that upon a worthless mtge., but in the same box, in which the documents relating to the mtge. were kept, was found a transfer from the solr. to his client of shares, together with the share certificates. The transfer was undated, &, although executed by the solr., was not executed by the client, who was ignorant of it, nor had it ever been presented to the co. for registration:—*Held:* the shares were not part of the estate of bkpt., but belonged to the client.—*Re* DODDS, *Ex p.* BROWN *v.* COATES (1891), 60 L. J. Q. B. 599; 64 L. T. 476; 7 T. L. R. 259; 8 Morr. 86.

6266. Agent to buy stock—Right to stock purchased.]—A. sent money to a financial firm to be invested by them in an American concern, &, the stock being short, they paid her money into a special account at a bank, in the joint names of the directors of the firm, to await the time when the stock should be delivered. Subsequently a liquidator of the firm was appointed, & when the stock was delivered the bank applied the money in taking it up:—*Held:* the payment into the bank was a clear method of providing for the purchase of the stock, & the firm were trustees for A., who was entitled to the stock.—*Re* CHAPLIN, MILNE GRENFELL & Co., LTD. (1915), 59 Sol. Jo. 250.

6267. Agent to sell goods—Right to bills in payment in hands of agent.]—A merchant abroad employed debtor to sell wines on commission, & to purchase wines on his account, for which he provided letters of credit. Debtor became bkpt.:—*Held:* the bills & notes in the hands of bkpt. for the payment of wine, which could be distinguished, must be given up, but with regard to money the produce of sales, which was mixed with that of the bkpt., no order could be made.—*Re* HUNTER, *Ex p.* MOLDAUT (1833), 3 Deac. & Ch. 351, Ct. of R.

6268. —— **Auctioneer—Right to proceeds of sale.**]—Where an auctioneer received money after his bkpcy. in respect of a sale for a customer, & paid it to the official assignee, the sum was ordered to be repaid to the customer.—*Re* SHUTTLEWORTH, *Ex p.* PARSONS (1854), 2 Bankr. & Ins. R. 4.

6269. —— —— ——.]—Deceased was an auctioneer holding cattle sales in B. It was alleged that his course of business was to sell stock in his own name, giving varying credit to the buyers, but paying the vendors at the conclusion of the sale if they so wished, or otherwise within two days, irrespective of the time of payment of the purchase price by the buyers. His conditions of sale provided that he sold as commission agent & would in no way be liable as principal, & that the remedy of the vendor should be against the purchaser only. On Apr. 23, 1912, deceased held a sale at B. at which, among other lots, he disposed of cattle belonging to C. On Apr. 24 deceased left his office, & on Apr. 25 committed suicide. Earlier on the same day his son had paid into a special account at the bank the proceeds of such sale, amounting to £794, including a cheque from the purchaser of C.'s cattle for the amount due. On May 24 an order was made for administration of deceased's estate in bkpcy., & G. was appointed trustee. The vendor, C., applied for an order that the trustee should pay over to him the purchase price of the cattle, less the auctioneer's commission:—*Held:* (1) there was no evidence of an agreement by which the vendor became the creditor of the auctioneer & looked to him alone & not to the purchaser for payment; (2) the auctioneer received the money in a fiduciary capacity; (3) as it could be traced, it must be paid over to the vendor.—*Re* COTTON, *Ex p.* COOKE (1913), 108 L. T. 310; 57 Sol. Jo. 343, C. A.

6270. —— **Broker—Right to proceeds of sale.**]—C., a trustee, employed a broker, who had notice of the trust to sell consols & invest the proceeds in railway stock. The broker sold the consols for cash, bought railway stock to same amount for settling-day, & received the price of the consols in a cheque, which he paid into his account at his bankers. He stopped payment before settling-day, & went into liquidation. C. claimed so much of the broker's balance at his bankers as was attributable to the price of the consols:—*Held:* as the price of the consols was known by the broker to be trust money, it could be followed, & the claim must be allowed.

Apart from the question of trust, the position of a broker is not that of a banker, but of an agent into whose hands money is put to be applied in a particular way, & money paid to him can be followed by the customer (JAMES, L.J., & BRAMWELL, J.A.).—*Re* STRACHAN, *Ex p.* COOKE (1876), 4 Ch. D. 123; 46 L. J. Bcy. 52; 35 L. T. 649; 41 J. P. 180; 25 W. R. 171, C. A.

Annotations:—**Folld.** Birt *v.* Burt (1877), 36 L. T. 943. **Consd.** *Re* Hallett's Estate, Knatchbull *v.* Hallett (1880), 13 Ch. D. 696. **Distd.** Marten *v.* Rocke, Eyton (1885), 53 L. T. 946; King *v.* Hutton, [1899] 2 Q. B. 555. **Refd.** Pearson *v.* Scott (1878), 9 Ch. D. 198; *Re* Pollard, *Ex p.* Dickin (1878), 8 Ch. D. 377, C. A.; *Re* Smith, Fleming, *Ex p.* Kelly (1879), 48 L. J. Bcy. 65, C. A.; *Re* Neck, *Ex p.* Broad (1884), 32 W. R. 912, C. A.; King *v.* Hutton (1900), 69 L. J. Q. B. 786, C. A.; Sinclair *v.* Brougham, [1914] A. C. 398, H. L.

6271. Agent to sell land—Solicitor—Right to proceeds of sale.]—B., a solr., was employed by the trustees for sale of an estate, his duty being to receive the purchase-money & pay it in to the trustees' banking account. B. received large sums, paid them in to his private account, & died insolvent. His banking account at his death showed a large credit, principally made up of specific sums which corresponded with receipts by him on account of sales of the trust estate:—*Held:* the specific sums could be followed by the trustees.—BIRT *v.* BURT (1877), 11 Ch. D. 773, n.; 36 L. T. 943.

Annotation:—**Folld.** *Re* Hallett's Estate, Knatchbull *v.* Hallett (1879), 13 Ch. D. 696, C. A.

6272. Agent to sell bonds—Solicitor—Right to proceeds of sale—Appropriation of drawings out from banking account.]—A solr., who died insolvent, had sold bonds, the property of the trustees of his marriage settlement, for £770, & other bonds, the property of a client, for £1,804, & paid the proceeds to the credit of his own banking account. The £770 was entered in the account before the £1,804. Before his death he had drawn out amounts, which covered the whole £770, & a large part of the £1,804, but there had

always been a balance to the credit of his account more than sufficient to answer both sums :—*Held :* (1) where money held by a person in a fiduciary character, though not as trustee, had been paid to his account at his bankers, the person, for whom he held the money, could follow it & had a charge on the balance in the bankers' hands ; (2) where a person, who held money as a trustee or in a fiduciary character paid it into his account at his bankers, & mixed it with his own money, & afterwards drew on the account, the rule, attributing the first drawings out to the first payments in, did not apply, but the drawer must be taken to have drawn out his own money in preference to the trust money.—*Re* HALLETT'S ESTATE, KNATCHBULL *v.* HALLETT (1880), 13 Ch. D. 696 ; 49 L. J. Ch. 415 ; 42 L. T. 421 ; 28 W. R. 732, C. A.

Annotations :—**Distd.** Kirkham *v.* Peel (1880), 43 L. T. 171. **Consd.** New Zealand & Australian Land Co. *v.* Ruston (1880), 5 Q. B. D. 474 ; Harris *v.* Truman (1881), 7 Q. B. D. 340 ; *Re* Mawson, *Ex p.* Hardcastle (1881), 44 L. T. 523. **Distd.** New Zealand & Australian Land Co. *v.* Watson (1881), 7 Q. B. D. 374, C. A. **Consd.** Collins *v.* Stimson (1883), 11 Q. B. D. 142. **Apld.** *Re* Murray, Dickson *v.* Murray (1887), 57 L. T. 223. **Foll.** Hancock *v.* Smith (1889), 41 Ch. D. 456, C. A. **Consd.** *Re* Hallett, *Ex p.* Blane, [1894] 2 Q. B. 237, C. A. **Foll.** *Re* Stenning, Wood *v.* Stenning, [1895] 2 Ch. 433 ; Mutton *v.* Peat, [1899] 2 Ch. 556 ; *Re* Oatway, Hertslet *v.* Oatway, [1903] 2 Ch. 356. **Consd.** Davis *v.* Petrie, [1906] 2 K. B. 786, C. A. **Apld.** Wilson's & Furness-Leyland Line *v.* British & Continental Shipping Co. (1907), 23 T. L. R. 397 ; Sinclair *v.* Brougham, [1914] A. C. 398, H. L. **Foll.** *Re* Dacre, Whitaker *v.* Dacre, [1915] 2 Ch. 480. **Distd.** Roscoe *v.* Winder, [1915] 1 Ch. 62. **Refd.** Ellis *v.* Goulton, [1893] 1 Q. B. 350, C. A. ; Cory *v.* SS. Mecca, [1897] A. C. 286, H. L. ; *Re* Hodgson's Trusts, Public Trustee *v.* Milne, [1919] 2 Ch. 189. **Mentd.** Lyell *v.* Kennedy (1887), 18 Q. B. D. 796 ; *Re* Miller, *Ex p.* Official Receiver, [1893] 1 Q. B. 327, C. A. ; Moss *v.* Hancock, [1899] 2 Q. B. 111 ; Grunnell *v.* Welch, [1905] 2 K. B. 650, D. C. ; Wimbledon *v.* Eden, *Re* St. Mark's, Wimbledon, [1908] P. 167 ; Kreglinger *v.* New Patagonia Meat & Cold Storage Co., [1914] A. C. 25, H. L.

6273. Bills remitted for discount or collection—Right to proceeds—Bills in hand.]—The G. Co. in London were in the habit of accepting bills drawn upon them by the M. bank at Gothenburg, & the bank from time to time forwarded bills payable in London, which the co. either discounted or collected as they arrived at maturity, & a running account was kept by the co. as between themselves & the bank. The co. stopped payment on Jan. 20, 1879, & went into liquidation on the 22nd of the same month, & the bank had to take up the co.'s acceptances to the amount of £2,197. The bank claimed to be paid such sum out of the proceeds of bills amounting to £2,300, which had been remitted by itself to the co., & some of which remained in the hands of the co. at the commencement of the liquidation :—*Held :* the proceeds of bills discounted before the stoppage could not be followed by the bank, but the bank was entitled to all bills remitted by it to the co. which were in the hands of the co. when it stopped payment.—*Re* GOTHENBURG COMMERCIAL CO. (1881), 44 L. T. 166 ; 29 W. R. 358, C. A.

Annotations :—**Apld.** *Re* Neck, *Ex p.* Broad (1884), 13 Q. B. D. 740, C. A. **Consd.** *Re* Suse, *Ex p.* Dever (1885), 14 Q. B. D. 611, C. A. **Refd.** *Re* Drucker, *Ex p.* Basden (1902), 71 L. J. K. B. 686, C. A.

6274. Mixed fund—Right to proceeds in hands of trustee.]—Property was entrusted to E., upon certain terms. E. mixed it with property of his own, & absconded. He was immediately afterwards made a bkpt. Subsequently E. was taken with the money in his hands, which was clearly shown to be the produce of portions of the mixed property. On a bill, filed by the *cestuis que trust*, against the assignees in bkpcy. :—*Held :* the whole trust fund must be made good out of the money remaining in E.'s hands before the assignees could establish any claim on behalf of the general creditors. *Semble :* the decision would have been the same, even if the assignees could have shown, which they did not, that the mixed fund had been reduced by payments made thereout by bkpt. by way of fraudulent preference.—FRITH *v.* CARTLAND (1865), 2 Hem. & M. 417 ; 34 L. J. Ch. 301 ; 12 L. T. 175 ; 11 Jur. N. S. 238 ; 13 W. R. 493 ; 71 E. R. 525.

Annotations :—**Apld.** Birt *v.* Burt (1877), 36 L. T. 943. **Consd.** *Re* Hallett's Estate, Knatchbull *v.* Hallett (1880), 13 Ch. D. 696, C. A. **Refd.** Harris *v.* Truman (1881), 7 Q. B. D. 340. **Mentd.** Brown *v.* Adams (1869), 4 Ch. App. 764, L. J.

6275. Money entrusted for specific purpose—Misappropriation—Right to shares purchased.]—Bkpt., a cashier in a bank, misappropriated money entrusted to him by his employers for banking purposes, & purchased therewith shares :—*Held :* the trustee must deliver up to the bank the shares purchased with the stolen money.—*Re* HULTON, *Ex p.* MANCHESTER & COUNTY BANK (1891), 39 W. R. 303 ; 8 Morr. 69, D. C.

6276. Money credited but not received—Nothing in specie to follow.]—Trustees gave an authority to debtors, their bankers, to receive £1,600, the proceeds of debentures in a co. The debentures formed part of the trust estate. Debtors had to pay £1,900 to the co. upon other accounts, & they paid them the difference of £300 & never actually received the £1,600, the proceeds of the debentures, but they credited the trust account with that amount, as if it had been received, & became bkpt. Upon an application for a declaration that the trust estate was entitled to £1,600 part of debtors' balance at their London bankers :—*Held :* as debtors had not in fact received the money, there was nothing existing in specie which could be followed & the doctrine as to following trust money had no application.—*Re* HALLETT & Co., *Ex p.* BLANE (1894), 2 Q. B. 237 ; 63 L. J. Q. B. 573 ; 70 L. T. 361 ; 42 W. R. 305 ; 10 T. L. R. 287 ; 1 Mans. 25 ; 9 R. 278, C. A.

6277. Money paid into general account—Appropriation.]—Payments into a general account cannot, without proof of express intention, be appropriated to the replacement of trust money, which has been improperly mixed with that account & drawn out.

6273 i. *Bills remitted for discount or collection—Right to proceeds.*]—Where a person sends an agent a bill of exchange for collection & to remit the money, & the money is collected & mixed with the agent's money, on the agent's insolvency the principal has a good claim against the trustee in insolvency for the full amount so collected.—LONDON & WESTMINSTER BANK *v.* COMMERCIAL BANK TRUSTEES (1897), 8 Nfld. L. R. 8.—**NFLD.**

x. *Money received by trustee—Misappropriation—Right to specific lien.*]—Where C., an insolvent, had assigned all his assets & stock-in-trade to S., as trustee for creditors, & pltf. claimed a specific lien on same to the extent of certain trust money, which had come into C.'s hands, as trustee & exor. for pltf., but had been wrongfully converted by C. to his own use, & employed in his own business to pay his trading debts, but as to which there did not appear to be any identity or connection with the stock-in-trade assigned to S. :—*Held :* pltf. as against S. was only entitled to a dividend with the other creditors, on the full amount, with interest down to the time of the assignment.—CULHANE *v.* SLUART (1883), 6 O. R. 97.—**CAN.**

y. —— —— *Right to profits.*]—An improperly appointed trustee speculated with the trust funds, investing them by taking up land on "perpetual lease," making the required statutory declaration that he did so solely for his own use & benefit. He made a profit which he paid into his private account. A judgment being obtained against him, he was adjudicated a bkpt. He claimed that the profit belonged to the trust estate, & paid into a trust account the whole money still remaining in his private account :—*Held :* the official assignee was entitled to the money.—DAVIES *v.* DEPUTY OFFICIAL ASSIGNEE (1904), 24 N. Z. L. R. 161. —**N.Z.**

Sect. 5.—"Property held by the bankrupt on trust for any other person": Sub-sect. 4, A. & B. Sect. 6.]

A co. sold its business to W., who, by the agreement for sale, was to get in the book debts of the business then owing, &, on or before Apr. 30, 1913, to pay over to the co. all money received by him on account of the book debts, "such amount to be equal to the gross amount of the debts owing on Mar. 1, 1913. Thereafter all debts then outstanding" were to "belong to the purchaser." The gross amount of the book debts so owing was £623 8*s.* 5*d.*, & W. collected that sum, & before or on May 19, 1913, paid £455 18*s.* 11*d.*, part thereof, into his private general account at a bank. By May 21, 1913, he had drawn out all the money standing to his credit, except £25 18*s.*, & applied it for his own purposes & not in paying the co. as agreed. Subsequently he paid in money of his own, & drew on the account for his own purposes, with the result that on his death there was a credit balance of £358 5*s.* 5*d.* In an action by the co. against the trustee of W.'s property under an administration order in bkpcy. the co. claimed to have a charge on the £358 5*s.* 5*d.* for the £455 18*s.* 11*d.*:—*Held:* W. was a trustee for the co. of the £455 18*s.* 11*d.*, but the co.'s charge extended only to the intermediate balance of £25 18*s.*—ROSCOE (JAMES) (BOLTON) LTD. *v.* WINDER, [1915] 1 Ch. 62; 84 L. J. Ch. 286; 112 L. T. 121; [1915] H. B. R. 61.

B. Presumption that Trustee spent his own Money.

6278. Shares of cestuis que trust mixed with own shares.]—Trust funds were invested in the purchase of transferable shares in a banking co., in the name of one of the trustees, who executed a declaration of the trusts thereof, the rules of the co. not allowing shares to stand in the name of joint owners or *cestuis que trust*. The trustee was also a proprietor of shares in his own right in the same co., & made various sales & purchases of shares therein. There was nothing to distinguish which were the individual shares held by the different proprietors, the same being in the nature of capital, expressed by quantity. The trustee contracted to assign a number of shares to the banking co. as a security for advances which they made to him, & he afterwards became bkpt.:—*Held:* (1) the trustee must be presumed to have transferred or pledged such shares as belonged to himself, &, so far as he had shares of his own, not to have transferred or pledged the shares of his *cestuis que trust;* (2) the *cestuis que trust* were entitled to so many of the shares standing in the name of the trustee at the time of his bkpcy. as could be presumed to be identical with the shares in which the trust funds were invested, from the fact that such a number of shares had always thenceforwards stood in the name of the trustee.—PINKETT *v.* WRIGHT (1842), 2 Hare, 120; 12 L. J. Ch. 119; 6 Jur. 1102; 67 E. R. 50; *affd. sub nom.* MURRAY *v.* PINKETT, 12 Cl. & Fin. 764, H. L.

Annotations:—**Distd.** Pennell *v.* Deffell (1853), 4 De G. M. & G. 372. **Folld.** *Re* Birchall, Wilson *v.* Birchall (1881), 44 L. T. 243. **Refd.** Ashwin *v.* Burton (1862), 32 L. J. Ch. 196; Brown *v.* Adams (1869), 21 L. T. 71, L. J.; Société Générale de Paris *v.* Tram. Union Co. (1884), 14 Q. B. D. 424, C. A. **Mentd.** Clack *v.* Holland (1854), 19 Beav. 262; Aberaman Ironworks *v.* Wickens (1868), L. R. 5 Eq. 485; *Re* Leslie, Leslie *v.* French (1883), 23 Ch. D. 552; *Re* Bell, *Ex p.* Hodgson (1891), 65 L. T. 245.

6279. Mixed fund—Appropriation of drawings.]—An official assignee in bkpcy. paid money received in his official character, & also his private money, into two banks, to his own undistinguished account, & he also drew from each of those accounts money for his private purposes, & on account of his office. He kept no "official account," but in passing his accounts treated the account with one of the banks as the "official account," the balance being made to tally with the balance appearing to be in his hands. At the time of his death, there were balances in his favour at both banks. The successor claimed both the balances as applicable to the payment of sums received by him in his official character:—*Held:* he was entitled to such portion of the balances as consisted of money attributable to the official money, which was to be ascertained on the principle of considering each sum drawn out as going to discharge the earliest debt due from the bank then remaining unpaid.—PENNELL *v.* DEFFELL (1853), 4 De G. M. & G. 372; 1 Eq. Rep. 579; 23 L. J. Ch. 115; 22 L. T. O. S. 126; 18 Jur. 273; 1 W. R. 499; 43 E. R. 551, L. JJ.

Annotations:—**Distd.** Collinson *v.* Lister (1855), 7 De G. M. & G. 634, L. JJ. **Consd.** Merriman *v.* Ward (1860), 1 John. & H. 371; Frith *v.* Cartland (1865), 2 Hem. & M. 417; Brown *v.* Adams (1869), 4 Ch. App. 764, L. J.; *Re* Scheibler, *Ex p.* Cooper (1874), 31 L. T. 417, L. JJ.; Birt *v.* Burt (1877), 36 L. T. 943; *Re* West of England & South Wales District Bank, *Ex p.* Dale (1879), 11 Ch. D. 772; *Re* Hallett's Estate, Knatchbull *v.* Hallett (1880), 13 Ch. D. 696, C. A. **Refd.** Harford *v.* Lloyd (1855), 20 Beav. 310; Ernest *v.* Croysdill (1860), 2 De G. F. & J. 175, L. JJ.; *Re* European Bank, *Ex p.* Oriental Commercial Bank (1870), 5 Ch. App. 358, L. J.; G. E. Ry. Co. *v.* Turner (1872), 8 Ch. App. 149, L. C.; Edinburgh *v.* Lord Advocate (1879), 4 App. Cas. 823, H. L.; Allcard *v.* Skinner (1887), 36 Ch. D. 145, C. A.; Lyell *v.* Kennedy, Kennedy *v.* Lyell (1889), 14 App. Cas. 437, H. L.; Sinclair *v.* Brougham, [1914] A. C. 398, H. L.

6280. —— Banking account—Investment made by trustee—Right to follow.]—A trustee paid trust money into his banking account, whereby it became mixed with his own money, & out of money drawn from the account purchased an investment in his own name, but subsequently applied the balance to his own purpose:—*Held:* his representatives could not successfully maintain that the investment was purchased out of the trustee's own money, & that what had been spent, & could no longer be traced & recovered, was the money belonging to the trust.—*Re* OATWAY, HERTSLET *v.* OATWAY, [1903] 2 Ch. 356; 72 L. J. Ch. 575; 88 L. T. 622.

Annotation:—**Expld.** Roscoe *v.* Winder, [1915] 1 Ch. 62.

6281. Agent to buy goods—Purchase for principal presumed.]—Defts. employed F. to buy barley & malt it for them only. F., for the purpose of purchasing such barley, was empowered to draw upon a certain fund paid into a bank in the name of defts. F. bought barley upon credit, & at the same time fraudulently drew out money from the fund so supplied by defts., representing by his conduct that the money so drawn out was used for the purpose of paying for barley approved of by defts. F. was paid by commission, which included all necessary disbursements. F. also bought malt which he represented to have been made from barley bought with defts.' money. Defts., F. having become bkpt., seized all the barley & malt upon his premises, the value of which was less

PART XX. SECT. 5, SUB-SECT. 4.—B.

a. *Money of friendly society mixed with own money.*]—In July a trustee of a friendly society received money on behalf of the society. In Nov. he executed a deed of assignment for creditors. In the following Feb. the trustees of the society demanded the money of the trustees of the creditors' deed:—*Held:* the presumption was that the trustee had not been guilty of embezzlement, & he still had the society's money when he executed the deed of assignment, & his assignees must pay it over.—EASTWOOD *v.* SCOTT (1871), 2 V. L. R. R. 101.—AUS.

6281 i. *Agent to buy goods—Purchase for principal presumed.*]—When an agent purchases goods for his principal with money supplied by the latter there is a trust impressed upon the goods in the principal's favour, & this trust is enforceable against the agent's assignee for the benefit of creditors, even though

than the money he had drawn out. In an action brought by the trustee of F. to recover the value of the barley & malt so seized :—*Held :* the barley & malt seized by defts. were charged in trust with the amount of the price which was, or ought to have been, & which F. represented by his conduct to have been, paid for them with defts.' money, & as F., who never had been reputed owner, was estopped from saying he was not trustee of the barley & malt for defts., the trustee in his bkpcy. was also estopped from disputing the equitable right of defts., who were entitled to judgment.—HARRIS *v.* TRUMAN (1882), 9 Q. B. D. 264 ; 51 L. J. Q. B. 338 ; 46 L. T. 844 ; 30 W. R. 533, C. A.

Annotations :—**Refd.** Chelsham & Woldingham Assocn. *v.* Hayward (1911), 76 J. P. 52. **Mentd.** Mercer *v.* Vans Colina (1897), 4 Mans. 363 ; *Re* Van Laun, *Ex p.* Chatterton (1907), 76 L. J. K. B. 644, C. A.

SECT. 6.—"TOOLS OF HIS TRADE," "WEARING APPAREL," AND OTHER PROPERTY OF BANKRUPT EXEMPTED BY STATUTE.

See, now, 1914 Act, s. 38 (2).

6282. "Tools, implements, & other like necessaries"—1854 Act—Scaffold-poles of builder.]—Scaffold-poles used by a builder in his trade are not "tools, implements, & other like necessaries" within the above Act relating to excepted articles to be retained by bkpt.—*Re* DAVIS (1857), 29 L. T. O. S. 99.

6283. "Tools of his trade"—Letters of introduction, testimonials, etc.—Colonisation agent.]—The provision in 1914 Act, s. 38 (2) as to bkpt.'s "tools of his trade" was intended to protect the implements of a workman's trade & does not include, in the case of a colonisation agent, testimonials, letters of introduction, documents as to patents, & a book with entries of the distances between certain places.—*Re* SHERMAN (1915), 32 T. L. R. 231 ; [1915] H. B. R. 231.

6284. —— What value exempted—Application of Small Debts Act, 1845 (c. 127).]—A sheriff seized the goods of a judgment debtor under a writ of *fi. fa.* at the suit of a judgment creditor for more than £20, & advertised them for sale, except debtor's tools of trade, etc., to the value of £5, as provided by Small Debts Act, 1845, s. 8. Before the sale a receiving order was made against debtor, & thereupon he claimed that, by virtue of 1883 Act, s. 44, his tools of trade, etc., to the value of £20 were excepted from the sale. The official receiver made no request to the sheriff under 1890 Act, s. 11, & declined to interfere :—*Held :* (1) Small Debts Act, 1845, s. 8, was in no way modified or extended by 1883 Act, s. 44 ; (2) the sheriff was bound to sell, & under 1890 Act, s. 11, to hand over the proceeds of sale, less costs of execution, to the official receiver, although, had there been no sale, debtor would have been entitled inder 1883 Act, s. 44, to his tools of trade, etc., to the value of £20.—*Re* DAWSON, *Ex p.* DAWSON, [1899] 2 Q. B. 54 ; 68 L. J. Q. B. 668 ; 80 L. T. 498 ; 47 W. R. 524 ; 43 Sol. Jo. 440 ; 6 Mans. 200.

See, further, Sect. 10, *post.*

"Bedding".]—*See* DISTRESS.

6285. Bankrupt serving sentence of penal servitude—Allowance to wife in lieu of excepted articles.]—Where bkpt. had no opportunity of selecting the excepted articles by reason of his being in prison undergoing a sentence of penal servitude, the ct. granted £20 to bkpt.'s wife in lieu of excepted articles, & made her an allowance for maintenance under 1849 Act, s. 194.—*Re* BARROW & HAMMOND, *Ex p.* BARROW, *Ex p.* HAMMOND (1858), 31 L. T. O. S. 318.

See 1914 Act, ss. 38 (2), 58, & 1915 Rules, rr. 312, 370.

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the agent has, while purchasing for the principal, also purchased goods of the same kind for himself & has not set aside specific portions of the goods to answer the principal's claim.—CARTER *v.* LONG & BISBY (1896), 26 S. C. R. 430 ; 23 A. R. 121.—**CAN.**

6281 ii. ——— ———.]—Applts. advanced money to M., a manufacturer of bark extract, for the purchase of bark for them from time to time. M. also agreed to buy from applts. the full supply of bark required for his factory, not less than six hundred cords per month, at $1 per cord advance on cost price. M. bought the bark in his own name, & it was piled on his land, where a quantity was measured & specially identified by applts. M. having afterwards become insolvent, applts. claimed that they were entitled to the bark so measured & identified, & seized it in the possession of M.'s curator :—*Held:* applts. were entitled to revendicate the bark from the curator.—CHURCH *v.* BERNIER (1892), Q. R. 1 Q. B. 257.—**CAN.**

PART XX. SECT. 6.

a. *"Wearing apparel"—Expensive watch—Not necessary & ordinary wearing apparel.*]—*Re* SANBORN, 14 C. L. J. 241.—**CAN.**

b. —— *Watch & chain of no great value—Not ordered to be given up to assignee.*]—*Re* ROBINSON, 15 C. L. J. 287.—**CAN.**

d. *Homestead.*]—H. & P. became insolvent, & assigned their estates to the official assignees. Each was possessed of a house & land on which he resided, each being under mtge., but the equity of redemption exceeding in value $600 in each case. The assignees having advertised the properties for sale, & refused to comply with an application of insolvents to have a homestead set-off to them, the county ct. judge ordered the sales to proceed, & the proceeds to the amount of $600 to be handed over to each of insolvents : —*Held :* the judge had no power to make such an order.—*Re* HARRISON, *Re* POTTER (1873), 2 Pug. 11.—**CAN.**

f. ——.]—A building in which is the actual residence & home of debtor & not worth more than $1,500, will not pass to the assignee by an assignment for the benefit of creditors under R. S. M. c. 7, s. 3.—BERTRAND *v.* MAGNUSSON (1895) 10 Man. L. R. 490.—**CA N.**

g. ——.]—*Held :* as deft.'s permanent & real residence was, at the time of the execution of the transfers & for some time prior thereto, at a place in a foreign country, the quarter sections were not exempt as being his homestead.—MINOT GROCERY CO. *v.* DURICK (1913), 23 W. L. R. 270 ; 3 W. W. R. 904 ; 6 Sask. L. R. 44 ; 10 D. L. R. 126.—**CAN.**

h. —— *Time for claiming exemption.*]—The exemption under Homesteads Act (C. S. B. C. 1888, c. 57) Amendment Act, 1890, s. 2 is not an absolute right, but a privilege to be effectuated only by claiming it within a reasonable time, & it is too late for the assignor to claim the exemption after the property assigned has been converted into money.—PILLING *v.* STEWART (1895), 4 B. C. R. 94.—**CAN.**

j. *Insurance policy—Life insurance.*]—The protection against creditors afforded by Life Assurance Cos. Act, 1873 (No. 474), s. 37 extends to any policy or policies, whatever the amount assured, the surrender or market value of which in the aggregate does not at the time of the protection arising exceed £1,000.—DAVEY *v.* PEIN (1885), 11 V. L. R. 446.—**AUS.**

k. —— ——— *On insolvent's life—For wife's benefit.*]—A policy of life assurance, effected on the life of a man for the benefit of his wife, cannot be claimed by the creditors of the husband in case of insolvency.—BROSSARD *v.* MARSOUIN & VILBON (1873), 17 L. C. J. 270.—**CAN.**

m. —— ——— *Election.*]—Where bkpt., who has a right to protection of life-insurance policies under Life Insurance Act, 1908, s. 65, has left the Dominion, the official assignee is not bound to serve the notice required by s. 66 (4) on bkpt. personally, even if he knows of his address abroad ; it is sufficient if the notice is "left at or posted to his last known place of abode or residence in New Zealand." If on service of such notice bkpt. does not exercise his election within a reasonable time, the official assignee may elect, but he must elect in the interests of the administration of the estate.—*Re* GREENAWAY (1910), 30 N. Z. L. R. 293.—**N.Z.**

o. —— *Accident insurance.*]—An accident insurance policy is protected from creditors of the assured under Life Assurance Policies Act, 1884, s. 33, & Amendment Act, 1885, s. 2.—MITCHELL *v.* SCOTT (1886), 5 N. Z. L. R. 274.—**N.Z.**

r. *Assets very small—Barely exceeding value of furniture excepted.*]—The fact that bkpt. had not filed a schedule & that his entire assets amounted to little more than the £20 worth of furniture excepted by the statute :—*Held :* no objection to his being allowed that amount, there being no evidence of absolute fraud or concealment.—*Re* CONNELL (1861), 13 Ir. Jur. 419.—**IR.**

SECT. 7.—PROPERTY ACQUIRED BY OR DEVOLVING ON BANKRUPT.

SUB-SECT. 1.—PROPERTY ACQUIRED BEFORE CLOSE OF BANKRUPTCY.

See, further, Part XXI., *post*.

A. Position of Bankrupt and Trustee.

(a) In General.

6286. Can acquire property only for creditors.]—An uncertificated bkpt., in general, can acquire property only for the creditors, & bkpt., having entered into a trade in partnership, the creditors of that partnership have no equity against the assignees, for an account & application to their debts of the property used or acquired in that partnership.—EVERETT *v.* BACKHOUSE (1804), 10 Ves. 94; 32 E. R. 779.

6287. —— No new assignment necessary.]—It is a good plea to an action on a promissory note & for money lent, that pltf. is an uncertificated bkpt., & that his assignees required deft. to pay to them the money claimed by pltf., & it is no good replication that the causes of action accrued after pltf. became bkpt., & that deft. treated with pltf. as a person capable of receiving credit in those behalves, & that the comrs. had made no new assignment of the notes & money, for the general assignment of the comrs. passes to the assignees of bkpt. all his after-acquired as well as present personal property & debts.—KITCHEN *v.* BARTSCH (1805), 7 East, 53; 103 E. R. 21.

Annotations:—**Distd.** Drayton *v.* Dale (1823), 2 B. & C. 293; Braithwaite *v.* Gardiner (1846), 8 Q. B. 473. **Refd.** Clark *v.* Calvert (1819), 8 Taunt. 742; Taylor *v.* Buchanan (1825), 4 B. & C. 419; Mackay *v.* Wood (1841), 7 M. & W. 420; *Re* Gibbs, *Ex p.* Grimstead, *Ex p.* Gibbs, *Ex p.* Strahan (1844), De G. 72, Ct. of R.; Herbert *v.* Sayer (1844), 5 Q. B. 965.

6288. Has no property—May acquire property by action.]—The decisions, that an uncertificated bkpt. has no property, & that he may acquire property by action, are not reconciled, but both are settled points, which cannot be disturbed (LORD ELDON, C.).—*Ex p.* LEES, *Ex p.* POULDEN (1810), 16 Ves. 472; 33 E. R. 1064, L. C.

Annotation:—**Mentd.** *Re* Kenton, *Ex p.* Devas (1834), 3 L. J. Bcy. 89.

6289. —— Nor rights of action against third parties—Except with trustee's assent.]—An uncertificated bkpt. can have no property, & no rights of action even against third parties, unless with the assent of his assignees (*per* CUR.).—CHAMBERS *v.* BERNASCONI (1830), 6 Bing. 498; 4 Moo. & P. 218; 8 L. J. O. S. C.P. 159; 130 E. R. 1373.

Annotation:—**Mentd.** Burton *v.* Haworth (1833), 4 B. & Ad. 462.

See, further, Part XXI., *post*.

6290. —— Proceeds of bill drawn & indorsed after bankruptcy.]—Where an uncertificated bkpt. was the drawer & first indorser of a bill of exchange, it might be assumed that he had received value from the indorsee, the amount of which ought to find its way to the assignees (COLERIDGE, J.).—BRAITHWAITE *v.* GARDINER (1846), 8 Q. B. 473; 15 L. J. Q. B. 187; 6 L. T. O. S. 367; 10 Jur. 591; 115 E. R. 954.

Annotation:—**Mentd.** Smith *v.* Marsack (1848), 6 C. B. 486.

6291. Whether able to hold property against trustee.]—An uncertificated bkpt. is not entitled to hold any property against his assignees.—NIAS *v.* ADAMSON (1819), 3 B. & Ald. 225; 106 E. R. 644.

Annotations:—**Expld.** *Re* Bakewell, *Ex p.* Butler (1842), 2 Mont. D. & De G. 731, Ct. of R. **Consd.** Engelback *v.* Nixon (1875), L. R. 10 C. P. 645.

6292. —— Patent rights.]—A patent right for the exclusive exercise of an invention obtained from the Crown by an uncertificated bkpt. vests in the assignees.—HESSE *v.* STEVENSON (1803), 3 Bos. & P. 565; Dav. Pat. Cas. 244; 127 E. R. 305.

Annotations:—**Refd.** Nias *v.* Adamson (1819), 3 B. & Ald. 225; Bloxam *v.* Elsee (1825), 1 C. & P. 558; *Re* Roberts, [1900] 1 Q. B. 122, C. A. **Mentd.** Saward *v.* Anstey (1825), 2 Bing. 519; Smith *v.* Compton (1832), 3 B. & Ad. 189; Line *v.* Stephenson (1838), 4 Bing. N. C. 678.

PART XX. SECT. 7, SUB-SECT. 1.—A. (a).

6286 i. *Can acquire property only for creditors.*]—The comr.'s first warrant is sufficient to seize any property which bkpt. becomes possessed of until he gets his certificate.—*Re* MOORHEAD (1818), 2 Mol. 445.—**IR.**

6286 ii. —— *Settled property forfeited to bankrupt on divorce of wife.*]—Resp. by ante-nuptial contract settled on his wife a life policy, farming implements & household forniture, of which she never obtained possession. Resp. became insolvent, & subsequently the wife was divorced, & the ct. decreed a forfeiture of benefits accruing to her under the ante-nuptial contract, with the result that the property thereunder again accrued to resp.:—*Held:* the articles included in the settlement were properly regarded as property coming to resp. subsequent to his insolvency, & were liable to execution at the hands of a creditor.—STONE *v.* HUMPHREYS (1913), C. P. D. 603.—**S. AF.**

6291 i. *Whether able to hold property against trustee—Title by lapse of time.*]—The possession of after-acquired property by insolvent, so long as the official assignee does not intervene, may be adverse to the latter, so as to bar his title by lapse of time.—KRISTOCOMUL MITTER *v.* SURESH CHUNDER DEB (1882), I. L. R. 8 Calc. 556; 12 C. L. R. 253.—**IND.**

6291 ii. —— *Absconding debtor.*]—Where proceedings have been taken against a person as an absconding debtor, & trustees have been appointed under 1 R. S. c. 125, property acquired by debtor after the appointment of the trustees does not vest in them.—HANNINGTON *v.* HARSHMAN (1873), 1 Pug. 217.—**CAN.**

6291 iii. —— *Gift.*]—L. made an agreement with his children, including M., an insolvent, the account in whose estate had not been confirmed, whereby he agreed that, in consideration of the children paying L. £250, his farm should be sold & the proceeds distributed among them after deduction of the respective debts owing by them to L. It was known to all parties that the farm was worth much more than £250 & that there would be a considerable balance for distribution after deduction of the £250. The creditors had passed a resolution authorising insolvent to trade, but no authority to that effect had been given by the trustee:—*Held:* by being party to the agreement M. had accepted the donation, & his trustee was entitled to claim M.'s share of the balance of the proceeds of the farm.—CILLIERS *v.* LIEBENBERG (1909), 26 S. C. 611; 19 C. T. R. 989.—**S. AF.**

6291 iv. —— *Inheritance.*]—Insolvent, whose estate had been sequestrated in the Transvaal & who had never been rehabilitated, became entitled after the confirmation of the liquidation account in his estate to an inheritance:—*Held:* such inheritance vested not in insolvent, but in his trustee. Scheme of Cape Ordinance in regard to ownership of after-acquired property considered.—KIRKLAND *v.* ROMYN (1915), App. D. 327.—**S. AF.**

6291 v. —— *Judgment debt—Cause of action arising before bankruptcy.*]—In 1892 A. recovered judgment in a district ct. action for an assault. In Aug., 1898, the estate of A. was sequestrated. In Sept. the amount of the judgment was paid into the district ct.:—*Held:* the judgment debt passed to A.'s official assignee.—*Re* AITKEN, *Ex p.* AITKEN & OFFICIAL ASSIGNEE (1898), 19 N. S. W. B. 44.—**AUS.**

6291 vi. —— *Lease acquired by proceeds of personal labour.*]—Where E., an insolvent, had, between the dates of his sequestration & the confirmation of the trustee's account, acquired a lease for five years & had paid the rent out of the crops, which were the direct result of his work & labour:—*Held:* the trustee was entitled to the lease as an asset in the estate.—ELFERT'S TRUSTEE *v.* ELFERT (1904), 21 S. C. 167.—**S. AF.**

6291 vii. —— *Money payable under insurance policy—On life of another—For benefit of bankrupt & others.*]—When the mother of insolvent effects a policy of insurance on her life for the benefit of her children, share & share alike, the amount on her death to be paid to her son, who in the meantime becomes insolvent, & nothing with regard to the policy appears in his sched., upon her death the assignees are not entitled to receive the amount.—*Re* HANNON (1867), 1 I. L. T. Jo. 8.—**IR.**

6292 i. —— *Patent rights.*]—Insolvent, having since his insolvency invented a process for a certain manufacture, obtained letters patent for his invention:—*Held:* the trustee could not claim the right to the patent as part of the assets of the estate.—BOOSÉ'S TRUSTEE *v.* BOOSÉ (1892), 9 S. C. 467.—**S. AF.**

a. —— *Reversion.*]—A husband & wife by their mutual will, appointed the survivor as sole heir, & by their codicil bequeathed "after the death

6293. Has right of property against all—Unless trustee intervenes.]—*Assumpsit* by the indorsee against the maker of a promissory note, payable to A. or his order. Plea, non-*assumpsit*, & that A. became a bkpt., & that his property was duly assigned to assignees, whereby the interest, title, & right to indorse the promissory note before the time of indorsement became vested in the assignees, whereby the indorsement by A. was void, & created no right in pltf. to sue. Replication to the last plea, that the indorsement was made with the consent of the assignees. Rejoinder taking issue upon that fact. A verdict having been found for pltf. on the first issue, & for deft. on the second :—*Held :* pltf. was entitled to judgment upon the whole record, because the property acquired by bkpt. subsequently to his bkpcy. did not absolutely vest in the assignees, although they had a right to claim it, but if they did not make any claim, bkpt. had a right to such property against all other persons.—DRAYTON *v.* DALE (1823), 2 B. & C. 293 ; 3 Dow. & Ry. K. B. 534 ; 2 L. J. O. S. K. B. 20 ; 107 E. R. 393 .

Annotations :—**Follд.** Herbert *v.* Sayer (1844), Dav. & Mer. 723, Ex. Ch. **Refd.** Pitt *v.* Chappelow (1841), 8 M. & W. 616. **Mentd.** Gwynne *v.* Burnell (1840), 7 Cl. & Fin. 572, H. L. ; Sanderson *v.* Collman (1842), 4 Man. & G. 209 ; Steadman *v.* Duhamel (1845), 1 C. B. 888 ; Smith *v.* Marsack (1848), 6 C. B. 486 ; Hallifax *v.* Lyle (1849), 3 Exch. 446 ; Vagliano *v.* Bank of England (1889), 23 Q. B. D. 243, C. A.

6294. —— ——.]—A party, who has taken possession of the goods of intestate after his death, cannot set up as a defence to an action of trover by the administrator, that intestate had been first insolvent & then bkpt., & had not paid 15*s.* in the pound under the fiat, & that the property in the goods vested absolutely in his assignees, the goods having been acquired by intestate after the bkpcy., & he having been allowed by the assignees to retain possession of them.—FYSON *v.* CHAMBERS (1842), 9 M. & W. 460 ; 11 L. J. Ex. 190 ; 152 E. R. 195.

Annotations :—**Consd.** Herbert *v.* Sayer (1844), 5 Q. B. 965, Ex. Ch. **Apld.** Welchman *v.* Sturgis (1849), 13 Q. B. 552 ; Morgan *v.* Knight (1864), 15 C. B. N. S. 669. **Refd.** Newnham *v.* Stevenson (1851), 10 C. B. 713 ; Bourne *v.* Fosbrooke (1865), 18 C. B. N. S. 515 ; *Re* Clarke, *Ex p.* Beardmore, [1894] 2 Q. B. 393, C. A.

6295. Legacy left to bankrupt—While discharge suspended on conditional order.]—Bkpt.'s discharge was suspended until he should pay 5*s.* in the pound, his discharge to take effect from the date of such payment being certified by the trustee. A legacy was left him which was more than sufficient to pay the 5*s.* Bkpt. claimed to retain the balance for himself :—*Held :* as the legacy had devolved upon bkpt. before his discharge, it vested in his trustee, & was divisible among the creditors.—*Re* HAWKINS, *Ex p.* OFFICIAL RECEIVER, [1892] 1 Q. B 890 ; 40 W. R. 484 ; 8 T. L. R. 449 ; 36 Sol. Jo. 365 ; 9 Morr. 118 ; *sub nom. Re* HAWKINS, *Ex p.* HAWKINS, 61 L. J. Q. B. 458 ; 66 L. T. 737, C. A.

6296. Property—Pension of retired colonial judge—Voted annually by colonial legislature.]—The effect of 1869 Act, ss. 15, 17, was to vest in the trustee all the "property" of bkpt. of whatever nature, including the matters dealt with by s. 23 & ss. 87–95, but subject to the exceptions & qualifications introduced by those sects.

The pension of a retired judge of a Crown colony, granted by the Secretary of State for the Colonies, & voted annually by the legislature of the colony, is, in case of the bkpcy. of the judge, "property" which vests in the trustee.—*Re* HUGGINS, *Ex p.* HUGGINS (1882), 21 Ch. D. 85 ; 51 L. J. Ch. 935 ; 47 L. T. 559 ; 30 W. R. 878, C. A.

Annotations :—**Consd.** Lucas *v.* Harris & Blair (1886), 3 T. L. R. 106, C. A. ; Hollinshead *v.* Hazleton, [1916] 1 A. C. 428, H. L. **Refd.** *Re* Hutton, *Ex p.* Benwell (1884), 14 Q. B. D. 301, C. A. ; *Re* Saunders, *Ex p.* Saunders, [1895] 2 Q. B. 117 ; *Re* Pickard, *Ex p.* Official Receiver, [1912] 1 K. B 397. **Mentd.** *Re* Mirams, [1891] 1 Q. B. 594 ; *Re* Elford, Elford *v.* Elford, [1910] 1 Ch. 814.

6297. —— Salary of workhouse chaplain.]—Bkpt., who was chaplain of the Birmingham Workhouse & Workhouse Infirmary, prior to his bkpcy. gave a charge upon his salary to secure payment of £49. Upon the bkpcy. taking place, the official receiver, as trustee of bkpt.'s estate, applied to the county ct. for an order declaring that the salary of bkpt. as chaplain vested in him, & to restrain the person to whom the charge had been given from receiving any portion of the salary :—*Held :* during the continuance of the bkpcy. & of the office the salary subject to the charge vested in the trustee as property of bkpt. within 1883 Act, s. 44, subject to the power of the ct. to make an order under s. 53 (2), appropriating the salary.—*Re* MIRAMS, [1891] 1 Q. B. 594 ; 39 W. R. 464 ; 7 T. L. R. 309 ; 8 Morr. 59.

Annotations :—**Mentd.** Mogul S.S. Co. *v.* McGregor, Gow, [1892] A. C. 25, H. L. ; Horwood *v.* Millar's Timber & Trading Co., [1916] 2 K. B. 44.

Property of bankrupt, generally.]—*See* Sect. 4, *ante*.

Appropriation of pay or salary, etc.]—*See* Sect. 15, *post*.

Sequestration of ecclesiastical benefice.]—*See* Sect. 14, *post*.

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of the survivor," a farm to pltf. :—*Held :* the right of reversion vested in pltf. upon the death of the first dying, & such right having accrued before the confirmation of the account in pltf.'s insolvent estate, vested in his trustee.—STRYDOM *v.* STRYDOM'S TRUSTEE (1894), 11 S. C. 425.—**S. AF.**

6293 i. *Has right of property against all—Unless trustee intervenes.*]—An undischarged bkpt. may, until the official assignee intervenes, sue in his own name in respect of property acquired by him after the date of the bkpcy.—HUTCHISON *v.* BENGE (1908), 27 N. Z. L. R. 1060.—**N.Z.**

6293 ii. —— ——.]—Resps. were the joint proprietors of a lease of licensed premises, the lease being registered under Land Transfer Act, & applt. was the lessee of the premises under a sub-lease. One of resps. was adjudicated a bkpt. The official assignee, though he did not disclaim the lease, took no steps to register a transmission of bkpt.'s interest to himself, & bkpt. remained a registered proprietor, applt., who had no knowledge of the bkpcy., paying rent to him & other resp. up to the end of the term of the sub-lease. Resps. sued applt. on the covenants contained in the sublease for the price of certain repairs to the premises which had been ordered by the local licensing committee as a condition precedent to the renewal of the licence :—*Held :* as the repairs were paid for out of after-acquired property of bkpt., which had not been claimed by the official assignee, he was not debarred from suing for its recovery by the fact of his bkpcy., & the money recovered remained his property until the official assignee intervened.—MESSITER *v.* WOLLERMAN & FREEMAN (1907), 27 N. Z. L. R. 589.—**N.Z.**

6293 iii. —— ——.]—Subject to the right & claim of the official assignee, & so long as he does not interfere, insolvent, who has not obtained his final discharge, has power, with respect to after-acquired property, to buy & sell & give discharges & do all other acts which he could have done before his insolvency.—KRISTOCOMUL MITTER *v.* SURESH CHUNDER DEB (1882), I. L. R. 8 Calc. 556 ; 12 C. L. R. 253.—**IND.**

6293 iv. —— ——.]—R. became possessed of properties in 1872 & 1881. In 1866 R. had presented a petition in insolvency, & a vesting order had been duly made. No final order of discharge was ever made, & R. died in 1888 :—*Held :* the properties coming to R. after his insolvency, vested in him, subject only to the right & claim of the official assignee, should he think fit to assert it.—FATIMABIBI *v.* FATIMABIBI (1892), I. L. R. 16 Bom. 452.—**IND.**

d. *Property acquired by bankrupt in new domicil.*]—Where bkpt. has changed his domicil after the bkpcy., property acquired by him in the new domicil does not pass to the assignee in the old domicil, at all events as against creditors in the new domicil. *Qu. :* whether the assignee could claim the after-acquired property, if there were no creditors in the new domicil.—STRIKE *v.* GLEICH (1879), O. B. & F. 50.—**N.Z.**

Sect. 7.—Property acquired by or devolving on bankrupt: Sub-sect. 1, A. (a) & (b).]

Exercise of appointment in favour of bankrupt—Before certificate—Whether fund appointed vests in trustee.]—*See* No. 5818, *ante*.

Damages & costs awarded bankrupt before & after bankruptcy.]—*See* Sect. 4, sub-sect. 2, E., *ante*.

(b) Personal Earnings of Bankrupt.

6298. General rule.]—The assignees are not entitled to the profits arising from bkpt.'s personal labour, as they cannot let out bkpt., & cannot contract for his labour.—CHIPPENDALE *v.* TOMLINSON (1752), 1 Cooke's Bankrupt Laws, 7th ed., p. 406.

Annotations:—**Extd.** Silk *v.* Osborn (1794), 1 Esp. 140, N. P. **Consd.** Kitchen *v.* Bartsch (1805), 7 East, 53. **Apld.** Coles *v.* Barrow (1813), 4 Taunt. 754. **Distd.** Drake *v.* Beckham (1843), 11 M. & W. 315, Ex. Ch. **Folld.** Williams *v.* Chambers (1847), 10 Q. B. 337. **Distd.** Elliot *v.* Clayton (1851), 20 L. J. Q. B. 217. **Refd.** Drayton *v.* Dale (1823), 2 B. & C. 293.

See, also, Sect. 15, *post*.

6299. ——.]—The assignees of bkpt. cannot take the profits of bkpt.'s daily labour. He must live (LORD ALVANLEY, C.J.).—HESSE *v.* STEVENSON (1803), 3 Bos. & P. 565; Dav. Pat. Cas. 244; 127 E. R. 305.

Annotations:—**Consd.** Nias *v.* Adamson (1819), 3 B. & Ald. 225. **Apprvd.** *Re* Roberts, [1900] 1 Q. B. 122, C. A. **Mentd.** Bloxam *v.* Elsee (1825), 1 C. & P. 558; Saward *v.* Anstey (1825), 2 Bing. 519; Smith *v.* Compton (1832), 3 B. & Ad. 189; Line *v.* Stephenson (1838), 4 Bing. N. C. 678.

6300. What are personal earnings—Patent rights.]—A patent right for the exclusive exercise of an invention obtained from the Crown by an uncertificated bkpt., is affected by the previous assignment of the comrs., & vests in the assignees.

It is said that, although by the assignment every right & interest, & every right of action as well as right of possession & possibility of interest, is taken out of bkpt. & vested in the assignees, yet the fruits of a man's own invention do not pass. It is true, that the schemes which a man may have in his own head before he obtains his certificate, or the fruits which he may make of such schemes do not pass, nor could the assignees require him to assign them over, provided he does not carry his schemes into effect until after he has obtained his certificate. But if he avail himself of his knowledge & skill, & thereby acquire a beneficial interest, which may be the subject of assignment, I cannot frame to myself an argument why that interest should not pass in the same manner as any other property acquired by his personal industry (LORD ALVANLEY, C.J.).—HESSE *v.* STEVENSON (1803), 3 Bos. & P. 565; Dav. Pat. Cas. 244; 127 E. R. 305.

Annotations:—**Apprvd.** *Re* Roberts, [1900] 1 Q. B. 122, C. A. **Refd.** Nias *v.* Adamson (1819), 3 B. & Ald. 225; Bloxam *v.* Elsee (1825), 1 C. & P. 558. **Mentd.** Saward *v.* Anstey (1825), 2 Bing. 519; Smith *v.* Compton (1832), 3 B. & Ad. 189; Line *v.* Stephenson (1838), 4 Bing. N. C. 678.

6301. —— Charges of furniture broker employed to remove furniture—Employing men & materials.]—Pltf., a furniture broker, & uncertificated bkpt., was employed by deft. to remove his goods, in the course of which business he employed several men & vans, supplied packing cases, repaired furniture, & provided materials for that purpose & other articles to a trifling amount:—*Held:* the debt which thereby accrued to pltf. was not in respect of personal labour, but was claimable by the assignees.—CROFTON *v.* POOLE (1830), 1 B. & Ad. 568; 9 L. J. O. S. K. B. 59; 109 E. R. 898.

Annotations:—**Folld.** Elliot *v.* Clayton (1851), 16 Q. B. 581; *Re* Dowling, *Ex p.* Banks (1877), 4 Ch. D. 689. **Consd.** Mercer *v.* Vans Colina (1897), [1900] 1 Q. B. 130, n. **Refd.** *Re* Gibbs, *Ex p.* Grimstead, *Ex p.* Gibbs, *Ex p.* Strahan (1844), De G. 72, Ct. of R.; Williams *v.* Chambers (1847), 10 Q. B. 337.

6302. —— Charges for surveying tithes.]—Bkpt. since his bkpcy. had been employed as a surveyor in valuing tithes, & the money he earned, which it was not proved was more than sufficient for the decent maintenance of himself & his family, he had not paid over or accounted for to his assignees:—*Held:* the money had been received by bkpt. in respect of his personal labour, & he was not liable to account for it to his assignees.—*Re* HAND, *Ex p.* WALTERS (1842), 2 Mont. D. & De G. 635, Ct. of R.

6303. —— Costs of solicitor acting for himself in petition.]—Bkpt., a solr., acted for himself in the matter of a petition, to which he was made resp. in the character of a trustee. Bkpt. had not obtained his certificate:—*Held:* the costs ordered to be paid to bkpt. belonged to him, & did not pass to the assignees.—*Re* GIBBS, *Ex p.* GRIMSTEAD, *Ex p.* GIBBS, *Ex p.* STRAHAN (1844), De G. 72; 3 L. T. O. S. 303; 8 Jur. 652, Ct. of R.

6304. —— Charges of medical practitioner—Using drugs, etc., in preparation of medicines sold.]—To a declaration containing counts for work & labour as a surgeon & apothecary & for goods sold & delivered, deft. pleaded that before the accruing of the causes of action pltf. became bkpt., & that his assignees claimed the debt from deft. Pltf. replied that the labour was his own personal labour bestowed after the bkpcy., & done for the necessary support of himself & his family, & that the goods sold were medicines purchased out of the proceeds of other personal labour & increased in value by pltf. for the necessary support of himself & his family, & as a part of, & incidental & necessary to his personal labour. Pltf., a general medical practitioner, was an uncertificated bkpt., & by an arrangement with a friend who had purchased his stock of medicines, had continued in possession of them, & had carried on his business as before, & had also purchased fresh drugs upon credit. The debt was contracted by pltf. attending deft. & furnishing medicines compounded by him out of the drugs:—*Held:* this was not a mere demand for personal labour, but as pltf. was in substance carrying on his business for profit, his assignees were entitled to the proceeds.—ELLIOT *v.* CLAYTON (1851), 16 Q. B. 581; 20 L. J. Q. B. 217; 17 L. T. O. S. 26; 15 Jur. 293; 117 E. R. 1002.

Annotations:—**Folld.** *Re* Dowling, *Ex p.* Banks (1877), 4 Ch. D. 689; Emden *v.* Carte (1881), 17 Ch. D. 169. **Consd.** *Re* Rogers, *Ex p.* Collins (1893), 63 L. J. Q. B. 178; Mercer *v.* Vans Colina (1897), [1900] 1 Q. B. 130, n. **Refd.** Wadling *v.* Oliphant (1875), 24 W. R. 246; Bailey *v.* Thurston, [1902] 2 K. B. 397.

PART XX. SECT. 7, SUB-SECT. 1.—A. (b).

6298 i. *General rule.*]—In the case of personal earnings arising from the personal efforts of insolvent, the right of the trustee rests upon the principle that the personal earnings, after a deduction has been made of what is reasonably necessary for the maintenance of insolvent & his family, are surplus property acquired by insolvent, either in his hands or in the hands of some person from whom he is entitled to receive it.—*Re* LOVELL, *Ex p.* DIXON, [1904] S. R. Q. 262.—AUS.

6298 ii. ——.]—A trustee is barred from claiming as part of the original estate of insolvent any property acquired by the personal labour of insolvent.—STONE *v.* HUMPHREYS (1913), C. P. D. 603.—S. AF.

6303 i. *What are personal earnings—Costs of solicitor.*]—The remuneration of an uncertificated bkpt. as a solr. in legal proceedings is within the term "personal earnings," and does not vest in the official assignees.—*Re* EBBS (1886), 19 L. R. Ir. 81.—IR.

6304 i.——*Charges of medical practitioner.*]—A debt due to insolvent, a doctor, for medical attendance, which has accrued after the preparation of scheds., but before the acceptance of surrender, vests in the trustee, & is not recoverable by insolvent himself.—DE VILLIERS *v.* GADOW (1900), 17 S. C. 295.—S. AF.

f. —— *Brokerage.—Earned after*

6305. —— Compensation recovered for wrongful dismissal.]—Bkpt., who had never obtained his order of discharge or passed his final examination, procured employment as editor of a weekly newspaper without the permission or knowledge of his trustee, & six years after the bkpcy. he was awarded by the decree of a competent ct. £104 as six months' salary in lieu of proper notice of dismissal:—*Held:* the money was not the proceeds of bkpt.'s personal labour subsequent to his bkpcy., but a compensation for the breach of a contract, which became part of his estate in bkpcy.—WADLING *v.* OLIPHANT (1875), 1 Q. B. D. 145; 45 L. J. Q. B. 173; 33 L. T. 837; 24 W. R. 246.

Annotations:—Consd. *Re* Graydon, *Ex p.* Official Receiver, [1896] 1 Q. B. 417. Distd. Bailey *v.* Thurston, [1903] 1 K. B. 137, C. A. Refd. *Re* Curtoys, *Ex p.* Pillers (1881), 17 Ch. D. 653; Emden *v.* Carte (1881), 17 Ch. D. 169; Cohen *v.* Mitchell (1890), 25 Q. B. D. 262, C. A.; *Re* Roberts, [1900] 1 Q. B. 122, C. A.

6306. —— Charges of painter—Employing men & material.]—Debtor, who had carried on business as a painter, after he filed his petition, but before he had obtained any order of discharge, contracted to paint a yacht for £49. During the progress of the work he received £7 on account. The trustee claimed the balance of £42, and it was paid to him by the owner of the yacht. The £49 represented £15 for debtor's personal labour, £15 for wages for workmen, £10 for cost of materials, & £9 for profit, & debtor borrowed money to pay the workmen & purchased the materials on credit. The county ct. judge having ordered the trustee to pay debtor £33 out of the £42:—*Held:* the trustee was entitled to retain the whole of the £42.—*Re* DOWLING, *Ex p.* BANKS (1877), 4 Ch. D. 689; 46 L. J. Bcy. 74; 36 L. T. 117; 25 W. R. 515.

6307. —— Charges of dentist carrying on business in partnership.]—A partner in a firm of dental surgeons mortgaged his share in the business. The mtgees. brought an action to realise their mtge. & obtained a receiver; subsequently the mtgor. became bkpt., but continued to carry on business under the terms of the partnership deed. The trustee claimed that the profits, which since the bkpcy. had been paid to the receiver, should be paid over to him:—*Held:* the earnings of bkpt. could not be treated as his personal earnings even though the business was one which very largely depended upon the exercise of personal skill by debtor, & even if they were personal earnings they lost that character by being dealt with as part of a partnership business & vested in the trustee.—*Re* ROGERS, *Ex p.* COLLINS, [1894] 1 Q. B. 425; 63 L. J. Q. B. 178; 70 L. T. 107; 10 T. L. R. 24; 1 Mans. 387; 10 R. 469.

Annotations:—Distd. Mercer *v.* Vans Colina (1897), [1900] 1 Q. B. 130, n. Refd. *Re* Roberts, [1900] 1 Q. B. 122, C. A.

6308. —— Royalties on patent—Estoppel of trustee.]—An undischarged bkpt. took out letters patent for an invention, & granted a licence to a co. to work the patented invention at a royalty of £10 *per* week. Two instalments of the royalty, *i.e.*, £20, becoming payable were claimed by the trustee as after-acquired property of bkpt. The co. took out an interpleader summons in the High Ct., which was remitted to a county ct. for decision. The county ct. judge held that the £20 was in the nature of personal earnings & belonged to bkpt., & refused leave to appeal. Subsequent royalties became due, & the trustee applied to the Bkpcy. Ct. for a declaration that they vested in him as after-acquired property of bkpt.:—*Held:* the judgment of the county ct. estopped the trustee from asserting that the royalties were not the personal earnings of bkpt. *Semble:* the royalties were not the personal earnings of bkpt.—*Re* GRAYDON, *Ex p.* OFFICIAL RECEIVER, [1896] 1 Q. B. 417; 65 L. J. Q. B. 328; 74 L. T. 175; 44 W. R. 495; 12 T. L. R. 208; 40 Sol. Jo. 420; 3 Mans. 5.

Annotations:—Mentd. Shoolbred *v.* Roberts, [1899] 2 Q. B. 560; Mercer *v.* Vans Colina (1897), [1900] 1 Q. B. 130, n.; *Re* Roberts, [1900] 1 Q. B. 122, C. A.; *Re* Hancock, [1904] 1 K. B. 585, C. A.; Affleck *v.* Hammond, [1912] 3 K. B. 162, C. A.

6309. —— Commission—On sale of property—No office or clerks.]—Commission earned by an undischarged bkpt. on the sale of a public house is not personal earnings as distinguished from income earned by him in his trade or profession, notwithstanding that bkpt. at the time had no office or clerk, but passed his time in endeavouring to negotiate such sales.—MERCER *v.* VANS COLINA (1897), [1900] 1 Q. B. 130, n.; 67 L. J. Q. B. 424; 78 L. T. 21; 4 Mans. 363.

Annotations:—Apprvd. Shoolbred *v.* Roberts, [1899] 2 Q. B. 560. Refd. *Re* Roberts, [1900] 1 Q. B. 122, C. A.; Affleck *v.* Hammond, [1912] 3 K. B. 162, C. A. Mentd. *Re* Beall, *Ex p.* Official Receiver, [1899] 1 Q. B. 688; *Re* Behrend's Trust, Surman *v.* Biddell, [1911] 1 Ch. 687, C. A.

6310. —— —— On procuring loan.]—Pltf., while an undischarged bkpt., earned his living as a commission agent, & obtained from defts. a commission note, under which he was to be paid £60 if he procured a certain loan for them. Pltf. having alleged that he had earned the £60 & begun

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adjudication.]—*Held:* a cause of action, which accrued to bkpt. subsequent to the adjudication in respect of after-acquired property, remained vested in him & did not vest in his trustee, & he was proper pltf. to sue in respect thereof, & anything recovered by him remained in bkpt. until the trustee intervened.—MURRAY *v.* EAST BENGAL MAHAJAN FLOTILLA CO., LTD. (1918), 22 C. W. N. 1018.—IND.

g. —— *Shares in return for services rendered.*]—H., an insolvent, performed work for a syndicate, the result of which was the sale of claims in a mine, on very advantageous terms, to the C. Co. The syndicate having received the greater part of the purchase price in shares in the co., gave five hundred of the shares to insolvent as remuneration for his work & labour. Upon an application by the trustees to restrain insolvent from disposing of the shares:—*Held:* he was protected.—HALL'S TRUSTEE *v.* HALL (1888), 6 S. C. 190.—S. AF.

j. —— —— *Shares given to wife.*]—While L., who had special knowledge concerning the locality of oil-producing country in New South Wales, was undischarged insolvent, an agreement was entered into between him, his wife, & the trustees of a syndicate, formed to acquire a lease of the country when its exact locality should be discovered by L. By that agreement the wife covenanted to supply two men, of whom insolvent should be one, to search for the oil on behalf of the syndicate. The trustees of the syndicate agreed to pay £4 per week to the wife during the continuance of the search, & also to transfer & deliver to the wife forty paid-up shares in the syndicate before the search-party should be bound to start. The agreement was carried out, the country was found, & a lease obtained, & a co. was subsequently formed, which acquired the rights of the syndicate. The wife was given four hundred paid-up shares in the co. in substitution for the forty shares in the syndicate:—*Held:* the shares were not property acquired by, or devolving on insolvent during the continuance of the insolvency.—*Re* LOVELL, *Ex p.* DIXON (1904), S. R. Q. 262.—AUS.

6305 i. —— *Compensation in lieu of notice.*]—Money agreed to be paid to bkpt. by his employer as compensation in lieu of notice of dismissal:—*Held:* property which became absolutely vested in the official assignee.—*Re* PEACOCK (1885), 4 N. Z. L. R. 76.—N.Z.

6309 i. —— *Commission—As trustee.*]—Commission granted to bkpt., as one of three trustees on the passing of their accounts in the Probate Ct., does not pass to the official assignee as after-acquired property of bkpt., but must be considered as the personal earnings of bkpt.—*Re* BROWNE, *Ex p.* BROWNE, OFFICIAL ASSIGNEE (1894), 15 N. S. W. B. 73.—AUS.

l. —— *Remuneration as election agent.*]—The remuneration of an uncertificated bkpt. acting as an election agent is within the term "personal earnings," & does not vest in the official assignees.—*Re* EBBS (1886), 19 L. R. Ir. 81.—IR.

Sect. 7.—Property acquired by or devolving on bankrupt: Sub-sect. 1, A. (b) & (c), B. (a).

an action to recover same:—*Held:* the money claimed by bkpt. was his "personal earnings," & was excepted from the property passing to his trustee.—AFFLECK *v.* HAMMOND, [1912] 3 K. B. 162; 81 L. J. K. B. 565; 106 L. T. 8; 19 Mans. 111, C. A.

Annotations:—**Refd.** Hill *v.* Settle (1916), 86 L. J. Ch. 243, C. A.; Hamilton *v.* Caldwell (1919), 88 L. J. P. C. 173, H. L.

6311. —— Billiard balls supplied to professional billiard player.]—*Qu.:* whether the billiard balls supplied to bkpt., a professional billiard player, as stated in *Re Roberts*, No. 6315, *post*, could be regarded as personal earnings.—*Re* ROBERTS, [1900] 1 Q. B. 122; 69 L. J. Q. B. 19; 81 L. T. 467; 48 W. R. 132; 16 T. L. R. 29; 44 Sol. Jo. 44; 7 Mans. 5, C. A.

Annotations:—**Mentd.** Shoolbred *v.* Roberts, [1900] 2 Q. B. 497, C. A.; *Re* Hancock, [1904] 1 K. B. 585, C. A.; Affleck *v.* Hammond, [1912] 3 K. B. 162, C. A.; Hamilton *v.* Caldwell (1919), 88 L. J. P. C. 173, H. L.

6312. —— Winnings of professional billiard player.]—Deft., an undischarged bkpt., & another person, deposited £100 with a stakeholder, to abide the event of a billiard match, the whole to be paid to the winner. Deft. won, & both he & pltf., his trustee, claimed the £200 from the stakeholder, who paid the £200 into ct.:—*Held:* the trustee was entitled to the whole sum of £200.—SHOOLBRED *v.* ROBERTS, [1900] 2 Q. B. 497; 69 L. J. Q. B. 800; 83 L. T. 37; 16 T. L. R. 486; 7 Mans. 388, C. A.

Annotation:—**Mentd.** Affleck *v.* Hammond, [1912] 3 K. B. 162, C. A.

6313. Limits of bankrupt's right to personal earnings—Application of 1883 Act, s. 53.]—The principles which underlie the above sect. with respect to salary & income of bkpt. are also applicable to his personal earnings. In each case it is a question of amount, & he will be allowed to retain only such a sum as is sufficient for the reasonable maintenance of himself & his family, & the residue will pass to his trustee.—*Re* GRAYDON, *Ex p.* OFFICIAL RECEIVER, [1896] 1 Q. B. 417; 65 L. J. Q. B. 328; 74 L. T. 175; 44 W. R. 495; 12 T. L. R. 208; 40 Sol. Jo. 420; 3 Mans. 5.

Annotations:—**Refd.** Mercer *v.* Vans Colina (1897), [1900] 1 Q. B. 130, n.; Shoolbred *v.* Roberts, [1899] 2 Q. B. 560; *Re* Roberts, [1900] 1 Q. B. 122, C. A.; *Re* Hancock, [1904] 1 K. B. 585, C. A.; Affleck *v.* Hammond, [1912] 3 K. B. 162, C. A.

6314. —— ——.]—Where the personal earnings of an undischarged bkpt. are received by him under a contract periodically by way of salary or income, & are more than sufficient for the maintenance of himself & his family, the ct. has jurisdiction, under the above sect., to direct a part of such earnings to be set apart for the benefit of the creditors.—*Re* ROGERS, *Ex p.* COLLINS, [1894] 1 Q. B. 425; 63 L. J. Q. B. 178; 70 L. T. 107; 10 T. L. R. 24; 1 Mans. 387; 10 R. 469.

Annotations:—**Refd.** Mercer *v.* Vans Colina (1897), [1900] 1 Q. B. 130, n.; *Re* Roberts, [1900] 1 Q. B. 122, C. A.

6315. —— ——.]—All personal earnings of bkpt. between the commencement of his bkpcy. & his discharge belong to his trustee, save only what is necessary for the support of bkpt. & his family.

R., a professional billiard player, while an undischarged bkpt., entered into a contract with a billiard-ball manufacturing co., whereby the co. agreed to supply him annually for five years, free of cost, with two thousand billiard balls of their manufacture as & when required by him, & R. agreed that he would not, during the five years, play public billiard matches, not being championship matches, other than with balls manufactured & supplied by the co., but the contract did not impose any obligation on R. to play billiards at all. The co. supplied R. during his bkpcy. with balls according to the contract, intending that he might sell them & apply the proceeds to his own use:—*Held:* the balls belonged to the trustee, the evidence showing that they were not wanted for R.'s support.—*Re* ROBERTS, [1900] 1 Q. B. 122; 69 L. J. Q. B. 19; 81 L. T. 467; 48 W. R. 132; 16 T. L. R. 29; 44 Sol. Jo. 44; 7 Mans. 5, C. A.

Annotations:—**Apld.** Shoolbred *v.* Roberts, [1900] 2 Q. B. 497, C. A. **Folld.** *Re* Hancock, [1904] 1 K. B. 585, C. A. **Distd.** Affleck *v.* Hammond, [1912] 3 K. B. 162, C. A. **Refd.** Hamilton *v.* Caldwell (1919), 88 L. J. P. C. 173, H. L.

6316. —— ——.]—A creditor obtained judgment against debtor, a furniture dealer's salesman, whose sole income was derived from his salary or wages, payable weekly, & commission on his sales. He had two children dependent upon him. Debtor having failed to pay the judgment debt, & finding himself unable to comply with a committal order, presented a bkpcy. petition, which was followed, upon his own application, by a receiving order & adjudication. The judgment creditor was his only creditor, & he had no assets beyond the personal earnings from his employment. The judgment creditor having applied for annulment of the bkpcy. proceedings:—*Held:* the proceedings would not prejudice the judgment creditor, as the personal earnings of bkpt., beyond what was necessary for the maintenance of himself & his family, could be applied, in the proceedings, towards payment of the judgment debt.—*Re* HANCOCK, *Ex p.* HILLEARYS, [1904] 1 K. B. 585; 73 L. J. K. B. 245; 90 L. T. 389; 52 W. R. 547; 48 Sol. Jo. 260; 11 Mans. 1, C. A.

Annotation:—**Refd.** Hamilton *v.* Caldwell (1919), 88 L. J. P. C. 173, H. L.

6317. —— What amount sufficient for maintenance.]—The right to work an invention patented by an undischarged bkpt. was sold for £500 & a royalty of £10 a week:—*Held:* bkpt. could only retain out of the royalties sufficient for the reasonable maintenance of himself & his family, & £5 a week was sufficient for that purpose.—*Re* GRAYDON, *Ex p.* OFFICIAL RECEIVER, [1896] 1 Q. B. 417; 65 L. J. Q. B. 328; 74 L. T. 175; 44 W. R. 495; 12 T. L. R. 208; 40 Sol. Jo. 420; 3 Mans. 5.

Annotations:—**Refd.** Shoolbred *v.* Roberts, [1899] 2 Q. B. 560; Mercer *v.* Vans Colina (1897), [1900] 1 Q. B. 130, n.; *Re* Roberts, [1900] 1 Q. B. 122, C. A.; *Re* Hancock, [1904] 1 K. B. 585, C. A.; Affleck *v.* Hammond, [1912] 3 K. B. 162, C. A.

6313 i. *Limits of bankrupt's rights to personal earnings.*]—An assignee is entitled to all the earnings of insolvent, which are earned after the assignment in insolvency, & before discharge, over & above what is necessary for the reasonable maintenance of insolvent & his family.

Where insolvent, pending his discharge, applied part of his earnings in the purchase of land for the benefit of his wife:—*Held:* to the extent of earnings so applied the assignee was entitled to a lien on the land.—CLARKSON *v.* WHITE (1882), 4 O. R. 663.—**CAN.**

6313 ii. ——.]—After-acquired property of insolvent, vests in the official assignee, but subject to Insolvency Act, s. 27, as to salary & pension, & subject to the unwritten law as to personal earnings sufficient for the maintenance, according to his position in life, of insolvent & his family, & the official assignee is not entitled to claim such salary or income except by means of an order obtained under s. 27 of the Act, nor such personal earnings at all, unless & until in either case insolvent has accumulated a margin beyond what has been required for his adequate support.—*Re* DONAGHUE (1894), I. L. R. 19 Bom. 232.—**IND.**

6317 i. —— *What amount sufficient for maintenance—Evidence.*]—Whether or not any earnings of insolvent exceed what is reasonably necessary for the maintenance of himself & his family, must be determined on evidence showing the requirements & the power of insolvent otherwise to maintain himself & family as at the date of the application by the trustee for the surplus.—*Re* LOVELL, *Ex p.* DIXON, [1904] S. R. Q. 262.—**AUS.**

6318. ——— ———.]—Pltf., an undischarged bkpt, brought an action against defts., claiming a sum of £60 alleged to be due to him on a commission note given by them to him during the bkpcy., by which, in consideration of his obtaining for them a certain loan, they agreed to pay him that sum as commission. For the year preceding the bringing of the action pltf.'s total earnings, including the sum sued for, had not exceeded £100 :—*Held :* the sum sued for was personal earnings of pltf. necessary for his maintenance, within the exception which excluded such earnings of bkpt. from the general rule that the property of bkpt. vested in the trustee.—AFFLECK *v.* HAMMOND, [1912] 3 K. B. 162 ; 81 L. J. K. B. 565 ; 106 L. T. 8 ; 19 Mans. 111, C. A.

Annotations :—**Refd.** Hill *v.* Settle (1916), 86 L. J. Ch. 243, C. A. ; Hamilton *v.* Caldwell (1919), 88 L. J. P. C. 173, H. L.

(c) Bankrupt continuing to trade.

6319. Remuneration—Bankrupt employed by trustee in carrying on business—Evidence of contract.]—If the assignees of a bkpt. manufacturer employ him in carrying on the manufacture for the benefit of the estate, & pay him money from time to time, this is evidence of such a contract between him & his assignees as will enable him to recover from them a reasonable compensation for his work & labour.—COLES *v.* BARROW (1813), 4 Taunt. 754 ; 2 Rose, 277 ; 128 E. R. 527.

Annotations :—**Distd.** Nias *v.* Adamson (1819), 3 B. & Ald. 225. **Expld.** Emden *v.* Carte (1881), 44 L. T. 344.

6320. Profits of business—Bankrupt continuing with purchaser of business—Purchase price payable by instalments—Part price payable by bankrupt out of future earnings.]—Creditors agreed to dispose of the whole of debtor's estate to a purchaser, in consideration of a sum agreed to be paid by the purchaser by instalments, debtor himself agreeing to pay part of such sum out of his future earnings. Debtor's business was then continued by the purchaser & himself. All the instalments were duly paid :—*Held :* it would be inequitable to allow the creditors to claim the profits of the business merely because the order of discharge had not been formally granted, & an injunction should be granted to restrain the creditors from interfering with the profits of the business.—*Re* FRANCE, *Ex p.* TINKER (1874), 9 Ch. App. 716 ; 43 L. J. Bcy. 147 ; 30 L. T. 806, L. JJ.

Annotations :—**Expld.** & **Distd.** *Re* Wainwright, *Ex p.* Wainwright (1881), 19 Ch. D. 140, C. A. **Refd.** *Re* Russell, *Ex p.* Russell (1875), 10 Ch. App. 255 ; *Re* Caughey, *Ex p.* Ford (1876), 34 L. T. 634, C. A.

6321. Assets of business—Bankrupt buying estate with consent of creditors under two successive liquidations—Price claimed by trustee in first liquidation—Claim by trustee in second liquidation against stock-in-trade.]—An undischarged debtor went into business again, & afterwards filed a second petition. His creditors, old & new, empowered the trustee to sell debtor's estate to him for £475, upon payment of which sum he was to be entitled to his discharge. The money was paid, & was then claimed by the trustee under the first liquidation. The ct. decided in favour of that claim. The second trustee thereupon claimed debtor's stock-in-trade & effects :—*Held :* debtor, having paid the £475, was free from the claims of all his creditors, & was entitled to retain whatever property he had acquired.—*Re* CAUGHEY, *Ex p.* CAUGHEY (1877), 4 Ch. D. 533 ; 46 L. J. Bcy. 18 ; 36 L. T. 39 ; 25 W. R. 308.

See 1914 Act, s. 39.

6322. Indemnity from trustee—Against debts incurred since bankruptcy—Trading without consent of trustee.]—An undischarged bkpt., who trades without the knowledge of his trustee, is not, on the fact being discovered & the property taken over by the trustee, entitled to an indemnity against liabilities incurred by him during such trading.

A., an undischarged bkpt., carried on the business of an innkeeper in B.'s name, unknown to his trustee, &, as he alleged, borrowed money to rebuild the inn on its being burnt down. On the inn being sold, a dispute as to the division up of the purchase-money arose between A. & B., & A. thereupon gave information to his trustee, who claimed the money. A. applied for an indemnity against the liabilities he had incurred :—*Held :* (1) A. was not entitled to the indemnity ; (2) A. should have first obtained the trustee's sanction to carry on the business, when he would have become his agent & entitled to an indemnity.—*Re* CLARKE, *Ex p.* NEWTON *v.* KEARLY (1889), 60 L. T. 335 ; *sub nom. Re* CLARK, *Ex p.* KEARLEY, 5 T. L. R. 247 ; 6 Morr. 42, D. C.

6323. Assets surplus to debts incurred after bankruptcy—Rights of creditors under bankruptcy.]—A person, who had taken the benefit of Insolvent Debtors Act, died some years afterwards, leaving more assets than were required for the payment of all his debts contracted subsequently to his insolvency, which assets were alleged to be in danger of being wasted :—*Held :* the creditors of insolvent antecedent to the insolvency had such an interest in the assets which he acquired after his insolvency, as entitled them to the assistance of the ct. to realise & protect such assets. *Qu. :* whether the ct. will ultimately administer the surplus of the property among the parties who were creditors anterior to the insolvency.—WARD *v.* PAINTER (1840), 5 My. & Cr. 298 ; 10 L. J. Ch. 4 ; 4 Jur. 1005 ; 41 E. R. 384, L. C.

Annotations :—**Apld.** *Re* Moylan (1852), 16 Beav. 220. **Consd.** Dunlevie *v.* Hort (1857), 30 L. T. O. S. 23, C. A. ; Galsworthy *v.* Durrant (1860), 29 Beav. 277 ; *Re* Smith, Green *v.* Smith (1883), 24 Ch. D. 672. **Refd.** Bell *v.* Bell (1849), 13 Jur. 1040 ; *Re* Simmons, *Ex p.* Kelly (1877), 7 Ch. D. 161, C. A.

See, also, Nos. 6354 *et seq., post.*

B. Position of Third Parties contracting with Bankrupt.

(a) In General.

6324. General rule.]—Where bkpt., who has not obtained his discharge, enters into transactions in respect of property acquired after the bkpcy., then, until the trustee intervenes, all such transactions, with any person dealing with bkpt. *bonâ fide* & for value, & whether with or without knowledge

PART XX. SECT. 7, SUB-SECT. 1.—A. (c).

n. *With authority of trustee.*]—Where a trustee has given insolvent written authority to trade in his own name, such trustee is not entitled to claim any property acquired by insolvent by virtue of such authority to trade.—GRADY'S TRUSTEE *v.* GRADY (1891), 8 S. C. 279.—S. AF.

p. ———.]—A trustee is barred from claiming as part of the original estate of insolvent any property acquired by the latter, after leave to trade has been given.—STONE *v.* HUMPHREYS (1913), C. P. D. 603.—S. AF.

r. ———.]—Insolvent, who has obtained permission to trade from the trustee & creditors, can purchase land.—VAN DER WESTHUIZEN *v.* REGISTRAR OF DEEDS, [1918] C. P. D. 111.—S. AF.

t. *Renewal of liquor licence.*]—When insolvent obtains the renewal of a liquor licence into his own name he acquires it for the use of his trustee.—FICK *v.* WOOLCOTT (1910), T. P. D. 1225.—S. AF.

PART XX. SECT. 7, SUB-SECT. 1.—B. (a).

6324 i. *General rule.*]—Until the trustee intervenes all transactions by bkpt., after being made bkpt., with any person dealing with him *bonâ fide*

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of the bkpcy., are valid against the trustee.—COHEN *v.* MITCHELL (1890), 25 Q. B. D. 262; 59 L. J. Q. B. 409; 63 L. T. 206; 38 W. R. 551; 6 T. L. R. 326; 7 Morr. 207, C. A.

Annotations:—**Expld. & Distd.** *Re* Rogers, *Ex p.* Woodthorpe (1891), 8 Morr. 236; *Re* New Land Development Assocn. & Gray, [1892] 2 Ch. 138, C. A.; *Re* Clark, *Ex p.* Beardmore, [1894] 2 Q. B. 393, C. A. **Apld.** *Re* Clarke, *Ex p.* Dickenson (1894), 1 Mans. 47, D. C. **Consd.** *Re* Rogers, *Ex p.* Collins, [1894] 1 Q. B. 425. **Apld.** Re Clayton & Barclay's Contract, [1895] 2 Ch. 212. **Consd.** Mercer *v.* Vans Colina (1897), [1900] 1 Q. B. 130, n. **Apld.** Hunt *v.* Fripp, [1898] 1 Ch. 675. **Consd.** Bird *v.* Philpott, [1900] 1 Ch. 822; London & County Contracts *v.* Tallack (1903), 19 T. L. R. 156. **Expld. & Apld.** Official Receiver *v.* Cooke, [1906] 2 Ch. 661. **Consd.** *Re* Bennett, *Ex p.* Official Receiver, [1907] 1 K. B. 149. **Apld.** *Re* Kent County Gaslight & Coke Co., [1909] 2 Ch. 195. **Consd.** *Re* Behrend's Trust, Surman *v.* Biddell, [1911] 1 Ch. 687. **Distd.** *Re* Teale, *Ex p.* Blackburn, [1912] 2 K. B. 367; *Re* Shrager (1913), 108 L. T. 346. **Consd.** Hill *v.* Settle, [1917] 1 Ch. 319, C. A.; Hosack *v.* Robins, [1918] 2 Ch. 389, C. A. **Refd.** *Re* Beall, *Ex p.* Official Receiver, [1899] 1 Q. B. 688.

6325. —— Application where bankrupt trading.]—The protection with regard to after-acquired property afforded by *Cohen* v. *Mitchell*, No. 6324, *ante*, to persons dealing *bonâ fide* with an undischarged bkpt., relates to cases in which bkpt. is carrying on a business without interference by the trustees, & is meant to protect persons who deal with him in the ordinary way & are paid with money acquired by carrying on such business.

After a receiving order had been made against him debtor discounted a bill of exchange, which had been previously handed to him by a third party for that purpose, & made use of the money in paying it into ct. under an order in an action brought against him by a creditor. The drawer & acceptor of the bill were subsequently satisfied by debtor out of other money.

On an application by the trustee for an order upon the creditor to repay the money to him, the objection was taken that the money was property acquired by bkpt. after the commencement of the bkpcy., & that the trustee was not entitled to claim it:—*Held:* the objection must fail.—*Re* ROGERS, *Ex p.* WOODTHORPE (1891), 8 Morr. 236.

Annotations:—**Refd.** *Re* New Land Development Assocn. & Gray, [1892] 2 Ch. 138, C. A. **Mentd.** *Re* New Land Development Assocn. & Fagence's Contract (1892), 61 L. J. Ch. 323.

6326. —— ——.]—Bkpt., who never obtained his discharge, carried on business as a builder, & contracted debts without disclosing the fact that he was an undischarged bkpt. Pltf. acted as bkpt.'s solr. & obtained advances for, & himself advanced money to, bkpt., who subsequently was adjudicated bkpt. a second time, & pltf. then became aware for the first time that bkpt. was already an undischarged bkpt.:—*Held:* as all the after-acquired property of bkpt. vested in the trustee of the first bkpcy., charges which bkpt. had attempted to make in favour of pltf. were ineffectual as against the trustee in the first bkpcy.—BIRD *v.* PHILPOTT, [1900] 1 Ch. 822; 69 L. J. Ch. 487; 82 L. T. 110; 16 T. L. R. 173; 44 Sol. Jo. 246; 7 Mans. 251.

Annotations:—**Apld.** *Re* Connolly, Wood *v.* Connolly (1912), 106 L. T. 738, C. A. **Refd.** London & County Contracts *v.* Tallack (1903), 51 W. R. 408. **Mentd.** Preston's Trustee *v.* Cooke (1906), 75 L. J. Ch. 757.

6327. —— Application to real estate.]—An undischarged bkpt. cannot, even before the trustee intervenes, convey real estate acquired after the bkpcy., so as to give a *bonâ fide* purchaser for value without knowledge of the bkpcy. a good title against the trustee.—*Re* NEW LAND DEVELOPMENT ASSOCN. & GRAY, [1892] 2 Ch. 138; *sub nom. Re* NEW LAND DEVELOPMENT ASSOCN. LTD. & FAGENCE'S CONTRACT, 61 L. J. Ch. 495; 66 L. T. 694; 40 W. R. 551; 36 Sol. Jo. 446, C. A.

Annotations:—**Consd.** *Re* Poppleton & Jones' Contract (1896), 74 L. T. 582; *Re* Calcott & Elvin's Contract (1898), 67 L. J. Ch. 327. **Apprvd. & Folld.** Bird *v.* Philpott, [1900] 1 Ch. 822. **Consd.** Official Receiver *v.* Cooke, [1906] 2 Ch. 661. **Refd.** *Re* Ailesbury S. E. (1893), 9 T. L. R. 616; *Re* Clayton & Barclay's Contract, [1895] 2 Ch. 212; London & County Contracts *v.* Tallack (1903), 51 W. R. 408; *Re* Kent County Gas Light & Coke Co., [1909] 2 Ch. 195; *Re* Behrend's Trust, Surman *v.* Biddell, [1911] 1 Ch. 687, C. A. **Mentd.** Hunt *v.* Fripp, [1898] 1 Ch. 675.

See, now, 1914 Act, s. 47.

6328. ——— ——.]—The rule in *Cohen* v. *Mitchell*, No. 6324, *ante*, does not apply to real estate.—LONDON & COUNTY CONTRACTS, LTD. *v.* TALLACK (1903), 51 W. R. 408; 19 T. L. R. 156; 47 Sol. Jo. 255.

Annotation:—**Mentd.** Preston's Trustee *v.* Cooke (1906), 75 L. J. Ch. 757.

See, now, 1914 Act, s. 47.

6329. —— ——.]—A freehold house was conveyed to S., who was in fact a trustee for P., an undischarged bkpt., after his bkpcy. A lease for ninety-nine years was expressed to be executed by S. to P. under the alias of R. P. then under the same alias executed a mtge., by demise, of the leasehold interest to deft. for £1,750. The money was paid to P., & the whole transaction was *bonâ fide* so far as deft. was concerned. The trustee, who had not intervened at the date of the mtge. brought an action for a declaration that he was entitled to the freehold house free & discharged from the lease & the mtge. It was alleged that the signature of S. to the lease was forged by P., & the ct. found that it had not been proved to be the signature of S., & the mtge. did not pass any legal estate to deft., but it was contended that it gave a good charge upon bkpt.'s equitable interest in the freehold:—*Held:* the rule in *Cohen* v. *Mitchell*, No. 6324, *ante*, must be considered not to apply to real estate, whether equitable or legal, but only to personal estate including leaseholds.—OFFICIAL RECEIVER *v.* COOKE (1906), 2 Ch. 661; *sub nom.* PRESTON'S TRUSTEE *v.* COOKE, 75 L. J. Ch. 757; 13 Mans. 337.

See, now, 1914 Act, s. 47.

6330. —— Application to interests of partners in partnership real estate.]—Two undischarged bkpts. in partnership purchased, without the knowledge of their trustees, realty by an indenture which described them as trading as D. & Co., & they afterwards sold & conveyed the realty to a co. before the intervention of the trustees:—*Held:* (1) the realty was conveyed to them as partnership property, & their respective interests in the realty were of the nature of personal property; (2) as the trustees had not intervened before the sale to the co., the conveyance to the co. was valid.—*Re* KENT COUNTY GAS LIGHT & COKE CO., LTD. (1909), 2 Ch. 195; 78 L. J. Ch. 625; 100 L. T. 983; 16 Mans. 185.

6331. —— Application to leaseholds.]—The proposition laid down in *Cohen* v. *Mitchell*, No. 6324, *ante*, applies to leaseholds.

& for value in respect of his after-acquired property, whether with or without the knowledge of the bkpcy., are valid against the trustee.—ANSTEE *v.* SPRING (1913), 32 N. Z. L. R. 966.—N.Z.

v. —— *Application to payment of legacy to bankrupt.*]—Where a person became entitled to a legacy after he had been adjudicated a bkpt., &, before he had obtained his discharge, such legacy was paid to him by testator's exors., acting *bonâ fide*, without notice of his bkpcy., & before any intervention on the part of the assignees in bkpcy., to assert title to the legacy for the benefit of the creditors of bkpt.:—*Held:* the exors. were not liable to the assignees for the amount of the legacy.—*Re* BALL, [1899] 2 I. R. 322; 33 I. L. T. 42.—IR.

Leases for terms of years & subject to onerous covenants were granted to an undischarged bkpt., & were subsequently demised by him by way of mtge., without any intervention by his trustee. A purchaser from the mtgees. having objected that no title could be made :—*Held :* until the trustee intervened bkpt. could deal with his after-acquired leaseholds, & the purchaser could be forced to accept the title.—*Re* CLAYTON & BARCLAY'S CONTRACT, [1895] 2 Ch. 212 ; 64 L. J. Ch. 615 ; 59 J. P. 489 ; 43 W. R. 549 ; 39 Sol. Jo. 503 ; 13 R. 556 ; *sub nom.* CLAYTON *v.* BARCLAY, 72 L. T. 764 ; 11 T. L. R. 415.

Annotations :—**Consd.** Official Receiver *v.* Cooke, [1906] 2 Ch. 661. **Refd.** London & County Contracts *v.* Tallack (1903), 19 T. L. R. 156 ; *Re* Kent County Gas Light & Coke Co., [1909] 2 Ch. 195.

6332. —— Application to assignment of legacy & share of residue—What are bona fides.]—Debtor became an insolvent in the colony of Victoria, & obtained his discharge. Before his discharge he became entitled under a will of testator domiciled in England to a legacy & share of residue. His assignee had no knowledge of the interest & had not intervened to claim it. After his discharge debtor assigned his interest under the will to pltf., who knew that the assignee was ignorant of debtor's interest, for valuable consideration. The trustees of the will knowing of the insolvency declined to pay pltf. :—*Held :* (1) the rule in *Cohen* v. *Mitchell*, No. 6324, *ante*, applied to a legacy & share of residue, even where the trustee intervened before the property had reached the hands of a *bonâ fide* equitable assignee ; (2) an assignment of future acquired property was not necessarily *malâ fide* because the assignee had knowledge of his assignor's bkpcy. & of the ignorance of the trustee that bkpt. had acquired the assigned property.—HUNT *v.* FRIPP (1898), 1 Ch. 675 ; 67 L. J. Ch. 377 ; 77 L. T. 516 ; 46 W. R. 125 ; 42 Sol. Jo. 47 ; 5 Mans. 105.

Annotations :—**Consd.** *Re* Behrend's Trust, Surman *v.* Biddell, [1911] 1 Ch. 687. **Refd.** *Re* Bennett, *Ex p.* Official Receiver, [1907] 1 K. B. 149.

6333. —— What is "transaction for value"—Settlement on marriage.]—A settlement made on a second marriage by an undischarged bkpt. of interests acquired after his bkpcy. in trust funds settled before his bkpcy., & still in the hands of the settlement trustees, is a transaction for value within the rule in *Cohen* v. *Mitchell*, No. 6324, *ante*, &, if the transaction is *bonâ fide* on the part of the second wife, is valid against the trustee until he intervenes by giving formal notice to the trustees of the settlement or otherwise. The facts that the settlement trustees have actual knowledge of the bkpcy., & that the value given for the transaction is not such as will increase bkpt.'s estate, do not prevent the application of the rule.—*Re* BEHREND'S TRUST, SURMAN *v.* BIDDELL, [1911] 1 Ch. 687 ; 80 L. J. Ch. 394 ; 104 L. T. 626 ; 55 Sol. Jo. 459 ; 18 Mans. 111.

6334. —— —— Charging order.]—A charging order made under Judgments Act, 1838 (c. 110) s. 14, on the after-acquired property of an undischarged bkpt. before the intervention of the trustee, is not a transaction with bkpt. for value within *Cohen* v. *Mitchell*, No. 6324, *ante*, & is invalid as against the trustee.—HOSACK *v.* ROBINS, [1918] 2 Ch. 389 ; 87 L. J. Ch. 545 ; 119 L. T. 522 ; 62 Sol. Jo. 681 ; [1918-19] B. & C. R. 54, C.A.

6335. Sale by bankrupt before seizure.]—Where two commissions have issued against bkpt., bkpt., until seizure by the assignees, has such a property in future effects as enables him to sell to a *bonâ fide* purchaser.—ASHLEY *v.* KELL (1744), 2 Stra. 1207 ; 93 E. R. 1131.

Annotations :—**Consd.** Fowler *v.* Down (1797), 1 Bos. & P. 44 ; Drayton *v.* Dale (1823), 2 B. & C. 293 ; Herbert *v.* Sayer (1844), 5 Q. B. 965. **Refd.** Cash *v.* Young (1823), 3 Dow. & Ry. K. B. 652.

See, also, Nos. 6342 *et seq.*, *post.*

6336. Sale while carrying on trade—Purchaser's title good against all except assignees.]—If an uncertificated bkpt. carry on trade & sell a vessel to A. he has a good title against all persons but the assignees.—LAROCHE *v.* WAKEMAN (1792), Peake, 190.

Annotations :—**Refd.** Fowler *v.* Down (1797), 1 Bos. & P. 44 ; Clark *v.* Calvert (1819), 3 Moore, C. P. 96 ; Herbert *v.* Sayer (1844), 8 Jur. 812, Ex. Ch. **Mentd.** Kitchen *v.* Bartsch (1805), 7 East, 53.

6337. Grant of annuity while continuing in possession.]—A. being a bkpt. continued in possession of his estate & granted an annuity out of certain premises to B. The tenant in possession paid the rent to B. in order to prevent a distress :—*Held :* the assignees could not maintain an action for money had & received against B.—DARNTON *v.* PIGMAN (1796), Peake, Add. Cas. 111.

6338. Charge given simultaneously with bankrupt's purchasing property—Deposit of deeds with memorandum.]—G., a publican, agreed to sell his public-house, which M. & Co. supplied with beer, to A. A. being unable to pay the whole purchase-money, M. & Co., at his request, agreed to pay to G. £1,000, part of it. At a meeting of the parties for completing the purchase, M. & Co. paid the £1,000 to G., who executed the conveyance of the house, &, immediately afterwards, delivered it to M. & Co., & A. signed a memorandum expressing that he had deposited the deed with M. & Co., for securing, by way of equitable mtge., the payment to them of the £1,000. Shortly afterwards, M. & Co. discovered that A. was an uncertificated bkpt. :—*Held :* they had, as against A.'s assignees, a lien on the deed for the £1,000.—MEUX *v.* SMITH (1843), 11 Sim. 410 ; 2 Mont. D. & De G. 789 ; 12 L. J. Ch. 209 ; 7 Jur. 821 ; 59 E. R. 931.

Annotations :—**Follds.** Bird *v.* Philpott, [1900] 1 Ch. 822. **Apld.** *Re* Connolly, Wood *v.* Connolly (1912), 106 L. T. 738.

6339. —— Assignment in security.]—M., an uncertificated bkpt., having been employed as manager of an hotel, agreed to purchase the stock & goodwill from K., who knew of the bkpcy. & who agreed to lend M. a sum of money to purchase the stock & other trade effects, but on the understanding that the effects were to be assigned to K. in security of the debt. K. lent to M. the money, taking M.'s bond for the amount, & the same day M. purchased the effects, & assigned

6338 i. *Charge given simultaneously with bankrupt's purchasing property—Bond.*]—Where insolvent, before the confirmation of the final account, bought land & received transfer, & *simul ac semel* & *pari passu* with the transfer passed a bond on the land to secure repayment of money advanced to pay off the balance of the purchase price of the land :—*Held :* the bond was valid, & insolvent's trustees were bound to take the land with the burden upon it.—WARNER'S TRUSTEES *v.* WICHT (1886), 4 S. C. 463.—S. AF.

6338 ii. *Agreement to give charge simultaneously with bankrupt's purchasing property—No charge given before intervention of trustee.*]—For the purpose of enabling an uncertificated insolvent to purchase a leasehold property, Y. advanced money to him, without security & without notice of the insolvency, upon a promise of repayment as soon as the transfer should be completed, by means of a loan to be raised on the security of the land. After insolvent was registered as proprietor under Transfer of Land Statute & before the money was repaid to Y., the official assignee interfered & the Ct. of Insolvency ordered the land to be sold & the proceeds divided ratably amongst such of the creditors of insolvent at the date of the sequestration as had proved their debts :—*Held :* Y. had no legal or equitable right enforceable against insolvent's estate.—*Re* WARNE, *Ex p.* YOUNG (1885), 11 V. L. R. 320.—AUS.

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same in security to K. The official assignee knew that M. was carrying on business on his own account, but did not know of the above transaction:—*Held:* the loan, purchase & mtge. were one transaction, & nothing passed to the official assignee except what was subject to K.'s lien.—KERAKOOSE *v.* BROOKS (1860), 8 Moo. Ind. App. 339; 14 Moo. P. C. C. 452; 3 L. T. 712; 19 E. R. 559, P. C.

6340. —— Charge.]—Where an agreement for an advance to be made to an undischarged bkpt., in order to enable him to obtain a conveyance of real estate, is contemporaneous with an agreement that the lender shall have a charge on the property so purchased, & the lender has no notice of the bkpcy., the charge will be supported against the trustee.—BIRD *v.* PHILPOTT, [1900] 1 Ch. 822; 69 L. J. Ch. 487; 82 L. T. 110; 16 T. L. R. 173; 44 Sol. Jo. 246; 7 Mans. 251.

Annotations:—**Apld.** *Re* Connolly, Wood *v.* Connolly (1912), 106 L. T. 738. **Mentd.** London & County Contracts *v.* Tallack (1903), 51 W. R. 408; Preston's Trustee *v.* Cooke (1906), 75 L. J. Ch. 757.

6341. Securities given to creditor—For debts contracted after & without notice of bankruptcy.]—Securities given by an uncertificated bkpt. to a creditor, for debts contracted subsequent to & without notice of the bkpcy., will be valid as against the assignee.—*Re* CAZNEAU'S LEGACY (1856), 2 Jur. N. S. 157.

Annotation:—**Mentd.** *Re* Hutchinson's Trusts (1860), 1 Drew. & Sm. 27.

6342. Bankrupt allowed to remain in possession—Rights of execution creditors.]—Where assignees allow bkpt. to remain in undisturbed possession for a period of four years, of furniture which they might at the time of adjudication have properly claimed, they cannot afterwards claim it against execution creditors.—*Re* STAFFORD, *Ex p.* HANNINGTON (1870), 18 W. R. 959.

Annotation:—**Expld.** Meggy *v.* Imperial Discount Co. (1878), 3 Q. B. D. 711, C. A.

6343. —— Bill of sale granted subsequently by bankrupt.]—A trustee, who permits debtor to remain in possession of his furniture as apparent owner, does not, in the absence of knowledge that debtor was holding himself out as the real owner & dealing with it as such, forfeit his right to it, & his right to it cannot be defeated by a bill of sale given by debtor.—MEGGY *v.* IMPERIAL DISCOUNT CO., LTD. (1878), 3 Q. B. D. 711; 48 L. J. Q. B. 54; 38 L. T. 309; 42 J. P. 740; 26 W. R. 342, C. A.

Annotations:—**Distd.** Cohen *v.* Mitchell (1890), 7 Morr. 207, C. A. **Mentd.** *Re* Clark, *Ex p.* Beardmore, [1894] 2 Q. B. 393, C. A.

6344. —— Subsequent sale by debtor to bonâ fide purchaser.]—The mere fact that the trustee has not taken possession of debtor's property for two months after the date of his appointment, but has allowed debtor to continue trading as before, will not be sufficient to destroy his right to the property, notwithstanding that it has been sold by debtor to a *bonâ fide* purchaser in the meantime.—*Re* GREEN, *Ex p.* COOPER (1878), 39 L. T. 260.

6345. —— —— Negligence of trustee.]—If a trustee negligently permits bkpt. to appear as the real owner of goods, & bkpt. sells them to a *bonâ fide* purchaser, the trustee loses his right to recover either the goods, or their value, from the purchaser.—MASON *v.* BRIGGS (1885), 1 T. L. R. 502.

See, also, No. 6335, *ante.*

6346. Rent paid in advance.]—Money received by an undischarged bkpt. & paid away for value cannot be followed by the trustee, though the person to whom the money was paid had notice of the bkpcy.

An undischarged bkpt. took a furnished house from a person, who had notice of the bkpcy., on the terms of paying six months' rent in advance. Having obtained a sum of £200 as compensation for being turned out of an appointment which he had taken since the bkpcy., he paid to the landlord out of such sum £130 as the six months' rent:—*Held:* though the trustee could have intercepted the £200 & required it to be paid to him, he could not follow any part of it into the hands of the landlord.—*Re* VANLOHE, *Ex p.* DEWHURST (1871), 7 Ch. App. 185; 41 L. J. Bcy. 18; 25 L. T. 731; 20 W. R. 172, L. JJ.

Annotations:—**Apld.** Wadling *v.* Oliphant (1875), 1 Q. B. D. 145. **Consd.** Cohen *v.* Mitchell (1890), 25 Q. B. D. 262, C. A.

6347. Deposit made on bankrupt contracting to purchase property.]—A trader secretly realised his goods in fraud of his creditors, & absconded & paid the proceeds into a bank. He was afterwards adjudicated bkpt. & pltf. was appointed trustee. Bkpt., subsequently, in an assumed name, entered into a contract for the purchase of real property, & paid a deposit to deft., an auctioneer acting as stakeholder under the contract. Both deft. & the intending vendor acted *bonâ fide* & without notice of the bkpcy. or the fraud. Bkpt. having failed to complete the purchase:—*Held:* the deposit had become the property of the vendor, & could not be followed by the trustee.—COLLINS *v.* STIMSON (1883), 11 Q. B. D. 142; 52 L. J. Q. B. 440; 48 L. T. 828; 47 J. P. 439; 31 W. R. 920.

Annotations:—**Consd.** Howe *v.* Smith (1884), 27 Ch. D. 89, C. A. **Mentd.** Bishop *v.* Taylor (1891), 60 L. J. Q. B. 556; Burdett *v.* Horne (1911), 27 T. L. R. 402.

6348. Assignment of right of action.]—An undischarged bkpt., who was carrying on business without the knowledge of the trustee, having commenced an action in respect of the wrongful conversion of machines acquired by bkpt. in the course of such business, subsequent to the bkpcy., assigned the cause of action to pltf. in consideration of certain advances. Pltf. knew that he was dealing with an undischarged bkpt., but acted *bonâ fide* in making the advances & taking the assignment. Bkpt. having recovered a verdict for

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6341 i. *Security given to creditor—For advances made after bankruptcy.*]—Bkpt. & resps. were joint trustees under a will, & as such from time to time passed their accounts in the Probate Ct. & were allowed commission for their pains & trouble. The accounts for 1891 were passed, & commission allowed on Oct. 24, 1892, & a similar order was made on Dec. 7, 1893, with regard to the accounts for 1892. Bkpt. sequestrated his estate on July 7, 1892. From the beginning of 1891 advances were from time to time made to bkpt. by resps., the advances being secured by charges on any future commission to be at any time thereafter received by bkpt. in respect of the estate. The advances continued to be made after the bkpcy.:—*Held:* as regards the advances after the bkpcy. resps.' claim could not be supported, either under the charge on the commission, or as a *bonâ fide* dealing with after-acquired property before the intervention of the official assignee.—*Re* BROWNE, *Ex p.* OFFICIAL ASSIGNEE, BROWNE & BROWNE (1895), 16 N. S. W. B. 62.—AUS.

a. —— *Mortgage with notice of insolvency.*]—Insolvent was adjudicated in 1888, received her personal discharge in 1890, obtained a house under a deed of gift in Apr., 1891, mortgaged it in Dec., 1891, & died intestate in May, 1892, having never obtained a discharge under Insolvency Act, s. 59. The mtgees. took their mtge. with notice of the insolvency. The official assignee did not become aware that insolvent had acquired the property till Sept., 1892, when he intervened & claimed the property free from the mtge.:—*Held:* the official assignee was entitled to the mortgaged property free from the mtge.—ROWLANDSON *v.* CHAMPION (1893), I. L. R. 17 Mad. 21.—IND.

6348 i. *Assignment of sum found due to bankrupt in cause.*]—A. became bkpt. in 1839. In 1848 there was a report in a cause, finding certain sums due to A. In Apr., 1853, he assigned his

damages, pltf., before the money was paid over, gave notice that he claimed it under the assignment. Deft. also gave notice that he claimed it as trustee :—*Held :* in the circumstances, the assignment, was valid as against the trustee, & pltf. was entitled to the amount recovered by bkpt.—COHEN *v.* MITCHELL (1890), 25 Q. B. D. 262 ; 59 L. J. Q. B. 409 ; 63 L. T. 206 ; 38 W. R. 551 ; 6 T. L. R. 326 ; 7 Morr. 207, C. A.

Annotations :—**Distd.** *Re* Rogers, *Ex p.* Woodthorpe (1891), 8 Morr. 236. **Consd.** *Re* New Land Development Assocn. & Gray, [1892] 2 Ch. 138, C. A. **Distd.** *Re* Clark, *Ex p.* Beardmore, [1894] 2 Q. B. 393, C. A. **Apld.** *Re* Clarke, *Ex p.* Dickenson (1894), 1 Mans. 47, D. C. **Consd.** *Re* Rogers, *Ex p.* Collins, [1894] 1 Q. B. 425. **Apld.** *Re* Clayton & Barclay's Contract, [1895] 2 Ch. 212 ; Hunt *v.* Fripp, [1898] 1 Ch. 675. **Consd.** London & County Contracts *v.* Tallack (1903), 19 T. L. R. 156 ; Official Receiver *v.* Cooke, [1906] 2 Ch. 661. **Expld.** *Re* Bennett, *Ex p.* Official Receiver, [1907] 1 K. B. 149. **Apld.** *Re* Kent County Gas Light & Coke Co., [1909] 2 Ch. 195. **Consd.** *Re* Behrend's Trust, Surman *v.* Biddell, [1911] 1 Ch. 687 ; Hill *v.* Settle, [1917] 1 Ch. 319, C. A. ; Hosack *v.* Robins, [1918] 2 Ch. 389, C. A. **Refd.** *Re* Beall, *Ex p.* Official Receiver, [1899] 1 Q. B. 688 ; Bird *v.* Philpott, [1900] 1 Ch. 822 ; Mercer *v.* Vans Colina (1897), [1900] 1 Q. B. 130, n. ; *Re* Teale, *Ex p.* Blackburn, [1912] 2 K. B. 367 ; *Re* Shrager (1913), 108 L. T. 346.

6349. Lien of party creating after-acquired property—Taking out patent & granting licences.]—An undischarged bkpt. took out letters patent for an invention & granted a licence to a co. to work the patented invention at a royalty of £10 a week :—*Held :* the balance of the royalties, after allowing a sum for the maintenance of bkpt. & his family, passed to the trustee, subject to a first charge in favour of bkpt.'s solr. for his costs in creating the funds, *i.e.*, his costs properly incurred in taking out & maintaining the letters patent & carrying through the arrangement with the co.—*Re* GRAYDON, *Ex p.* OFFICIAL RECEIVER, [1896] 1 Q. B. 417 ; 65 L. J. Q. B. 328 ; 74 L. T. 175 ; 44 W. R. 495 ; 12 T. L. R. 208 ; 40 Sol. Jo. 420 ; 3 Mans. 5.

Annotations :—**Refd.** Shoolbred *v.* Roberts, [1899] 2 Q. B. 560 ; Mercer *v.* Vans Colina (1897), [1900] 1 Q. B. 130, n. ; *Re* Hancock, [1904] 1 K. B. 585, C. A. ; Affleck *v.* Hammond, [1912] 3 K. B. 162, C. A. **Mentd.** *Re* Roberts, [1900] 1 Q. B. 122, C. A.

6350. Assignment of after-acquired furniture.]—By a marriage settlement a husband settled furniture, then being in his residence, upon his wife for life, & covenanted that in the event of his bringing at any future time other furniture upon the premises & permitting it to be used with the first-mentioned furniture, it should thereupon vest in & become the property of the trustees of the marriage settlement in trust for the wife. After the marriage the husband became bkpt., & while undischarged bought furniture out of his personal earnings, & brought it on to the premises, & used it with the other furniture. The additional furniture having been seized in execution, the trustees of the marriage settlement claimed it. The trustee did not intervene to claim the goods on behalf of the creditors :—*Held :* bkpt. had a qualified property in the goods until the trustee intervened, & as before any intervention he had transferred them to claimants for value, their title was good.—HAMPTON *v.* LUBBOCK, [1900] W. N. 18, D. C.

Annotation :—**Consd.** *Re* Behrend's Trust, Surman *v.* Biddell, [1911] 1 Ch. 687.

6351. Policies taken out after adjudication—Proceeds divided by administrator after bankrupt's death.]—An undischarged bkpt. effected policies on his life & died intestate & undischarged. The administrator of his estate, without notice of the bkpcy., distributed the policy money amongst bkpt.'s next of kin before the trustee intervened :—*Held :* the administrator was not personally liable to the trustee for the money he had distributed, but the next of kin must refund to the trustee the shares they had respectively received.—*Re* BENNETT, *Ex p.* OFFICIAL RECEIVER, [1907] 1 K. B. 149 ; 76 L. J. K. B. 134 ; 95 L. T. 887 ; 23 T. L. R. 99 ; 51 Sol. Jo. 83 ; 14 Mans. 6.

6352. —— Proceeds do not pass under debtor's will.]—Debtor, while his affairs were being liquidated by arrangement under Debtors Act, 1869 (c. 62), effected a policy of insurance upon his life without the knowledge of the trustee, & paid the premiums during the liquidation & after his discharge until his death. In 1883 the liquidation was closed, the trustee was released, & debtor obtained his discharge. He died in 1917 having appointed appct. to be his extrix. The evidence of the original trustee in the liquidation went to show that he had no knowledge of the existence of the policy during the time that he was acting as trustee, or of the payment of the premiums :—*Held :* the proceeds did not pass under debtor's will, but belonged to the official receiver as successor to the original trustee.—*Re* STOKES, *Ex p.* MELLISH, [1919] 2 K. B. 256 ; 88 L. J. K. B. 794 ; 121 L. T. 391 ; 35 T. L. R. 345 ; [1918–19] B. & C. R. 208.

Annotation :—**Consd.** *Re* Thellusson, *Ex p.* Abdy, [1919] 2 K. B. 735, C. A.

6353. Liability of after-acquired property to be seized in execution.]—Where goods of a certificated bkpt., acquired after the bkpcy., were seized under a *fi. fa.* issued upon a judgment in respect of a debt due before the bkpcy., the ct. set aside the *fi. fa.*—DAVIS *v.* SHAPLEY (1830), 1 B. & Ad. 54 ; 8 L. J. O. S. K. B. 357 ; 109 E. R. 707.

Annotations :—**Apld.** Clark *v.* Smith (1847), 3 C. B. 982. **Apprvd.** Rossi *v.* Bailey (1868), L. R. 3 Q. B. 621. **Refd.** Sharpe *v.* D'Almaine (1840), 4 Jur. 989.

(b) Bankrupt continuing to trade.

6354. Bankrupt buying own stock from trustee.]—Bkpt. bought his own stock of the assignees, & sureties joined in security for the consideration. Bkpt. continued to trade for four years, & then died, without having got his certificate, & having contracted debts subsequent to the bkpcy. :—*Held :* the subsequent creditors were to be preferred to the creditors under the commission.—TROUGHTON *v.* GITLEY (1766), Amb. 630 ; 27 E. R. 408, L. C.

Annotations :—**Apld.** Everett *v.* Backhouse (1804), 10 Ves. 94. **Dbtd.** *Ex p.* Martin (1808), 15 Ves. 114, L. C. ; *Ex p.* Storks (1814), 3 Ves. & B. 105, L. C. **Consd.** *Re* Bakewell, *Ex p.* Butler (1842), 2 Mont. D. & De G. 731, Ct. of R. ; *Re* Carter, *Ex p.* Jungmichel (1842), 2 Mont. D. & De G. 471, Ct. of R. **Apld.** Tucker *v.* Hernaman (1853), 4 De G. M. & G. 395, L. JJ. **Consd.** Kerakoose *v.* Brooks (1860), 14 Moo. P. C. C. 452. **Apld.** Engelback *v.* Nixon

interest in the sum so reported due to him, to B., who had no notice of A.'s bkpcy. In May the sum was allocated to A. On a motion by the official assignee, the sum so reported was directed to be transferred to him, notwithstanding the assignment.—WALLER *v.* WILDRIDGE (1854), 6 Ir. Jur. 228.—**IR.**

d. *Assignment of after-acquired property—Second bankruptcy.*]—An undischarged bkpt. acquired assets, & voluntarily assigned them to his wife. His estate was shortly afterwards again sequestrated :—*Held :* the official assignee in the second bkpcy. was entitled to recover the assets so assigned.—*Re* HAYES, *Ex p.* OFFICIAL ASSIGNEE & HAYES (1898), 19 N. S. W. B. 37.—**AUS.**

f. —— *Mortgage.*]—A mtge. by insolvent of future acquired chattels, to secure repayment of the price of such chattels to the vendor thereof, is binding, notwithstanding 48 Vict., c. 26, s. 2.—GOULDING *v.* DEEMING 1887), 15 O. R. 201.—**CAN.**

6352 i. *Policies taken out after adjudication—Proceeds do not pass under debtor's will.*]—The whole of the policy money payable under a policy of life assurance, effected by bkpt. after his adjudication, on the death of bkpt. while still uncertificated, belong to the official assignee, notwithstanding that the policy endured for more than ten years.—*Re* RYGATE (1916), 16 S. R. N. S. W. 508.—**AUS.**

Sect. 7.—Property acquired by or devolving on bankrupt: Sub-sect. 1, B. (b).]

(1875), L. R. 10 C. P. 645. **Distd.** *Re* Winn, *Ex p.* Russell (1876), 2 Ch. D. 424. **Consd.** *Re* Anderson, *Ex p.* Nicholson (1877), 37 L. T. 40; *Re* Dysart, *Ex p.* Bolland (1878), 9 Ch. D. 312, C. A. **Distd.** *Re* Gorton, Dawse *v.* Gorton (1889), 60 L. T. 305. **Foll.** *Re* Burr, *Ex p.* Pannell (1901), 84 L. T. 327. **Refd.** *Ex p.* Crew (1809), 16 Ves. 236, L. C.; *Ex p.* Rhodes (1809), 15 Ves. 540, L. C.; *Re* Barber, *Ex p.* Abbott (1836), 5 L. J. Bcy. 33, Ct. of R.; *Re* Birch's Legacy (1856), 2 K. & J. 328; *Re* Bissell's Estate (1856), 2 Jur. N. S. 370; *Re* Rawbone's Trust (1857), 3 K. & J. 476; *Re* Caughey, *Ex p.* Ford (1876), 1 Ch. D. 521, C. A.; Meggy *v.* Imperial Discount Co. (1878), 48 L. J. Q. B. 54, C. A.; Tailby *v.* Official Receiver (1888), 13 App. Cas. 523, H. L.; *Re* Hardy, Hardy *v.* Farmer, [1896] 1 Ch. 904; *Re* Cullwick, [1918] 1 K. B. 646. **Mentd.** *Ex p.* Brown (1793), 2 Ves. 67, L. C.; *Ex p.* Lees, *Ex p.* Poulden (1810), 16 Ves. 472, L. C.; *Re* Simons, *Ex p.* Allard (1881), 16 Ch. D. 505, C. A.; Joseph *v.* Webb, Joseph *v.* Lyons Joseph *v.* Pidcock, Joseph *v.* Jones (1883), Cab. & El. 262.

6355. Bankrupt permitted to obtain credit as trader.]—If a commission be taken out, & another four or five years afterwards upon a subsequent trading, according to the strict law, the creditors taking out the first commission have a right to all the subsequently acquired property, until bkpt. shall have obtained his certificate under such first commission, but if he has been permitted to go into the world as a trader, & to gain credit as such, the ct. will not permit the creditors under the first commission to take that which they could not take without injustice to the creditors under the second, whom they have permitted to deal with bkpt. as if he had his certificate, & they shall only take that part of bkpt.'s subsequently acquired property which shall remain after all the creditors who have been so permitted to deal with him after the first commission shall have been paid; the profits derived by bkpt. from such subsequent dealings shall belong to the creditors under the first commission, but the debts contracted in his trading, after he secondly engaged in trade with the permission of those creditors, shall be first paid.—*Re* BOURNE, *Ex p.* BOURNE (1826), 2 Gl. & J. 137, L. C.

Annotations:—**Consd.** *Re* Barber, *Ex p.* Abbott (1836), 5 L. J. Bcy. 33, Ct. of R. **Apld.** *Re* Bakewell, *Ex p.* Butler (1842), 11 L. J. Bcy. 51, Ct. of R. **Consd.** *Re* Carter, *Ex p.* Jungmichel (1842), 2 Mont. D. & De G. 471, Ct. of R. **Refd.** Engelback *v.* Nixon (1875), L. R. 10 C. P. 645. **Mentd.** *Re* Christie, *Ex p.* Christie (1832), Mont. & B. 314, Ct. of R.; *Re* Christie (1833), Mont. & B. 329, L. C.; Butler *v.* Hobson (1838), 5 Bing. N. C. 128; *Re* Coulson & Phipps, *Ex p.* Phipps (1844), 3 Mont. D. & De G. 505, Ct. of R.

See 1914 Act, s. 39.

6356. Bankrupt permitted to trade with knowledge of trustee & creditors—Refusal of court to deprive trustee of title to after-acquired property.]—The ct. refused to interfere by impounding the proceedings, to deprive the assignees of bkpt. under a former commission of their legal title to the after-acquired property, although bkpt. had been permitted to trade, & the assignees & creditors were cognizant of it, for many years.—*Re* BARBER, *Ex p.* ABBOTT (1836), 2 Mont. & H. 599; 1 Deac. 479; 5 L. J. Bcy. 33, Ct. of R.

Annotation:—**Mentd.** Butler *v.* Hobson (1838), 5 Bing. N. C. 128.

6357. Goods remaining in bankrupt's possession with trustee's consent.]—Bkpt. remained in possession of goods with the consent of his assignee, & traded with them. He became bkpt. a second time:—*Held:* the goods vested in the assignee under the second bkpcy.—BUTLER *v.* HOBSON (1838), 4 Bing. N. C. 290; 1 Arn. 93; 5 Scott, 798; 7 L. J. C. P. 148; 132 E. R. 800; *subsequent proceedings*, 5 Bing. N. C. 128.

Annotations:—**Consd.** Morgan *v.* Knight (1864), 15 C. B. N. S. 669. **Refd.** Engelback *v.* Nixon (1875), L. R. 10 C. P. 645. **Mentd.** Buckton *v.* Frost (1838), 8 Ad. & El. 844; Isaac *v.* Belcher (1839), 5 M. & W. 139; Benjamin *v.* Belcher (1840), 11 Ad. & El. 350; *Re* Carter, *Ex p.* Jungmichel (1842), 2 Mont. D. & De G. 471, Ct. of R.

6358. Trustee lying by while bankrupt traded.]—An assignee under a second commission, under which bkpt. obtained his certificate, but did not pay 15*s.* in the pound, lay by, while bkpt. subsequently traded to a great extent for a period of eight years, without making any claim to his subsequently acquired property. The party then became bkpt. a third time:—*Held:* the assignee under the third bkpcy., & not the assignee under the second commission, had, on principles of equity, the preferable claim to the property thus sub-

PART XX. SECT. 7, SUB-SECT. 1.—B. (b).

6355 i. *Bankrupt permitted to obtain credit as trader.*]—M. obtained from all the creditors of D., an insolvent grocer, a subrogation of their rights & a transfer of their stock. He allowed D. to continue to sell the goods & collect outstanding accounts on his behalf, but reserved to himself the rights to take possession of the stock & premises at any time he pleased. D. made new purchases of goods from N., & others with M.'s knowledge, & failed to pay for them. M. took possession of the stock, including the new goods, & sold the whole estate to another party:—*Held:* the sale by M. was in fraud of the new creditors of insolvent, & M. must pay the proceeds into ct. to be distributed among the other creditors.—MCDONALD *v.* NIVEN (1866), 2 L. C. L. J. 151.—**CAN.**

6355 ii. ——.]—The creditors of liquidating debtors, who had been declared insolvent, agreed, on debtors entering into a deed of composition to pay 10*s.* in the pound, to stay the insolvency & discharge their trustees. Debtors took over the business & carried it on for some time, when failing to pay the whole of the compromise, the estate was again placed in liquidation in insolvency, & new trustees appointed. In their efforts to pay the compromise debtors had contracted new debts which remained unpaid. Three classes of creditors ranked against the estate, (1) original creditors, who under the deed of composition were paid no dividend; (2) original creditors, who received 8*s.* of the compromise; & (3) the new creditors:—*Held:* (1) creditors class one should be paid an equal amount to that paid creditors class two, or 8*s.* in the pound; (2) the residue of the estate should be distributed ratably amongst all the creditors in classes one, two, & three.—*Re* INSOLVENT ESTATE RIDLEY & SONS (1875), 6 Nfld. L. R. 56.—**NFLD.**

See, also, Part XII., Sect. 12, sub-sect. 3, *ante.*

6355 iii. ——.]—A trader petitioned the ct. under the arrangement clauses, with a view to pay a composition by instalments. The proposal was accepted, & two instalments were paid. The trading continued, debts with new creditors being contracted, credit having been given to the trader, not to his trustees. Upon failure to pay all the instalments, the case was turned into bkpcy.:—*Held:* the new creditors had no priority over the arrangement creditors, although the goods supplied by the new creditors evidently aided to make the payments which were made.—*Re* WILSON, *Ex p.* CHARLEY (1862), 14 Ir. Jur. 367.—**IR.**

6358 i. *Trustee lying by while bankrupt traded.*]—In Apr., 1905, the estate of S. was sequestrated as insolvent & due notice thereof given in the *Gazette*, & in May pltfs. were appointed trustees. In July, 1906, S. acquired from U. certain mining rights, over which, in Oct., he gave an option to defts., upon the stipulation that they should be at liberty to sell such rights for cash or shares in a co. to be formed, & that upon such sale taking place defts. should pay to U. £1,000, & one-third of the net profits received by them from such co. In June, 1907, defts. entered into an agreement with H. & Co., whereby they gave to H. & Co. the option to purchase the rights acquired from S., H. & Co. at the same time taking over all the obligations of defts., & agreeing that defts. should have a third share in a co. which was to be formed. In Jan., 1908, H. & Co. exercised their option, & in 1909 the K. Co. was formed. In Apr., 1910, the first liquidation account was laid before the master & was confirmed the following July. In Sept., 1910, S. was rehabilitated. Pltfs. claimed that upon the conclusion of the agreement of Jan., 1908, defts. became liable to pay to S., the £1,000 & one-third of the profit or interest acquired by them in the K. Co., & claimed they were entitled to payment from defts. of the £1,000 & one-third of the defts.' share in the profits of the co.:—*Held:* (1) defts. must be deemed to have had notice of the insolvency of S., & the negligence of pltfs. could not excuse the negligence of defts.; (2) the *bona fides* of defts. was of no avail as a defence, & no settlement with S. could discharge defts. from their liability to the trustees; (3) as soon as the agreement with H. & Co. was completed & the co. formed, the rights

sequently acquired.—*Re* BAKEWELL, *Ex p.* BUTLER (1842), 2 Mont. D. & De G. 731 ; 11 L. J. Bcy. 51 ; 6 Jur. 957, Ct. of R.

Annotations :—**Refd.** Morgan *v.* Knight (1864), 15 C. B. N. S. 669 ; Engelback *v.* Nixon (1875), L. R. 10 C. P. 645.

See 1914 Act, s. 39.

6359. —— Bankrupt soliciting business from trustee & creditor.]—Bkpt., having obtained his certificate under a second bkpcy., but not having paid 15*s.* in the pound, set up in trade as a tailor & draper & sent circulars soliciting custom to several of the creditors, who had proved under the second bkpcy., & among others, to one of the creditors' assignees. He continued to trade for five years, without molestation on the part of the creditors, having his name conspicuously written on the trade premises, & having, exposed to view there, stock-in-trade of considerable value. He then became bkpt. a third time :—*Held :* the assignee under the last bkpcy. could not be called upon to deliver up the assets collected by him to the assignees under the second fiat.—*Re* CARTER, *Ex p.* JUNGMICHEL (1842), 2 Mont. D. & De G. 471 ; 11 L. J. Bcy. 13 ; 6 Jur. 87, Ct. of R.

6360. Bankrupt trading with knowledge of trustee & creditors.]—An uncertificated bkpt. carried on business for several years after his bkpcy. with the knowledge of his assignees & of others, who were his creditors at the time of the bkpcy. He died possessed of considerable property. On a claim filed by one of his exors. against the other & the official assignee under the bkpcy. :—*Held :* the creditors subsequent to the bkpcy. were entitled to priority over the former creditors, & the estate ought to be administered in Ch.—TUCKER *v.* HERNAMAN (1853), 4 De G. M. & G. 395 ; 1 Eq. Rep. 360 ; 22 L. J. Ch. 791 ; 21 L. T. O. S. 251 ; 17 Jur. 723 ; 1 W. R. 274, 498 ; 43 E. R. 561, L. JJ.

Annotations :—**Apld.** Collins *v.* Burton (1859), 33 L. T. O. S. 313. **Consd.** Kerakoose *v.* Brooks (1860), 14 Moo. P. C. C. 452. **Distd.** *Re* Caughey, *Ex p.* Ford (1876), 1 Ch. D. 521, C. A. **Consd.** Meggy *v.* Imperial Discount Co. (1878), 3 Q. B. D. 711, C. A. **Distd.** *Re* Gorton, Dowse *v.* Gorton (1889), 60 L. T. 305, C. A. **Folld.** *Re* Burr, *Ex p.* Pannell (1901), 84 L. T. 327. **Refd.** *Re* Magnus, *Ex p.* Robertson (1873), 42 L. J. Bcy. 85, L. J. ; Engelback *v.* Nixon (1875), L. R. 10 C. P. 645. **Mentd.** Tailby *v.* Official Receiver (1888), 13 App. Cas. 523, H. L.

6361. Bankrupt trading for benefit of creditors—Lien of subsequent creditor for advances on price of business.]—The creditors of a liquidating debtor resolved that, on debtor's entering into a bond to pay the trustee £5,000, by half-yearly instalments, the trustee should allow him to carry on his business, he accounting to the trustee for the stock-in-trade as it was disposed of, & that, on the execution of the bond & the registration of the resolution, debtor should have his discharge. Debtor executed the bond & obtained his discharge, & carried on the business for two years, & then the creditors resolved that the business should be sold to a purchaser for £3,000, which was done, & the purchase-money received by the trustee :—*Held :* a creditor, who had advanced money to debtor after he had resumed business, had no lien upon any part of the £3,000.—*Re* MAGNUS, *Ex p.* ROBERTSON (1873), 8 Ch. App. 962 ; 42 L. J. Bcy. 85 ; 29 L. T. 124 ; 21 W. R. 875, L. J.

See 1914 Act, s. 57.

6362. —— With consent of trustee.]—E., a bkpt., was allowed by the trustee to carry on his business for the benefit of his creditors. A new creditor, who was ignorant of the circumstances in which E. was trading, obtained a judgment against him, under which the sheriff seized furniture which E. had acquired by means of the profits of such trading. Upon an interpleader issue, in which the trustee was pltf. & the execution creditor deft. :—*Held :* as a ct. of equity would, in the circumstances, decree the goods to be the goods of the execution creditor, the same result must follow upon an interpleader issue in a ct. of law.—ENGELBACK *v.* NIXON (1875), L. R. 10 C. P. 645 ; 44 L. J. C. P. 398 ; *sub nom.* ENGLEBACK *v.* NIXON, 32 L. T. 831.

Annotations :—**Distd.** Wadling *v.* Oliphant (1875), 1 Q. B. D. 145 ; *Re* Gorton, Dowse *v.* Gorton (1889), 60 L. T. 305, C. A.

See 1914 Act, s. 57.

6363. No positive proof that creditors knew of trading.]—The creditors of a trader, who had filed a liquidation petition, resolved that he should have his discharge when they had received 2*s.* in the pound on their debts. The estate realised only half that sum. Debtor went into business again & contracted new debts, & filed a second liquidation petition :—*Held :* in the absence of positive evidence that the trustee or his creditors under the first petition were aware of the subsequent trading, they were entitled in priority to the new creditors to the assets acquired by debtor in the course of his trading, to the extent necessary to make up the 2*s.* in the pound, & it could not be assumed that the old creditors intended, when they passed their resolution, that debtor should trade again in order to be able to pay the 2*s.* in the pound.—*Re* CAUGHEY, *Ex p.* FORD (1876), 1 Ch. D. 521 ; 45 L. J. Bcy. 96 ; 34 L. T. 634 ; 24 W. R. 590, C. A.

Annotations :—**Folld.** *Re* Clark, *Ex p.* Beardmore, [1894] 2 Q. B. 393, C. A. **Consd.** Hunt *v.* Fripp, [1898] 1 Ch. 675. **Refd.** *Re* Winn, *Ex p.* Russell (1876), 2 Ch. D. 424 ; Meggy *v.* Imperial Discount Co. (1878), 3 Q. B. D. 711, C. A. ; Joseph *v.* Webb, Joseph *v.* Lyons, Joseph *v.* Pidcock, Joseph *v.* Jones (1883), Cab. & El. 262 ; *Re* Clark, *Ex p.* Dickenson (1894), 70 L. T. 284, D. C.

See 1914 Act, s. 57.

6364. Bankrupt carrying on business under direction & control of trustee—Power reserved to trustee to enter & seize goods at any time.]—The creditors of a liquidating debtor resolved upon a liquidation by arrangement, appointed a trustee, & agreed to accept a composition payable by instalments. Debtor & trustee then entered into a deed by which the trustee agreed to sell all the stock-in-trade, chattels, & effects to debtor for a sum sufficient to pay the composition. The deed provided that debtor might, under the direction

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under his agreement with defts. accrued to S., & such rights vested in his trustees, who could not be divested of such rights by any agreement made between defts., H. & Co., & S.—SIEG'S TRUSTEES *v.* SPILHAUSE & CO. & SIEG (1911), C. P. D. 750.—**S. AF.**

6360 i. *Bankrupt trading with knowledge of trustee & creditors.*]—M., an uncertificated insolvent, carried on his practice as solr. after insolvency with the knowledge of the trustee, & acquired property, & incurred new debts : —*Held :* the subsequent creditors were entitled to be satisfied out of the property in priority to the previous creditors.—SHAW *v.* HYETT (1891), 17 V. L. R. 612.—**AUS.**

6360 ii. ——.]—I. & Co. assigned for the benefit of their creditors. Thereafter the estate was reassigned to I. & Co., in order to enable them to work the business for the purpose of paying their then creditors, & I. & Co. gave the assignees promissory notes for the amount of their debts. I. & Co. purchased goods on credit, but failed to meet their notes, & the assignees entered & took possession of the stock-in-trade, including the new goods : —*Held :* the new creditors were neither entitled to priority over the old, nor to the return of the goods, but must come in *pari passu* with them.—*Re* ISAACS & CO. (1879), 2 N. S. W. S. C. R. N. S. 27.—**AUS.**

6360 iii. ——.]—Insolvent having compounded with his creditors & had his goods restored to him, resumed business, with the knowledge of his assignees & creditors, & contracted new debts. Subsequently an attachment, under Insolvent Act 1869, was sued out against him by his subsequent creditors :—*Held :* they were entitled to be paid out of his assets in priority to the former creditors.—BUCHANAN *v.* SMITH (1870), 17 Gr. 208.—**CAN.**

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& control of the trustee, carry on his former business, & that the trustee should be at liberty, so long as any part of the composition remained unpaid, at any time without consent of debtor, " by forcible entry, or otherwise, to enter into & upon any premises " of debtor where any stock-in-trade or assets of debtor were, & " to seize & take possession of all & every the chattels & effects there found." Debtor obtained his discharge & recommenced trading, the trustee in no way interfering with him in the conduct of the business, & subsequently filed a second liquidation petition : —*Held :* the deed was against the policy of the law, & the trustee under the second liquidation was, as against the trustee under the first liquidation, entitled to all debtor's property.—*Re* ANDERSON, *Ex p.* NICHOLSON (1877), 37 L. T. 40.

See 1914 Act, s. 57.

6365. Further advances made by secured creditor —On faith of statements by trustee—Right to repayment out of surplus proceeds of security.]—An undischarged debtor, with the knowledge & assent of his creditors & of the trustee, continued trading, & dealt with his property as his own. A fully secured creditor, who had not proved under the liquidation, relying on the statement of the trustee that debtor was a free man, continued to deal with & give him credit. The security was subsequently realised, & a surplus remained in the hands of the creditor, which the trustee claimed :—*Held :* such creditor was entitled, as against the trustee, to deduct from such surplus the debts due to him from debtor in respect of the subsequent trading.—*Re* DYSART, *Ex p.* BOLLAND (1878), 9 Ch. D. 312 ; 47 L. J. Bcy. 74 ; 38 L. T. 693 ; 26 W. R. 807, C. A.

Annotation :—**Mentd.** *Re* New Land Development Assocn. & Gray, [1892] 2 Ch. 138, C. A.

See 1914 Act, s. 57.

6366. Bankrupt trading without knowledge of trustee.]—An undischarged bkpt. traded without the knowledge of the trustee & thereby acquired property. On May 11, 1893, he executed a deed, by which he assigned all his personal property to a trustee for the benefit of his creditors. & in consideration of the assignment the creditors thereby released him from their debts. On June 16, a receiving order was made against him, the act of bkpcy. being the execution of the deed, & on July 11 he was adjudged bkpt. a second time :—*Held :* the property so acquired by bkpt. must be distributed as assets in the first bkpcy.—*Re* CLARK, *Ex p.* BEARDMORE, [1894] 2 Q. B. 393 ; 63 L. J. Q. B. 806 ; 70 L. T. 751 ; 10 T. L. R. 459 ; 38 Sol. Jo. 492 ; 1 Mans. 207 ; 9 R. 498, C. A.

Annotations :—**Consd.** Hunt *v.* Fripp, [1898] 1 Ch. 675. **Refd.** *Re* Cullwick, [1918] 1 K. B. 646. **Mentd.** Shears *v.* Goddard (1896), 12 T. L. R. 234, C. A. ; Bird *v.* Philpott (1900), 82 L. T. 110.

See 1914 Act, s. 39.

6367. ——.]—An undischarged bkpt. started business under an assumed name, acquired freehold property, & mortgaged it in that name. A second receiving order was made, the assets being the equity of redemption of the property, & personal property which realised £113. Subsequently the identity of bkpt. was discovered :—*Held :* the mortgaged property should vest in the mtgees., upon the registrar being satisfied that all the debts in the first bkpcy., with all costs & expenses, had been paid in full, the £113 to be applied towards payment of the debts.

This is a hard case for the trustee in the second bkpcy. ; but the official receiver, as trustee in the first bkpcy., is entitled to the whole of the assets, subject to the rights of the mtgees. (WRIGHT, J.).—*Re* ADIE, *Ex p.* RUSHFORTH (1901), 84 L. T. 508 ; 45 Sol. Jo. 469.

See 1914 Act, s. 39.

6368. —— Rights of subsequent creditor—After-acquired property improved by advances.]—An undischarged bkpt. carried on business unknown to his trustee & acquired property, which was subsequently taken possession of by the trustee, & application was thereupon made by a person, who alleged that he had advanced money to bkpt. for the purpose of improving such after-acquired property that he might be paid out of it :—*Held :* as appct. knew that bkpt. had not obtained his discharge, & that the property in respect of which he was dealing was the property of the creditors, he had no equity. *Qu. :* whether there was a complete immunity of the trustee from all liability in respect of honest claims made in such case against bkpt.—*Re* CLARKE, *Ex p.* NEWTON *v.* KEARLY (1889), 60 L. T. 335 ; *sub nom. Re* CLARK, *Ex p.* KEARLEY, 5 T. L. R. 247 ; 6 Morr. 42, D. C.

See 1914 Act, s. 47 (1).

6369. Bankrupt trading with consent of original trustee—Successor of trustee unaware of trading.]—An undischarged bkpt., who carried on business with the knowledge of his trustee, was adjudicated bkpt. a second time. At the date of the second adjudication, there was a new trustee under the original bkpcy., who was unaware of the trading : —*Held :* the original trustee having acquiesced in the trading, his successor was not entitled to the assets so acquired, which vested in the trustee under the second bkpcy.—*Re* BURR, *Ex p.* PANNELL (1901), 84 L. T. 327 ; 17 T. L. R. 361 ; 45 Sol. Jo. 363.

See 1914 Act, s. 39.

See, also, Nos. 6319 *et seq., ante.*

C. Intervention by Trustee.

6370. Right to intervene—Bankrupt procuring employment without knowledge of trustee.]—Bkpt., who had never obtained his order of discharge or passed his final examination, procured employment as editor of a weekly newspaper without the permission or knowledge of his trustee, & six years after the bkpcy. he was awarded by the decree of a competent ct. £140 as six months' salary in lieu of proper notice of dismissal :—*Held :* bkpt.'s trustee could claim the money before it was paid to him, as against any creditors, subsequent to & without notice of the bkpcy., for the trustee had been guilty of no breach of duty towards such creditors, so as to estop him from setting up his claim.—WADLING *v.* OLIPHANT (1875), 1 Q. B. D. 145 ; 45 L. J. Q. B. 173 ; 33 L. T. 837 ; 24 W. R. 246.

Annotations :—**Distd.** Bailey *v.* Thurston, [1903] 1 K. B. 137, C. A. **Refd.** Emden *v.* Carte (1881), 17 Ch. D. 169 ; Cohen *v.* Mitchell (1890), 25 Q. B. D. 262, C. A. **Mentd.** *Re* Curtoys, *Ex p.* Pillers (1881), 17 Ch. D. 653, C. A. ; *Re* Graydon, *Ex p.* Official Receiver, [1896] 1 Q. B. 417 ; *Re* Roberts, [1900] 1 Q. B. 122, C. A.

6371. —— Effect of suspension of proceedings.]—A resolution suspending bkpcy. proceedings under 1861 Act, s. 110, does not take from the assignee his right to the after-acquired property of bkpt.,

6366 i. *Bankrupt trading without knowledge of trustee.]*—Where an undischarged bkpt., without the knowledge or consent of the official assignee, commences & carries on a trade, & subsequently acquires property & incurs new liabilities, & at length again becomes bkpt., his assets in the second bkpcy., belong to the creditors in the first bkpcy. in preference to those in the second.—*Re* POINTON (1907), 27 N. Z. L. R. 189.—**N.Z.**

& until bkpt. has obtained his discharge, the assignee can at any time claim such property.

Bkpt., whose creditors had agreed to a resolution suspending his bkpcy., but who had never obtained his discharge, recovered judgment in an action against C. for £500. The assignee gave notice to C. of the bkpcy., & claimed the money recovered. Afterwards, an arrangement having been come to between the assignee & bkpt., bkpt., without any interference by the assignee, sued out a debtor's summons against C. for the judgment debt :—*Held :* debtor's summons could not be supported, as it was not bkpt., but his assignee who was entitled to the money. *Qu. :* whether the claim having been once made by the assignee, could be withdrawn.—*Re* CARTER, *Ex p.* CARTER (1876), 2 Ch. D. 806 ; 45 L. J. Bcy. 145 ; 35 L. T. 388, C. A.

6372. **Sufficiency of intervention—Whether specific notice necessary.**]—Notice of intervention by a trustee in respect of the dealings of an undischarged bkpt. is not invalid, by reason of its being in general terms, & it is unnecessary to serve a specific & particular notice in order to affect the after-acquired property in question ; it suffices if the trustee clearly conveys the fact that he requires delivery of the property to him.—HILL *v.* SETTLE, [1917] 1 Ch. 319 ; 86 L. J. Ch. 243 ; 116 L. T. 263 ; 33 T. L. R. 168 ; 61 Sol. Jo. 217 ; [1917] H. B. R. 23, C. A.

6373. —— **Intervention by notice to holder of fund—Legacy becoming payable to bankrupt.**]—The estate of bkpt., on his second bkpcy. in 1846, was not sufficient to pay 15*s.* in the pound. The assignees allowed him to carry on his trade & contract debts for eight years, at the expiration of which a legacy was bequeathed to him, which the assignees claimed, serving the exors., two months after the death of the testatrix, with notice of their claim :—*Held :* (1) their right under 6 Geo. 4, c. 16, s. 127, to the legacy in question, was a right protected by the saving clause in 1849 Act, s. 4 ; (2) they had so conducted themselves that such right could not be taken from them. —*Re* BIRCH'S LEGACY (1856), 2 K. & J. 328 ; 69 E. R. 807.

6374. —— —— ——.]—Testatrix by her will, made in 1867, bequeathed a legacy of £2,000 to her father, whom she appointed one of her exors. Her estate consisted mainly of a reversionary interest, which was not sold by her exors., & which did not fall into possession until Mar., 1881. In Feb., 1844, the father had been adjudicated a bkpt. on a fiat issued in Dec., 1843. The bkpcy. was never closed & he did not obtain an order of discharge. On Mar. 17, 1882, the official assignee gave notice to the exors. that he claimed the legacy. On Apr. 3, the father assigned the legacy to A. as security for a balance due from him to A. upon an account stated that day of money received & paid by him onA.'s account from 1858 down to 1870. On Apr. 5, A. gave notice of the assignment to the exors. :—*Held :* as no money had been advanced by A. to bkpt. on the faith of the legacy, & as the official assignee had previously given notice to the exors. that he claimed the legacy, A. could not obtain any security until the claim of the official assignee had been satisfied, the official assignee having completed his title by giving the first notice to the exors.—*Re* BLACHFORD, BLACHFORD *v.* WORSLEY (1884), 27 Ch. D. 676 ; 33 W. R. 11.

Annotations :—**Mentd.** *Re* Johnson, Sly *v.* Blake (1885), 29 Ch. D. 964 ; *Re* Campbell, Campbell *v.* Campbell, [1893] 3 Ch. 468.

6375. —— —— **Commission on sale of house.**]—The trustee becomes the general assignee of bkpt.'s choses in action, other than personal earnings, as & whenever they arise, subject only to rights acquired by a *bonâ fide* assignee for value, whether with or without notice of bkpcy. before the trustee intervenes. If that particular assignee has not perfected his title by notice to the holder of the fund, where such notice is required, or by a stop order, the trustee as general assignee can by intervening & claiming the fund from bkpt. & giving notice to the holder of the fund, or by stop order if the fund is in ct., perfect his title first, to the exclusion of the particular assignee.

An undischarged bkpt. assigned his interest in a commission on the sale of a public-house, earned by him since the date of the bkpcy., & his trustee gave notice of his claim before the assignee :—*Held :* the trustee had acquired priority over the assignee.—MERCER *v.* VANS COLINA (1897), [1900] 1 Q. B. 130, n. ; 67 L. J. Q. B. 424 ; 78 L. T. 21 ; 4 Mans. 363.

Annotations :—**Folld.** *Re* Beall, *Ex p.* Official Receiver, [1899] 1 Q. B. 688. **Distd.** *Re* Behrend's Trust, Surman *v.* Biddell, [1911] 1 Ch. 687. **Mentd.** Shoolbred *v.* Roberts, [1899] 2 Q. B. 560 ; *Re* Roberts, [1900] 1 Q. B. 122, C. A. ; Affleck *v.* Hammond, [1912] 3 K. B. 162, C. A.

PART XX. SECT. 7, SUB-SECT. 1.—C.

6372 i. *Sufficiency of intervention—Whether specific notice necessary.*]—Where a declaration alleged that insolvent, due notice of whose insolvency had been gazetted, before the final account had been confirmed, had deposited sums of money in a bank on floating account, & the trustee of insolvent claimed those moneys :—*Held :* a plea, to the effect that the bank had no knowledge of the insolvency, that the money had been received in the ordinary way of banking business & had been so paid out *bonâ fide* in honouring cheques drawn against the money, was no defence, & an exception to such a plea should be upheld.—BAYLIS'S TRUSTEES *v.* CAPE OF GOOD HOPE BANK (1886), 4 S. C. 439.—**S. AF.**

6373 i. —— *Intervention by notice to judgment debtor—Notice to judgment creditor.*]—Where an undischarged bkpt., subsequently to his bkpcy. becomes entitled to a chose in action, his official assignee does not intervene within the rule in *Cohen* v. *Mitchell*, No. 6324, *ante*, unless debtor has notice that the official assignee claims such chose in action, a claim made on the judgment creditor alone does not constitute intervention.

The official assignee of an undischarged bkpt., who had, subsequently to his bkpcy., obtained a judgment against B., gave notice to the judgment creditor as follows :—"I give you notice that I claim the verdict obtained by you against [B.], or the fruits of such verdict, & caution you against dealing with or disposing of same in any way without written authority" : —*Held :* this did not constitute an intervention by the official assignee.—*Re* BURNS, *Ex p.* ELLESMERE (1912), 12 S. R. N. S. W. 658.—**AUS.**

h. *Within what time.*]—Insolvent, whose estate was sequestrated in 1880, became in 1885 the holder of a conditional purchase as mtgee. In 1888 insolvent obtained a certificate of conformity, & since that date paid money in respect of the land. In 1892 the official assignee claimed the land, subject to the repayment by him of all money paid in respect of the land by insolvent since the date of the certificate of conformity :—*Held :* the official assignee was not barred by any laches, & he was entitled to the order as asked.—MORRIS *v.* RYMAN (1892), 13 N. S. W. Eq. 92.—**AUS.**

j. ——.]—Testatrix, owner of the grantee's interest in the lands held under a fee-farm grant, devised the lands to certain persons for life, & on the death of the survivor, to Q. absolutely. Testatrix died in 1861. The last life died in 1904. Q. had been adjudicated bkpt. in 1878, & a certificate that all his estate & effects, real & personal, had vested in the official & creditor's assignees was issued in the following year, & was duly registered. The reversionary interest of Q. was mentioned in his statement of affairs. In 1880 he obtained his certificate of conformity, & died in 1892. By his will he devised all the residue of his real & personal estate, which included the lands, to his daughters in equal shares. When the reversionary interest fell in in 1904, the daughters entered into possession of the lands, & in 1906 conveyed same to B. for valuable consideration. B. thereupon entered into possession of the lands, & subsequently sold same under the Land Purchase Acts. On the distribution of the purchase-money, in 1916, the official assignee claimed the residue :—*Held :* the claim had not been made within a reasonable time & the residue of the purchase-money was properly payable to B.—*Re* BURKE'S ESTATE, [1916] 1 I. R. 371.—**IR.**

Sect. 7.—Property acquired by or devolving on bankrupt: Sub-sect. 1, C.; sub-sects. 2 & 3.]

6376. —— —— Costs payable to bankrupt.]—An undischarged bkpt. assigned for value the amount of his taxed bill of costs as solr. for petitioning creditors of a co. in liquidation. His trustee gave notice, before the assignee, to the liquidator of the co. claiming the amount of the taxed bill as part of the after-acquired property of the bkpt.: —*Held:* the trustee was entitled to the amount in priority to the assignee.—*Re* BEALL, *Ex p.* OFFICIAL RECEIVER, [1899] 1 Q. B. 688; 68 L. J. Q. B. 462; 80 L. T. 267; 43 Sol. Jo. 226; 6 Mans. 163.

Annotation:—**Distd.** *Re* Behrend's Trust, Surman *v.* Biddell, [1911] 1 Ch. 687.

6377. In regard to what property—Goods sent to bankrupt in error.]—A liquidating debtor, who had not obtained his discharge, engaged in trade. He ordered some goods from a wholesale house, who sent the goods to him in the belief that the order had come from a firm with whom they were acquainted, & whose name resembled that under which debtor traded. The trustee claimed the goods:—*Held:* debtor had acquired no property in the goods, & the trustee was bound to return them.—*Re* REED, *Ex p.* BARNETT (1876), 3 Ch. D. 123; 45 L. J. Bcy. 120; 34 L. T. 664; 24 W. R. 904.

6378. Withdrawal of intervention—Whether competent.]—*Qu.:* whether the trustee, having once intervened, could withdraw his claim.—AFFLECK *v.* HAMMOND, [1912] 3 K. B. 162; 81 L. J. K. B. 565; 106 L. T. 8; 19 Mans. 111, C. A.

Annotations:—**Consd.** Hill *v.* Settle (1916), 86 L. J. Ch. 243, C. A. **Mentd.** Hamilton *v.* Caldwell (1919), 88 L. J. P. C. 173, H. L.

6379. —— —— Effect of intervention.]—Where a trustee has intervened in regard to after-acquired property of an undischarged bkpt., that property vests indefeasibly in the trustee, & he cannot subsequently withdraw his intervention & so divest the property from himself & revest it in bkpt.—HILL *v.* SETTLE, [1917] 1 Ch. 319; 86 L. J. Ch. 243; 116 L. T. 263; 33 T. L. R. 168; 61 Sol. Jo. 217; [1917] H. B. R. 23, C. A.

SUB-SECT. 2.—ASSIGNMENTS OF AFTER-ACQUIRED PROPERTY.

See No. 6293 & *cases* in sub-sect. 1, B., *ante*, & Sect. 4, sub-sect. 7, *ante;* BILLS OF SALE; CHOSES IN ACTION; EQUITY.

SUB-SECT. 3.—PROPERTY ACQUIRED AFTER CLOSE OF BANKRUPTCY OR AFTER DISCHARGE.

6380. Trustee not entitled to—Certificate prior to 6 Geo. 4, c. 16, s. 127.]—The above sect. does not extend to the case where a trader has twice become bkpt. & obtained certificates, not paying 15*s.* in the pound under the last commission, but both bkpcies. & certificates are prior to the Act. In that case the after-acquired effects do not vest in the assignees under the second commission, & the Act does not prevent the assignees under a third commission from claiming property of which bkpt. has had the reputed ownership within s. 72 since the second commission. But, if the second certificate were subsequent to May 2, 1825, when the Act took effect as to certificates, s. 127 applies.—BENJAMIN *v.* BELCHER (1840), 11 Ad. & El. 350; 3 Per. & Dav. 317; 9 L. J. Q. B. 153; 113 E. R. 448.

Annotation:—**Refd.** Morgan *v.* Knight (1864), 15 C. B. N. S. 669.

6381. —— Though bankrupt has not obtained discharge.]—After the close of a bkpcy., property falling in to bkpt. belongs to him, & not to the trustee, although bkpt. has not obtained an order of discharge.

Where a bkpcy. has been closed, & debtor has not obtained an order of discharge the creditors have certain remedies, but the right to take debtor's property acquired since the close of the bkpcy. is not one of those remedies (BACON, V.-C.).—*Re* PETTIT'S ESTATE (1876), 1 Ch. D. 478.

Annotations:—**Consd.** *Re* Westby, *Ex p.* Lancaster Banking Corpn. (1879), 10 Ch. D. 776; *Re* Gosling, *Ex p.* Pitt (1882), 20 Ch. D. 308, C. A.; *Re* Smith, Green *v.* Smith (1883), 24 Ch. D. 672.

See, now, 1914 Act, s. 38.

6382. —— Except rights under 1869 Act, s. 54—Effect of 1869 Act, s. 12.]—An undischarged bkpt. died intestate within three years after the close of his bkpcy., having in the interval acquired fresh property & contracted fresh debts. Only a small dividend had been paid in the bkpcy., & bkpt. had not, after the close of the bkpcy., made any further payments to the creditors who had proved. An action was brought by one of the new creditors to administer bkpt.'s estate. The estate was sufficient to pay the costs of the action, to pay the new creditors in full, & to leave a surplus, which was claimed by the old creditors:—*Held:* the administratrix was entitled to the surplus, & the old creditors had no right to it.

The creditors of an undischarged bkpt. under 1869 Act have no rights against property acquired

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l. —— *After second bankruptcy—Outside jurisdiction.*]—An undischarged Scottish bkpt. traded in England, where some years after an adjudication in bkpcy. was issued against his estate. The trustee in Scotland applied to have the property acquired since the date of the Scottish sequestration declared to be vested in him:—*Held:* the trustee was not entitled to the declaration sought, but without prejudice to his appearing & claiming in the English bkpcy.—MEIN *v.* TURNER (1855), 17 Dunl. (Ct. of Sess.) 435.—SCOT.

m. *In regard to what property—Stock-in-trade acquired by wife & used in bankrupt's business.*]—The wife of insolvent purchased, with money advanced by her sister, a part of his stock-in-trade from the assignee, & carried on the business upon the same premises, altering the name to hers, purchasing stock, paying rent, & being assisted by the labour of insolvent, of all which the assignee was aware. Upon motion by the assignee an order was made for the delivery up to him of the stock-in-trade, as after-acquired property of insolvent.—*Re* MULCAHY, *Ex p.* MULCAHY (1879), 5 V. L. R. 7.—AUS.

n. —— *Rent due to separate estate—Joint bankruptcy.*]—Assignees under a joint commission against A. & B. may, as such, maintain an action for the use & occupation of premises, which belonged to A., without describing themselves as the assignees of the separate estate of A., when the rent becomes due for occupation subsequent to the bkpcy., the assignment passing the reversion to the assignees by virtue of the joint commission.—PEPPER & LOCKE (ASSIGNEES) *v.* MOLONY (1832), Alc. & N. 62.—IR.

PART XX. SECT. 7, SUB-SECT. 3.

6380 i. *Trustee not entitled to.*]—Pltf. was in exclusive possession of land from 1837 to 1869. In 1842 she was insolvent, & obtained her certificate in 1844:—*Held:* by twenty-years' possession since she obtained her certificate, she had acquired a good title as against the official assignee.

Pltf., who was insolvent in 1842 was proved to have been in possession of her certificate in 1844:—*Held:* it must be presumed that such certificate had been properly presented to, & allowed by the ct., in accordance with 7 Vict., No. 19, s. 20.—MARTIN *v.* PHILLIPS (1890), 11 N. S. W. L. R. 481.—AUS.

6381 i. —— *Though bankrupt has not obtained discharge—Release of trustee.*]—An undischarged bkpt. died intestate in England after the trustee had been released, having in the interval acquired fresh property & contracted fresh debts. A small dividend had been paid in the bkpcy., & bkpt. had not made any further payments to the creditors who had proved, but who had taken no further steps after payment of the dividend. An originating summons was brought by the administratrix to administer bkpt.'s estate. The estate showed a surplus after paying the costs & the new creditors in full:—*Held:* the administratrix was entitled to the surplus to the exclusion of the old creditors.—PEEL *v.* PEEL (1904), 38 I. L. T. 82.—IR.

by him after the close of the bkpcy., except such rights as are given to them by s. 54, & those rights cannot be enforced after the death of bkpt.

The provisions of s. 12 apply to property acquired by an undischarged bkpt. after the close of the bkpcy. as well as to property divisible among the creditors in the bkpcy.—*Re* SMITH, GREEN *v.* SMITH (1883), 24 Ch. D. 672; 52 L. J. Ch. 921; 49 L. T. 297.

6383. —— Certificate of conformity subject to suspension—1849 Act coming into operation during suspension.]—In July, 1848, an order was made that the grant of a certificate of conformity to bkpt. be suspended for three years. During the period of suspension 1849 Act came into operation:—*Held:* as, by virtue of s. 199, confirmation of the order of July, 1848, was no longer required, that order became, at the expiration of the period of suspension, of itself a complete discharge to bkpt., & property acquired by him after the expiration of that period belonged to him & not to the assignee.—*Re* DOVE, BOUSFIELD *v.* DOVE (1884), 27 Ch. D. 687; 53 L. J. Ch. 1099; 33 W. R. 197.

6384. Right to maintain action—Unless trustee intervenes.]—Under 6 Geo. 4, c. 16, ss. 63, 127, & 1 & 2 Will. 4, c. 56, s. 25, a person who has been twice bkpt. & obtained his certificates, but has not paid 15*s.* in the pound, may maintain an action in respect of property acquired since his last certificate, unless his assignee interferes.—HERBERT *v.* SAYER (1844), 5 Q. B. 965; 2 Dow. & L. 49; 1 Dav. & Mer. 723; 13 L. J. Q. B. 209; 8 Jur. 812; 114 E. R. 1512, Ex. Ch.

Annotations:—**Expld.** Williams *v.* Chambers (1847), 11 Jur. 798. **Folld.** Jackson *v.* Burnham (1852), 8 Exch. 173. **Expld.** Sprye *v.* Porter (1856), 7 E. & B. 58. **Folld.** Dodds *v.* London & Eastern Banking Corpn. (1857), 30 L. T. O. S. 122. **Consd.** Glover *v.* Weedon (1857), 3 Jur. N. S. 903. **Distd.** Richbell *v.* Alexander (1861), 30 L. J. C. P. 268. **Consd.** Morgan *v.* Knight (1864), 15 C. B. N. S. 669; Kitson *v.* Hardwick (1872), L. R. 7 C. P. 473. **Folld.** Jameson *v.* Brick & Stone Co. (1878), 4 Q. B. D. 208, C. A.; Cohen *v.* Mitchell (1890), 25 Q. B. D. 262, C. A. **Consd.** *Re* New Land Development Assocn. & Gray, [1892] 2 Ch. 138, C. A.; *Re* Clark, *Ex p.* Beardmore, [1894] 2 Q. B. 393, C. A. **Refd.** *Re* Jardine, *Ex p.* Jardine (1850), 16 L. T. O. S. 305; Cook *v.* Whellock (1890), 24 Q. B. D. 658, C. A.; *Re* Bennett, *Ex p.* Official Receiver, [1907] 1 K. B. 149; Hill *v.* Settle, [1917] 1 Ch. 319, C. A. **Mentd.** Lister *v.* Cundith (1844), 3 L. T. O. S. 242; Tucker *v.* Barnesley (1846), 16 M. & W. 54; Robinson *v.* Little (1848), 9 Q. B. 602; Emden *v.* Carte (1881), 44 L. T. 344; *Re* Solomons, [1904] 1 K. B. 106, C. A.

6385. Property succeeded to in right of wife—Right of trustee to oppose settlement thereof.]—The wife of J. by her next friend having brought a bill setting forth her being seduced into the marriage, & the husband's bkpcy., together with the certificate for his discharge, prayed that a legacy, which had become payable to her since the bkpcy. might be put out for her separate use for her life, & afterwards for her children, to which her husband putting in his answer, & declaring himself sensible of his having injured his wife, submitted to what was desired by the bill. The assignees opposed the bill, insisting that the comrs. might make a new assignment of the money:—*Held:* as the comrs. had executed their power, & the debts, which bkpt. owed to the creditors before the bkpcy., were extinct by Act of Parliament, & the portion was as a new acquired estate by the husband, in right of his wife, the legacy should be laid out in a purchase, in the meantime, the wife to have the interest for her separate use, etc., by which means the whole legacy would be saved to the wife, & to her separate use.—JACOBSON *v.* WILLIAMS (1717), 1 P. Wms. 382; 1 Eq. Cas. Abr. 54; 24 E. R. 435, L. C.

Annotations:—**Distd.** Higden *v.* Williamson (1731), 3 P. Wms. 132. **Consd.** Ineson *v.* Moulston, Vobe's Case (1742), 9 Mod. Rep. 373, L. C. **Mentd.** Kitchen *v.* Bartsch (1805), 7 East, 53.

6386. Legacy left to bankrupt—Before allowance of certificate—After signing of same.]—Bkpt.'s certificate does not overreach a legacy left bkpt. after the signing, but before the allowance thereof.—TUDWAY *v.* BOURNE (1759), 2 Burr. 716; 2 Keny. 423; 97 E. R. 529.

Annotations:—**Mentd.** Troughton *v.* Gitley (1766), Amb. 630, L. C.; Fowler *v.* Dunn (1797), 1 Bos. & P. 44; Kitchen *v.* Bartsch (1805), 7 East, 53.

6387. —— —— Unfounded petition to stay certificate pending.]—Legacy, falling to bkpt. before allowance of his certificate by testator's death, pending an unfounded petition to stay it, goes to his assignees, unless the petition was presented with the object.—*Ex p.* ANSELL (1812), 19 Ves. 208; 34 E. R. 496, L. C.

6388. Estate descending to bankrupt as heir at law—After obtaining certificate.]—An estate which comes to bkpt., after he has obtained his certificate, as heir at law, is not available for creditors.—MOTH *v.* FROME (1761), Amb. 394; 27 E. R. 262.

6389. Income accruing after discharge.]—Where a man is in receipt of an income at the time of his bkpcy., such income does not after his discharge continue to be vested in the trustee, & apart from any order of the ct. directing bkpt. to pay over a

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r. —— *Except where discharge without composition or consent of creditors.*]—A discharge obtained by bkpt., without composition or consent of creditors, has not the effect of annulling the sequestration with respect to property then vested in bkpt., but not payable to him until after the date of such discharge.—TRAPPES *v.* MEREDITH (1871), 10 Macph. (Ct. of Sess.) 38.—**SCOT.**

6385 i. *Property succeeded to in right of wife—After discharge.*]—A. was discharged as an insolvent debtor in 1848. In 1850 his wife became entitled, as one of the next-of-kin, on the death of her brother, to a moiety of his personal estate. The assignee of insolvent filed a cause petition against the exor. *de son tort* of the brother, stating that he sued "as such assignee," but without stating that he was a creditor of insolvent, or that he had entered judgment against him pursuant to Insolvent Act, 1840 (c. 107), ss. 78, 79, & without making the wife a party:—*Held:* the suit was unsustainable for want of title, the property not being vested in the assignee.—GLENNY *v.* WOOLSEY (1856), 4 I. Ch. R. 636.—**IR.**

s. *Legacy left to wife of bankrupt—Becoming payable after rehabilitation.*]—Testator by will provided that a bond due to him "should not be brought into account against debtor, & that no interest shall be demanded from him, it being the express will & desire of testator that the bond may only after the death of debtor be called up, & this then, in that eventual case, for the benefit of" pltf. After testator's death pltf.'s husband became insolvent & was rehabilitated, after which he died. Debtor died next, & upon his death:—*Held:* pltf., notwithstanding the previous insolvency of her husband, was entitled to the proceeds of the bond.—VAN BREDA *v.* MASTER OF THE SUPREME COURT (1890), 7 S. C. 360.—**S. AF.**

t. *Under exercise of power of appointment after discharge.*]—A., entitled to a share in leasehold premises in default of appointment, was discharged as an insolvent, & her surviving parent afterwards appointed the property to her:—*Held:* no interest in the trust premises vested in her assignees under 20 & 21 Vict. c. 60, ss. 267, 268.—STRATTON *v.* MURPHY (1867), I. R. 1 Eq. 345.—**IR.**

u. *Share in intestate's estate—After payment in full of creditors & costs.*]—An undischarged bkpt., who had paid all his proved creditors & the costs of his official assignee in full, applied to the Probate Ct. for an order that the administrator of a deceased's estate in which he (bkpt.) was interested should pay to him his share of the proceeds of sale of certain realty:—*Held:* bkpt. had no *locus standi* to intercept the title of his official assignee.—*In the estate of* NOWLAND (1908), 8 S. R. N. S. W. 138.—**AUS.**

w. *Share of residue not vesting until after bankrupt's rehabilitation—Trustee not entitled.*]—WHITEHEAD *v.* WHITEHEAD'S EXECUTOR (1908), 25 S. C. 65.—**S. AF.**

6389 i. *Income accruing after discharge.*]—Under a vesting order, an insolvent's estate became vested in the official assignee. A discharging order was afterwards made under Insolvent Debtors Act, s. 59. Subsequently the official assignee received the interest on securities which had been bequeathed to insolvent for his life before the date of the vesting order:—*Held:* the interest subsequently received by the

Sect. 7.—Property acquired by or devolving on bankrupt: Sub-sect. 3. Sect. 8.]

portion of his income notwithstanding his discharge, the income does not vest in the trustee in any way. —*Re* GOLD, *Ex p.* GOLD (1891), 8 Morr. 45, D. C.

6390. Property acquired after second discharge—Order of payment of creditors.]—A person who had been twice discharged by the Ct. for the Relief of Insolvent Debtors died possessed of considerable property:—*Held:* first the creditors subsequent to the second insolvency should be paid, then those after the first insolvency, &, lastly, those before the first insolvency.—BARTON *v.* TATTERSALL (1830), Taml. 378; 1 Russ. & M. 237; 48 E. R. 150; *subsequent proceedings* (1831), 2 Russ. & M. 541.

Annotations:—**Apld.** Ward *v.* Painter (1839), 2 Beav. 85; *Re* Moylan (1852), 16 Beav. 220. **Consd.** Dunlevie *v.* Hort (1857), 30 L. T. O. S. 23, C. A.; *Re* Clagett's Estate, Fordham *v.* Clagett (1882), 20 Ch. D. 637, C. A.; *Re* Smith, Green *v.* Smith (1883), 24 Ch. D. 672. **Refd.** *Re* Bender, *Ex p.* Fenwick (1836), 5 L. J. Bcy. 46; *Re* Lyon, *Ex p.* Robinson (1844), 2 L. T. O. S. 440; *Re* Emmings (1849), 14 L. T. O. S. 208; *Re* Hare, *Ex p.* Welchman (1879), 11 Ch. D. 48, C. A. **Mentd.** Ward *v.* Painter (1840), 5 My. & Cr. 298.

Property acquired by debtor after close of composition proceedings.]—*See* Part XXIII., Sect. 8, sub-sect. 3, C., *post.*

6391. Property acquired after date of order for discharge—& before certificate.]—Property acquired by bkpt. in the interval between the date of the order of discharge & the date of the certificate does not pass to the assignees, but belongs to bkpt.—*Re* LA FOREST, *Ex p.* BELL (1863), 2 New Rep. 251; 32 L. J. Bcy. 50; 8 L. T. 481; 9 Jur. N. S. 856; 11 W. R. 738, L. C.

Annotation:—**Mentd.** Jones *v.* Hill (1870), L. R. 5 Q. B. 230.

SECT. 8.—CAPACITY TO EXERCISE POWERS AND EFFECT OF BANKRUPTCY ON POWERS.

See, generally, POWERS.

See, now, 1914 Act, s. 38 (*b*).

6392. General power of appointment—Remainder in default of appointment to heirs of his body.]—Bkpt., seised for life with a general power of appointment, with remainder, in default of appointment, to the heirs of his body, cannot be compelled by decree in equity to execute the power for his creditors.—THORPE *v.* GOODALL (1811), 17 Ves. 388, 460; 34 E. R. 150, 178, L. C.

Annotations:—**Refd.** Jones *v.* Winwood (1841), 10 Sim. 150; Lee *v.* Olding (1856), 25 L. J. Ch. 580.

6393. —— Remainder in default of appointment to bankrupt in fee—Appointment after bankruptcy.]—A trader being seised of an estate for life, with a general power of appointment, with remainder, in default of appointment, to himself in fee, after having committed an act of bkpcy., upon which he was afterwards declared a bkpt. executed his appointment in favour of an appointee:—*Held:* such appointment was void, &, his assignee under the commission had a sufficient legal estate to maintain an ejectment.—DOE d. COLEMAN *v.* BRITAIN (1818), 2 B. & Ald. 93; 106 E. R. 301.

Annotations:—**Distd.** Lee *v.* Olding (1856), 25 L. J. Ch. 580. **Refd.** Hole *v.* Escott (1838), 4 My. & Cr. 187; *Re* Sprague, Miley *v.* Cape (1880), 43 L. T. 236. **Mentd.** Langton *v.* Horton (1842), 1 Hare, 549.

6394. —— To bankrupt & wife during joint lives—Joint appointment after insolvency.]—In 1819 an estate was settled to such uses as T. & F., his wife, should, during their joint lives, appoint, & in default of appointment, to the use of W. for life, with remainder to the use of the wife for life with remainder to the use of the sons of T. & his wife, successively in tail, with remainder to the use of their daughters as tenants in common in tail, with cross-remainders in tail, with remainder to W. in fee. In 1824 W. took the benefit of Insolvent Debtors Act, & conveyed all his estate to the provisional assignee. In 1828 W. & F., his wife, in execution of their joint power, appointed the estate to trustees in fee, in trust to sell. The trustees afterwards sold the estate:—*Held:* the power of appointment was not destroyed by the conveyance to the provisional assignee, & the appointment of 1828 vested in the trustees the whole inheritance in fee, except that portion of it which was vested in the provisional assignee.—JONES *v.* WINWOOD (1841), 10 Sim. 150; 10 L. J. Ch. 165; 5 Jur. 190; 59 E. R. 570.

Annotation:—**Apld.** *Re* Bedingfeld & Herring's Contract, [1893] 2 Ch. 332.

6395. —— Bankruptcy of married woman donee of power.]—The separate property of a married woman, who is made bkpt., passes to her trustee,

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official assignee was not after-acquired property within s. 59.—*Re* PEREIRA (1863), 1 Mad. 217.—**IND.**

a. *Assignment of claim to charge on land after discharge—Whether assignee trustee for creditors.*]—R., claiming a charge upon lands took the benefit of Insolvent Debtors Act. Afterwards an order dismissing the petition was made on consent of R.'s assignee. The land was sold, but the creditors of R. did not take any steps to realise the amount of R.'s claims out of the proceeds of that sale. R. afterwards assigned his claims for money to H., who had notice of the pendency of the insolvent proceedings:—*Held:* he could not be treated as constructively a trustee for R.'s creditors.—ROCHE *v.* HASSARD (1856), 5 I. Ch R. 14; 8 Ir. Jur. 246.—**IR.**

b. *Payments on account of annuity received after discharge.*]—A., entitled to a life estate in lands, with remainder to his wife B. for life, C., entitled to an annuity, & D. having a policy of insurance, in consideration of £350 advanced to A., mortgaged to E. the lands, annuity, & policy of insurance respectively, & A., B., & C. appointed F. their attorney. F. entered into receipt of the annuity, but did not apply it to the specified purposes but, with C.'s consent, applied the annuity to pay the interest on the £350. C., before consenting, had taken the benefit of Insolvent Act:—*Held:* F., as agent of C. as to the annuity, was not bound to pay the assignees the sums received by him after the insolvency.—M'DOWELL *v.* REEDE (1865), 16 I. Ch. R. 430.—**IR.**

c. *Amount of policy on life of bankrupt received after personal discharge—Policy previously sold by trustee.*]—The official assignee sold a policy of insurance on the life of insolvent, who, after obtaining his personal discharge, died. The purchaser, having bought the policy mainly for the benefit of insolvent, paid most of the sum realised by him upon it to the Administrator-General, who was about to take out letters of administration to the estate of insolvent:—*Held:* the Administrator-General was entitled to the proceeds of the policy in preference to the official assignee.—*Re* ACKRILL (1894), I. L. R. 18 Mad. 24.—**IND.**

f. *Assets discovered after thirty years.*]—Upwards of thirty years after the surrender of an insolvent estate an asset of the estate, being landed property, which had not been mentioned by insolvent in his scheds., was discovered & sold:—*Held:* insolvent's legal representatives were not entitled to claim the proceeds or any part thereof, until payment of all the claims which had been proved.—*Re* PARKER'S ESTATE (1899), 16 S. C. 529.—**S. AF.**

g. ——.]—Upwards of thirty years after the surrender & rehabilitation of an insolvent estate an asset of the estate, which had been mentioned by insolvent in his scheds., & which was not sold in the insolvent estate, was discovered by his legal representatives:—*Held:* insolvent's legal representatives were not entitled to an order authorising the transfer by them of the property to such persons as they might desire, there being still unsatisfied claims of creditors in excess of the value of the property.—*Re* MOSTERT (1905), 22 S. C. 550.—**S. AF.**

h. *Liability to execution.*]—Where a discharge was good & valid:—*Held:* subsequently-acquired property could not be attached for any debt discharged under the insolvency.—BRETT *v.* SCHONERSTEDT (1864), 2 Hyde, 1.—**IND.**

PART XX. SECT. 8.

a. *Power to consent to appointment—Power vested in bankrupt.*]—A deed of settlement gave B. a power of appointment over property with the consent of her husband. The husband committed an act of bkpcy., & B., with the consent of her husband, made an appointment:—*Held:* the consent of the husband was void without the consent of the official assignee.—*Re* BLACK, *Ex p.* OFFICIAL ASSIGNEE (1894), 15 N. S. W. B. 127.—**AUS.**

but she cannot be compelled to exercise a power of appointment in his favour.—*Re* ARMSTRONG, *Ex p.* GILCHRIST (1886), 17 Q. B. D. 521; 55 L. J. Q. B. 578; 55 L. T. 538; 34 W. R. 709; 2 T. L. R. 745; *sub nom. Ex p.* GILCHRIST, 51 J. P. 292; *sub nom. Re* ARMSTRONG, *Ex p.* ARMSTRONG, 3 Morr. 193, C. A.

Annotations :—**Consd.** Tremayne *v.* Rashleigh, [1908] 1 Ch. 681. **Refd.** *Re* Armstrong, *Ex p.* Boyd (1888), 21 Q. B. D. 264, C. A.; *Re* Roper, Roper *v.* Doncaster (1888), 39 Ch. D. 482; *Re* Rose, Rose *v.* Rose, [1904] 2 Ch. 348; Goatley *v.* Jones, Goatley *v.* Jones, [1909] 1 Ch. 557.

6396. —— By deed or will—Whether exercisable by trustee after death of bankrupt.]—A debtor had a general power of appointment by deed or will :—*Held :* his trustee had no power, after the death of debtor, to appoint the property the subject of the power.—NICHOLS TO NIXEY (1885), 29 Ch. D. 1005; 55 L. J. Ch. 146; 52 L. T. 803; 33 W. R. 840.

6397. —— By will only—Bankruptcy after making will—Death after certificate without revoking will.]—Bkpt. having a power of appointment over money, to be executed only by will, made his will disposing of the property, & then became bkpt. Afterwards he obtained his certificate, & died without revoking his will :—*Held :* the appointee by the will was a trustee for the creditors of bkpt., who became such after he had obtained his certificate.—JENNEY *v.* ANDREWS (1822), 6 Madd. 264; 56 E. R. 1091.

Annotations :—**Consd.** Williams *v.* Lomas (1852), 16 Beav. 1. **Apld.** Vaughan *v.* Vanderstegen (1853), 2 Drew. 165. **Consd.** Hobday *v.* Peters (1860), 28 Beav. 354. **Apld.** *Re* Guedalla, Lee *v.* Guedalla's Trustee, [1905] 2 Ch. 331. **Refd.** Shattock *v.* Shattock (1866), L. R. 2 Eq. 182; *Re* Hadley, Johnson *v.* Hadley, [1909] 1 Ch. 20, C. A.; *Re* Benzon, Bower *v.* Chetwynd, [1914] 2 Ch. 68, C. A.; O'Grady *v.* Wilmot, [1916] 2 A. C. 231, H. L.

6398. —— —— —— Death before discharge without revoking will.]—Under a settlement H. had a general testamentary power of appointment over a fund. In 1892 he made his will, executed the power in favour of E., & appointed him exor. A receiving order was made against H., & he was adjudicated a bkpt. E. proved in the bkpcy. for £1,131. H. never obtained his discharge, & in 1904 he died. At the time of his death he was indebted to various persons for debts incurred since the date of the receiving order :—*Held :* (1) the property divisible amongst the creditors in the bkpcy. did not include the appointed fund, & the trustee was not entitled to receive the fund; (2) the duty of dividing it devolved upon the exor.; & the creditors who had become so after the bkpcy. were the only creditors who had a right to share in the fund.—*Re* GUEDALLA, LEE *v.* GUEDALLA'S TRUSTEE, [1905] 2 Ch. 331; 75 L. J. Ch. 52; 94 L. T. 94; 54 W. R. 77; 12 Mans. 392.

Annotation :—**Consd.** *Re* Benzon, Bower *v.* Chetwynd, [1914] 2 Ch. 68, C. A.

6399. —— —— —— ——.]—The donee of a general testamentary power of appointment over a fund of £15,000 was adjudicated bkpt. in Jan., 1890, & a small dividend was paid. Early in 1892 the donee was again adjudicated bkpt., but no dividend was paid. The donee never obtained his discharge in either bkpcy., & died in July, 1911, having by his will duly exercised his power of appointment. In an action for the administration of his estate, which consisted almost entirely of the appointed fund, the creditors in the bkpcies. claimed to be paid the balance still remaining unsatisfied of their respective debts :—*Held :* the creditors in the bkpcies. were precluded from claiming against the appointed fund & their claims must be disallowed.—*Re* BENZON, BOWER *v.* CHETWYND, [1914] 2 Ch. 68; 83 L. J. Ch. 658; 110 L. T. 926; 30 T. L. R. 435; 58 Sol. Jo. 430; 21 Mans. 8, C. A.

6400. Limited power of appointment—Appointment after bankruptcy.]—By marriage settlement the husband took an estate for life, with power of appointment to children, remainder to trustees to preserve, etc., remainder to children in tail in default of appointment, remainder to husband in fee in default of issue. The husband became bkpt., & afterwards executed an appointment to his son in fee, after his own life estate. The assignees sold the life estate to bkpt.'s mother :—*Held :* the son took nothing under the appointment, but was entitled to an estate tail under the original settlement.—BADHAM *v.* MEE (1831), 7 Bing. 695; 1 Moo. & S. 14; 9 L. J. O. S. C. P. 213; 131 E. R. 268.

Annotations :—**Consd.** Hole *v.* Escott (1838), 4 My. & Cr. 187, L. C.; *Re* Cooper, Cooper *v.* Slight (1884), 27 Ch. D. 565. **Mentd.** R. *v.* Oundle (1834), 3 Nev. & M. K. B. 484.

6401. —— To husband & wife jointly or survivor—Joint appointment after bankruptcy—Appointment by widow after bankrupt's death.]—A husband, upon marriage, settled an estate to the use of himself for life, with remainder to the use of trustees, to preserve contingent remainders, with remainder to the use of trustees for a term of years, to secure a jointure for the wife, with remainder to the use of such children of the marriage as the husband & wife jointly, or, in default of a joint appointment, the survivor of them should appoint, with remainder, in default of such appointment, to the children of the marriage equally, with remainder to the right heirs of the husband. The husband became bkpt., & after his bkpcy. he & his wife made a joint appointment in favour of two of the children of the marriage. The husband died, & a bill having been filed by a person claiming under the bkpcy. for an account of the rents of the settled estate, the wife executed a separate appointment in favour of the same children, which she stated in her answer :—*Held :* (1) the joint appointment was inoperative, on the ground that the husband could not, by a subsequent execution of the power, deprive his assignees of an estate which had been once vested in them by his bkpcy.; (2) the wife's separate appointment after the husband's death was a good exercise of the power, & the account of the rents prayed by the bill could not be extended beyond the date of that appointment.—HOLE *v.* ESCOTT (1838), 4 My. & Cr. 187; 8 L. J. Ch. 83; 2 Jur. 1059; 41 E. R. 74, L. C.

Annotations :—**Distd.** Lee *v.* Olding (1856), 25 L. J. Ch. 580; *Re* Jakeman's Trust (1883), 23 Ch. D. 344. **Consd.** *Re* Cooper, Cooper *v.* Slight (1884), 27 Ch. D. 565. **Refd.** Nottidge *v.* Green (1875), 33 L. T. 220; *Re* Bedingfeld & Herring's Contract, [1893] 2 Ch. 332. **Mentd.** De Serre *v.* Clarke (1874), 31 L. T. 161; Oliver *v.* Lowther (1880), 28 W. R. 381.

6402. —— To survivor of husband & wife—Appointment by bankrupt after death of wife.]—By a post-nuptial settlement, a fund was settled in trust for the husband for life, or until he should become an insolvent debtor, with remainder to the wife for life, remainder to their children or issue, as the survivor should appoint, & in default of such appointment, in trust for the children then living & the issue of deceased children then living. The husband's interest ceased by his insolvency, & his wife afterwards died :—*Held :* the interests of the children & their issue in default of appointment thereupon became vested, & could no longer be varied by the execution by the surviving husband of his power of appointment.—HASWELL *v.* HASWELL (1860), 2 De G. F. & J. 456; 30 L. J. Ch. 97; 3 L. T. 393; 6 Jur. N. S. 1222; 9 W. R. 129; 45 E. R. 698, L. C.

Sect. 8.—*Capacity to exercise powers & effect of bankruptcy on powers. Sect.* 9: *Sub-sect.* 1.]

Annotations :—**Distd.** Wickham *v.* Wing (1865), 2 Hem. & M. 436. **Consd.** *Re* Aylwin's Trusts (1873), L. R. 16 Eq. 585. **Folld.** *Re* Kelly's Settlmt., West *v.* Turner (1888), 59 L. T. 494. **Consd.** *Re* Master's Settlmt., Master *v.* Master, [1911] 1 Ch. 321. **Refd.** Bradley *v.* Bury (1864), 10 L. T. 868.

6403. —— To take effect on death or bankruptcy —Appointment after bankruptcy.]—By a will real estate was devised upon trust to pay annuities, & subject thereto to pay the residue of the rents to B. for life, & until his bkpcy. or insolvency, & after his decease or immediately after his bkpcy. or insolvency, then, subject to the annuities, to his children as he should by deed or will appoint, & in default to all the children equally. B. became insolvent, but subsequently by deed exercised the power :—*Held :* notwithstanding the insolvency, the appointment was valid.—WICKHAM *v.* WING (1865), 2 Hem. & M. 436 ; 6 New Rep. 21 ; 34 L. J. Ch. 425 ; 12 L. T. 300 ; 13 L. T. 37 ; 11 Jur. N. S. 424 ; 13 W. R. 650 , 71 E. R. 533.

Annotations :—**Consd.** *Re* Aylwin's Trusts (1873), L. R. 16 Eq. 585. **Refd.** *Re* Master's Settlmt., Master *v.* Master, [1911] 1 Ch. 321.

6404. —— —— Power not effected by insolvency.]—Testator gave his interest in leasehold property to trustees to pay half of the rents to his son H. for life, or until his bkpcy. or insolvency, & after his decease, or bkpcy., or insolvency to pay same for the benefit of all or any of his children as he should appoint, & in default of appointment to pay same for the benefit of all the children equally. H. carried on business at Adelaide for some years, & while residing there filed, in July, 1863, a declaration in insolvency. After obtaining his certificate in Dec., 1864, he returned to England. He had five children, one being born after the date of the insolvency. There was a gift for the benefit of another son, F., & his children in similar terms of the remaining half of the rents, & there was a proviso in the will, that if at the death of testator's wife F. or H., or the issue of either who should be dead, should become entitled in possession, to certain other estates, he or they should take no part of the rents of the leasehold property, but that the other son, or his issue, should take the whole of such rents. Testator's widow died in 1866, & thereupon F. became entitled to the other estates :—*Held :* (1) the power of appointment was unaffected by the insolvency, & it was subsisting ; & (2) on the death of the widow new trusts affecting the entirety of the rents arose, which, subject to H.'s power of appointment, were for the benefit of his five children.—*Re* AYLWIN'S TRUSTS (1873), L. R. 16 Eq. 585 ; 42 L. J. Ch. 745 ; 28 L. T. 865 ; 21 W. R. 864.

Annotations :—**Consd.** *Re* Bedson's Trusts (1884), 25 Ch. D. 458 ; *Re* Master's Settlmt., Master *v.* Master, [1911] 1 Ch. 321.

6405. —— —— No appointment by bankrupt.]—S. bequeathed residue to children in equal shares, & directed that a part of each son's share should be set apart on trust for the son until bkpcy., then for such of his children as he should appoint, & in default of appointment for such children as should attain twenty-five. One son became bkpt., without having exercised his power of appointment :—*Held :* the fund set apart vested in his trustee & not in his children by implication in default of appointment.

All testator's children had executed a settlement reciting that the trust in default of appointment was void, & declaring that the son's shares should be held on the trusts of the will :—*Held :* this was a valid resettlement by the sons on themselves until bkpcy., & their children at twenty-five.—*Re* SPRAGUE, MILEY *v.* CAPE (1880), 43 L. T. 236.

6406. —— Donee's right to release for own benefit—Whether exercisable by trustee.]—The capacity which the donee of a limited power of appointment has of releasing the power of appointment for his own benefit cannot, on his bkpcy., be exercised by his trustee for the benefit of his estate.—*Re* ROSE, ROSE *v.* ROSE, [1904] 2 Ch. 348 ; *sub nom. Re* ROSE, HASLUCK *v.* ROSE, 73 L. J. Ch. 726 ; 91 L. T. 254 ; 11 Mans. 347 ; on appeal *sub nom. Re* ROSE, HASLUCK *v.* ROSE, [1905] 1 Ch. 94. C. A.

6407. Power of revocation—Not in possession but expectant on contingency.]—*Qu. :* whether a power of revocation was an interest capable of passing to the assignees under a bkpcy., the power being not in possession, but expectant on a contingency.—ANON. (1772), Lofft, 71 ; 98 E. R. 538.

6408. Power to consent to advancement—Must be exercised with sanction of trustee—Under direction of court of bankruptcy.]—Testatrix, who died in 1884, gave a moiety of a trust fund to trustee, in trust to pay the income to J. during his life, & after his death in trust for W., an infant, empowering the trustees to raise any part not exceeding one-half of W.'s share for his advancement, subject to the consent in writing of J. during his life. The trustees were desirous of exercising the power, but J. had become a bkpt., & was still undischarged :—*Held :* J.'s power of consenting to the advancement was not extinguished by his bkpcy., but could not be exercised without the sanction of his trustee in bkpcy. acting under the direction of the Ct. of Bkpcy.

I must take it now as well settled that where the tenancy for life & ultimate reversion are vested in one & the same person, there being intervening interests or limitations, & there is a power of appointment given to that person which might defeat his own interest, then if he becomes bkpt., or assigns his property for the benefit of his creditors, that power is not extinguished, but he is not allowed to exercise it so as to defeat the interest of his trustee in bkpcy. or of his assignee. So that the power not being extinguished, if the trustee in bkpcy. or the assignee chooses to say, "I do not object to the exercise of your power," it may be exercised. If he does object, then he has the right to say, "You shall not exercise it." Of course the trustee in bkpcy. could not give his consent without the sanction of the Ct. of Bkpcy. (KAY, J.).—*Re* COOPER, COOPER *v.* SLIGHT (1884), 27 Ch. D. 565 ; 51 L. T. 113 ; 32 W. R. 1015.

Annotation :—**Refd.** *Re* Bedingfeld & Herring's Contract, [1893] 2 Ch. 332.

6409. Power to consent to sale or lease of settled land—Power vested in trustees of settlement—Assent of tenant for life—& assignees.]—A power of sale over a settled estate was given to trustees, at the request & by the direction of the tenant for life. The tenant for life became bkpt. :—*Held :* the power was not extinguished, & a perfect title could be made with the assent of the tenant for life & his assignees.—HOLDSWORTH *v.* GOOSE (1861), 29 Beav. 111 ; 30 L. J. Ch. 188 ; 4 L. T. 196 ; 7 Jur. N. S. 301 ; 9 W. R. 443 ; 54 E. R. 569.

Annotations :—**Apprvd.** Alexander *v.* Mills (1870), 6 Ch. App. 124, L. JJ. **Consd.** *Re* Cooper, Cooper *v.* Slight (1884), 27 Ch. D. 565 ; Hardaker *v.* Moorhouse (1884), 26 Ch. D. 417 ; *Re* Bedingfeld & Herring's Contract, [1893] 2 Ch. 332.

6410. —— —— —— & all persons interested.]—Power of sale of realty given to trustees with the

consent of the tenant for life :—*Held :* exercisable after his bkpcy., with the consent of the tenant for life & of all persons who had become interested in his estate.—EISDELL *v.* HAMMERSLEY (1862), 31 Beav. 255 ; 6 L. T. 706 ; 54 E. R. 1136.

Annotations :—**Apld.** Alexander *v.* Mills (1870), 6 Ch. App. 124, L. JJ. **Consd.** Hardaker *v.* Moorhouse (1884), 26 Ch. D. 417. **Refd.** *Re* Cooper, Cooper *v.* Slight (1884), 27 Ch. D. 565 ; *Re* Bedingfeld & Herring's Contract, [1893] 2 Ch. 332.

6411. —— —— —— & incumbrancers & trustee in bankruptcy.]—Trustees, having power of sale with the consent of the tenant for life, sold land. The tenant for life had created incumbrances on his life estate, & was bkpt. :—*Held :* the tenant for life could still give his consent, but the concurrence of the incumbrancers & of the trustee in bkpcy. were also necessary to enable the trustees to give a good title.—*Re* BEDINGFELD & HERRING'S CONTRACT, [1893] 2 Ch. 332 ; 62 L. J. Ch. 430 ; 41 W. R. 413 ; 9 T. L. R. 354 ; 37 Sol. Jo. 355 ; 3 R. 483 ; *sub nom. Re* BEDDINGFIELD, NORRIS, & HERRING'S CONTRACT & VENDOR & PURCHASER ACT, 1874, 68 L. T. 634.

6412. —— Power vested in bankrupt.]—Pltf. by a post-nuptial settlement conveyed freeholds, the legal estate in which were outstanding, to a trustee, upon trust to pay the rents, to pltf.'s wife during her life, & after her death to pltf. during his life, & after the death of the survivor for the benefit of their children. The settlement contained a power to pltf., & after his death to the wife, & after the death of the survivor to the trustee, to renew leases for lives, & take fines on renewals, but so that the usual rents were still reserved. Pltf. subsequently became bkpt. :—*Held :* the power of granting renewed leases was not extinguished or suspended by pltf.'s bkpcy.—SIMPSON *v.* BATHURST, SHEPHERD *v.* BATHURST, [1896] 5 Ch. App. 193 ; 23 L. T. 29 ; 18 W. R. 772, L. C.

Annotations :—**Refd.** *Re* Bedingfeld & Herring's Contract, [1893] 2 Ch. 332. **Mentd.** *Re* Cowin, Cowin *v.* Gravett (1886), 33 Ch. D. 179.

6413. —— Under Settled Land Acts—Not suspended by bankruptcy.]—Debtor was tenant for life, under a will, of a settled estate, which his trustee in bkpcy. desired to let on building leases, & he prayed that the power of leasing might be exercised by the trustees of the will :—*Held :* (1) whether the powers of the tenant for life under the settlement were suspended or not, his bkpcy. did not suspend his powers of leasing under Settled Land Act, 1882 (c. 38) ; (2) the petition should stand over for a scheme to be arranged by consent, with liberty to apply if the tenant for life contumaciously refused to exercise his powers.—*Re* MANSEL'S SETTLED ESTATES, [1884] W. N. 209.

6414. —— —— ——.]—An old family mansion-house & estate became vested, under a settlement, in a tenant for life, against whom bkpcy. proceedings were pending, & who had mortgaged his life estate to a money-lender, who had commenced a foreclosure action & taken possession by a receiver. The tenant for life entered into a contract, under Settled Land Acts, for the sale of the entire estate, including the mansion-house, to a purchaser, & applied, under Settled Land Act, 1890 (c. 69), s. 10, for the sanction of the ct. to the sale of the mansion-house & demesne lands : —*Held :* the sale of the mansion-house & demesne lands ought to be sanctioned.

Settled Land Act, 1882, gives tenants for life power to sell settled estates, however long they may have been in families. There are clauses in it, I refer specially to ss. 50 & 51, which prevent the tenant for life from doing anything to incapacitate himself from exercising those powers. He is not deprived of them by becoming a bkpt. ; he cannot release them ; he can do nothing to destroy them, either by agreement or otherwise. It cannot be said that, because [the tenant for life] is bkpt., or because he has parted with all his interest, & because he has no further interest in this estate, it must be inferred that he is unable to sell (LINDLEY, L.J.). — *Re* AILESBURY'S (MARQUIS) SETTLED ESTATES, [1892] 1 Ch. 506 ; 61 L. J. Ch. 116 ; 65 L. T. 830 ; 40 W. R. 243 ; 8 T. L. R. 157 ; 36 Sol. Jo. 123, C. A. ; *affd.* S. C. *sub nom.* BRUCE (LORD) *v.* AILESBURY (MARQUIS), [1892] A. C. 356, H. L.

Annotations :—**Mentd.** Mogridge *v.* Clapp, [1892] 3 Ch. 382, C. A. ; Sutherland *v.* Sutherland, [1893] 3 Ch. 169 ; Chandler *v.* Bradley, [1897] 1 Ch. 315 ; *Re* Hope, De Cetto *v.* Hope, [1899] 2 Ch. 679, C. A. ; *Re* Mundy & Roper's Contract, [1899] 1 Ch. 275, C. A. ; *Re* Marshall's Settlmt., Marshall *v.* Marshall (1905), 54 W. R. 75.

6415. Power to elect—Between methods of payment to donee—Partnership deed.]—A deed of partnership for life between two solrs. contained a covenant that on the death of either the survivor should, during the joint lives of himself & the widow of the deceased partner, pay to such person or persons as the deceased partner should appoint, an annuity of £200 *per annum*, or one-fourth of the annual profits of the survivor, as the survivor should elect, & also provided for the admission on certain conditions of a son of the deceased partner into the "said" partnership business. One of the partners, by an ante-nuptial settlement made shortly after the execution of the partnership deed, exercised the power of appointment in favour of his wife, & several years afterwards died greatly indebted to the firm. The survivor continued to practise as a solr. for some years, & realised profits by his business, if estimated without regard to the former business, but they were insufficient to make good the outstanding liabilities of the late partnership, & he became bkpt. without having made any payment to the widow of the deceased partner or electing between the two modes of payment mentioned in the articles :—*Held :* (1) the assignees were entitled to make the election ; (2) on their electing not to pay the annuity of £200, the widow had no provable demand, the business carried on by the survivor being, according to the true construction of the deed, a continuation of the partnership business, & the payments made on account of the partnership being properly set off against the profits of the sole business.—*Re* JONES, *Ex p.* HARPER (1857), 1 De G. & J. 180 ; 26 L. J. Bcy. 74 ; 29 L. T. O. S. 168 ; 3 Jur. N. S. 724 ; 5 W. R. 537 ; 44 E. R. 692, L. JJ.

See, further, Nos. 1632, 1633, *ante*.

SECT. 9.—PROPERTY IN REPUTED OWNERSHIP OF BANKRUPT.

See, now, 1914 Act, s. 38 (*c*).

SUB-SECT. 1. "GOODS," "GOODS AND CHATTELS," "THINGS IN ACTION."

See 1914 Act, s. 167.

6416. "Goods," "goods & chattels"—Goods of third party.]—The enacting part of 21 Jac. 1, c. 19, s. 11, extends to goods of a third person, which he permits a trader, who afterwards becomes bkpt., to be in the possession of, & to sell as his own.—MACE *v.* CADELL (1774), 1 Cowp. 232 ; Lofft, 782 ; 98 E. R. 1060.

Sect. 9.—Property in reputed ownership of bankrupt: Sub-sect. 1.]

Annotations :—**Folld.** Horn *v.* Baker (1808), 9 East, 215. **Apprvd.** Batthews *v.* Galindo (1828), 4 Bing. 610. **Apld.** Edwards *v.* Farebrother (1828), 3 C. & P. 524, N. P. **Refd.** Langford *v.* Foot (1832), 2 Moo. & S. 349 ; Whitfield *v.* Brand (1847), 16 M. & W. 282 ; *Re* Gawan, *Ex p.* Barclay (1855), 5 De G. M. & G. 403, L. C. & L. JJ. **Mentd.** Cox *v.* Liotard (1784), 1 Doug. K. B. 166, n. ; R. *v.* Pierce (1814), 3 M. & S. 62 ; Cooke *v.* Hemming (1868), L. R. 3 C. P. 334.

6417. —— Personal estate.]—6 Geo. 4, c. 16, s. 72, only applies to personal estate.—*Re* BAKEWELL, *Ex p.* BUTLER (1842), 2 Mont. D. & De G. 731 ; 11 L. J. Bcy. 51 ; 6 Jur. 957, Ct. of R.

Annotations :—**Refd.** Morgan *v.* Knight (1864), 15 C. B. N. S. 669 ; Engelback *v.* Nixon (1875), L. R. 10 C. P. 645.

6418. —— Real property.]—The rule that possession is the criterion of title to a chattel, has been adopted in 21 Jac. 1, c. 19, s. 11 ; so that, if the owner has permitted bkpt. to be the visible proprietor, the property is devested, for no one can distinguish the property except by the possession. But that is not so as to land, for no person in his senses would take an offer of a purchase from a man, merely because he stood upon the ground. It is not even *primâ facie* evidence. He may be tenant by sufferance, or a trespasser. A purchaser must look to his title, &, if, being asked for the deeds, he acknowledges he has not got them, the purchaser is bound to further inquiry (LORD ERSKINE, C.).—HIERN *v.* MILL (1806), 13 Ves. 114 ; 33 E. R. 237, L. C.

Annotations :—**Apld.** Dryden *v.* Frost (1838), 3 My. & Cr. 670, L. C. **Refd.** Robinson *v.* Carrington (1833), 1 Mont. & A. 1 ; Jones *v.* Jones (1837), 8 Sim. 633 ; Hewitt *v.* Loosemore (1851), 9 Hare, 449. **Mentd.** Kennedy *v.* Green (1834), 3 My. & K. 699, L. C. ; Cockerell *v.* Dickens (1840), 1 Mont. D. & De G. 45, P. C. ; Jones *v.* Smith (1841), 1 Hare, 43 ; Fuller *v.* Benett (1843), 2 Hare, 394 ; West *v.* Reid (1843), 2 Hare, 249 ; Lang *v.* Purves (1862), 15 Moo. P. C. C. 389 ; Dresser *v.* Norwood (1863), 32 L. J. C. P. 201.

6419. —— ——.]—Bkpts. deposited with R.'s account as security for a loan of money a deed of conveyance to them of a plantation & slaves in Antigua with a written memorandum accompanying the deposit. The deed contained a schedule of the registered names & description of the slaves, but they were wholly omitted in the memorandum of the deposit :—*Held :* the slaves being real property in the island of Antigua, could not be considered as within the order & disposition of bkpts. at the time of their bkpcy.—*Re* RUCKER, *Ex p.* RUCKER (1834), 3 Deac. & Ch. 704 ; 3 L. J. Bcy. 104, Ct. of R.

6420. —— Not deteriorated by removal.]—The right of assignees in bkpcy. to such chattels as are in the order & disposition of bkpt. at the time of the bkpcy. only extends to chattels personal, such as pass by transfer & delivery, & the value of which are not deteriorated by removal.—*Re* WALSH, *Ex p.* KING (1840), 1 Mont. D. & De G. 119 ; 4 Jur. 510, Ct. of R.

6421. —— Debts.]—R. contracted to supply meat to a lunatic asylum, but, being unable to carry out the contract, assigned it to H., who delivered his own meat, but in R.'s name, the governing body of the asylum having no notice of the assignment, & not being aware that the contract was not being performed by R. The contract having been put an end to by notice from the committee of visitors of the asylum, & R. having become bkpt., the assignee under the bkpcy. claimed the sum then due for meat supplied as being "goods & chattels" in the possession, order, or disposition of R., at the time of his bkpcy., as reputed owner, with the consent & permission of H., the true owner, within 1849 Act, s. 125 :—*Held :* the debt in question was within the above sect., & passed to the assignee.—COOKE *v.* HEMMING (1868), L. R. 3 C. P. 334 ; 37 L. J. C. P. 179 ; 18 L. T. 772 ; 16 W. R. 903.

Annotation :—**Refd.** Semphill *v.* Queensland Sheep Investment Co. (1873), 29 L. T. 737.

6422. —— —— Mortgage debt.]—*Held :* debts in general were within 21 Jac. 1, c. 19, s. 11, but mtges. of real estate, whether real or by assignment, & though also secured by bond or covenant, were not.—JONES *v.* GIBBONS (1804), 9 Ves. 407 ; 32 E. R. 659.

Annotations :—**Refd.** *Re* Frazer, *Ex p.* Monro (1818), Buck, 300 ; *Re* Reay, *Ex p.* Barnett (1845), De G. 194, Ct. of R. **Mentd.** Cooper *v.* Fynmore (1814), 3 Russ. 60 ; *Re* Severn, *Ex p.* Tennyson (1832), Mont. & B. 67, L. C. ; *Re* Rucker, *Ex p.* Rucker (1834), 3 L. J. Bcy. 104, Ct. of R. ; Gardner *v.* Lachlan (1838), 4 My. & Cr. 129, L. C. ; Cooke *v.* Hemming (1868), L. R. 3 C. P. 334 ; *Re* Southampton's Estate, Allen *v.* Southampton, Banfather's Claim (1880), 16 Ch. D. 178 ; *Re* Richards, Humber *v.* Richards (1890), 45 Ch. D. 589 ; Dixon *v.* Winch (1900), 82 L. T. 437, C. A. ; Taylor *v.* London & County Banking Co., London & County Banking Co. *v.* Nixon, [1901] 2 Ch. 231, C. A.

6423. —— —— ——.]—W. assigned to B. by way of mtge. B. deposited the security with C., but no notice of such deposit was given to W. On the bkpcy. of B. :—*Held :* the mtge. debt was not "goods & chattels" within 1849 Act, s. 125, & in the circumstances it was not in the order & disposition of bkpt. at the time of the bkpcy.—*Re* BULLER, *Ex p.* WORNALD (1860), 2 L. T. 544.

6424. —— Trade fixtures—In general—Fixtures in shop.]—Articles were annexed by a shopkeeper to the premises of which he was a tenant for the purposes of the business, without any intention, except so far as might be inferred from the degree of annexation, of permanently making them part of the freehold. These articles he assigned to a moneylender by a bill of sale. In considering whether the articles were "goods" in the possession, order, or disposition of the shopkeeper in his trade or business within 1883 Act, s. 44 :—*Held :* the mere fact of annexation of the articles to the freehold, for the more efficient use of the articles as chattels, was not of itself sufficient to convert them into realty, & those articles remained "goods" within s. 44, but where the articles by their nature & by the degree of fixing were so annexed to the freehold as to lead to the inference that they were affixed for the better enjoyment of the freehold during the occupancy of the shopkeeper, they were not "goods" within the sect., although probably severable under the term.—HORWICH *v.* SYMOND (1915), 84 L. J. K. B. 1083 ; 112 L. T. 1011 ; 31 T. L. R. 212 ; [1915] H. B. R. 107, C. A.

6425. —— —— Distilling apparatus belonging to landlord.]—Stills, the property of the landlord, fixed to leasehold premises of bkpt. firm, do not pass to their assignees under the words "goods & chattels" in 21 Jac. 1, c. 19, s. 11.—HORN *v.* BAKER (1808), 9 East, 215 ; 103 E. R. 555.

Annotations :—**Consd.** Storer *v.* Hunter (1824), 3 B. & C. 368. **Folld.** Hubbard *v.* Bagshaw (1831), 4 Sim. 326 ; Clark *v.* Crownshaw (1832), 3 B. & Ad. 804 ; Coombs *v.* Beaumont (1833), 5 B. & Ad. 72. **Expld.** Hare *v.* Horton (1833), 2 Nev. & M. K. B. 428. **Distd.** Trappes *v.* Harter (1833), 2 Cr. & M. 153. **Folld.** Baydell *v.* M'Michael (1834), 1 Cr. M. & R. 177. **Apld.** *Re* Ogden & Walmsley, *Ex p.* Loyd (1834), 3 Deac. & Ch. 765, Ct. of R. **Distd.** CARROLL *v.* MURPHY (1871), I. R. 6 C. L. 114.—**IR.**

PART XX. SECT. 9, SUB-SECT. 1.

6421 i. *"Goods," "goods & chattels" —Debts.*]—The words "goods & chattels" in Irish 1857 Act, s. 325, do not include debts due to insolvent.—

6421 ii. —— —— *Debt due in course of trade or business.*]—A chose in action, if it is a debt due to insolvent in his trade or business, comes within the words "goods & chattels" as contained in Indian Insolvent Debtors Act, s. 23.—PUNINTHAVELU MUDALIAR *v.* BHASHYAM AYYANGAR (1901), I. L. R. 24 Mad. 406.—**IND.**

Whitfield *v.* Brand (1847), 16 M. & W. 282. **Folld.** *Re* Gawan, *Ex p.* Barclay (1855), 5 De G. M. & G. 403, L. C. & L. JJ. **Consd.** Whitmore *v.* Empson (1857), 23 Beav. 313. **Refd.** Thackthwaite *v.* Cock (1811), 3 Taunt. 487; Steward *v.* Lombe (1820), 1 Brod. & Bing. 506; *Re* Walsh, *Ex p.* King (1840), 4 Jur. 510, Ct. of R.; Horwich *v.* Symond (1914), 110 L. T. 1016. **Mentd.** Holroyd *v.* Gwynne (1809), 2 Taunt. 176; Gibson *v.* Bray (1817), 8 Taunt. 76; Lucas *v.* Dorrien (1817), 7 Taunt. 278; Oliver *v.* Bartlett (1819), 1 Brod. & Bing. 269; Monkhouse *v.* Hay (1820), 4 Moore, C. P. 549, Ex. Ch.; Watson *v.* Peache (1834), 4 L. J. C. P. 49; *Re* Stokes, *Ex p.* Pemberton, *Re* Stokes, *Ex p.* Hancox (1835), 1 Deac. 421, Ct. of R.

6426. —— —— Movable implements.]—L. took a lease of a mill & iron-forge, & bought the fixed & movable implements, etc., but it was agreed that they should be delivered up at the end or other determination of the term, at a valuation, if the lessors should give fifteen months' notice of their desire to have them. L. afterwards conveyed all his interest in the premises, implements, etc., to a creditor, in trust, if default should be made by L. in paying certain instalments, to enter upon & sell same, & satisfy himself out of the proceeds, reassigning the residue, & if the lessors should require a resale of the implements, etc., the proceeds of such resale were to go in discharge of the debt, if unsatisfied. L. made default, & subsequently became bkpt., after which, & during the term, the creditor, who had not before interfered, entered upon the property:—*Held:* L. had at the time of his bkpcy. the reputed ownership of the movable goods, but not of the fixtures.—CLARK *v.* CROWNSHAW (1832), 3 B. & Ad. 804; 110 E. R. 295.

Annotations:—**Expld.** Trappes *v.* Harter (1833), 2 Cr. & M. 153; *Re* Ogden & Walmsley, *Ex p.* Loyd (1834), 3 Deac. & Ch. 765, Ct. of R. **Distd.** *Re* Butterworth, *Ex p.* Wilson (1835), 2 Mont. & A. 61, Ct. of R. **Consd.** Spackman *v.* Miller (1862), 12 C. B. N. S. 659. **Expld.** Ashton *v.* Blackshaw (1870), L. R. 9 Eq. 510. **Refd.** *Re* Gawan, *Ex p.* Barclay (1855), 5 De G. M. & G. 403, L. C. & L. JJ.

6427. —— —— Steam engine.]—A steam engine erected for the purpose of working a colliery, to be used by the lessee of such colliery during his term, but to be held as the property of the landlord, subject to such use, will not pass to the assignees of the tenant on his bkpcy., for it does not come within the description of "goods & chattels" in 6 Geo. 4, c. 16, s. 72.—COOMBS *v.* BEAUMONT (1833), 5 B. & Ad. 72; 2 Nev. & M. K. B. 235; 2 L. J. K. B. 190; 110 E. R. 718.

Annotations:—**Consd.** *Re* Ogden & Walmsley, *Ex p.* Loyd (1834), 3 Deac. & Ch. 765, Ct. of R. **Apprvd.** Minshall *v.* Lloyd (1837), 2 M. & W. 450. **Refd.** *Re* Butterworth, *Ex p.* Wilson (1835), 2 Mont. & A. 61, Ct. of R.; *Re* Maberly, *Ex p.* Belcher (1835), 2 Mont. & A. 160, Ct. of R.; *Re* Gawan, *Ex p.* Barclay (1855), 5 De G. M. & G. 403, L. C. & L. JJ.; Wilde *v.* Waters (1855), 24 L. J. C. P. 193; Horwich *v.* Symond (1914), 110 L. T. 1016.

6428. —— —— ——.]—The tenant in fee of a cotton mill, in which there was a steam engine, boilers, etc., mortgaged the mill, engine, boilers, etc., but remained in possession until his bkpcy. The entablature plate of the engine, which however formed no part of the working apparatus, was fixed to the freehold of the mill, every other part of the engine was secured by bolts & screws, & might be removed without injury to the building:—*Held:* the steam-engine was not in the order & disposition of bkpt.—HUBBARD *v.* BAGSHAW (1831), 4 Sim. 326; 9 L. J. O. S. Ch. 190; 58 E. R. 122.

Annotations:—**Refd.** *Re* Ogden & Walmsley, *Ex p.* Loyd (1834), 3 Deac. & Ch. 765, Ct. of R.; *Re* Maberly, *Ex p.* Belcher (1835), 4 Deac. & Ch. 703, Ct. of R.; *Re* Gawan, *Ex p.* Barclay (1855), 5 De G. M. & G. 403, L. C. & L. JJ.

6429. —— —— Steam engine & machinery firmly fixed.]—A., a partner with B., deposited with their bankers the deeds of a cotton mill of A.'s, as security for advances for the firm, & in the memorandum of deposit it was stated that the buildings were insured for £2,000 & the machinery, etc., for £2,000 more, a steam engine & other machinery having been previous to the deposit erected by A. & B. for purposes of trade. A. & B. continued in possession of the premises with the machinery until their bkpcy.:—*Held:* the steam engine & machinery, though removable by the tenant as trade fixtures, yet being firmly attached to the walls & being such as were frequently put up by owners of cotton mills & let to tenants, were not in the reputed ownership of bkpts. within 6 Geo. 4, c. 16, s. 72.—*Re* OGDEN & WALMSLEY, *Ex p.* LOYD (1834), 3 Deac. & Ch. 765; 1 Mont. & A. 494; 3 L. J. Bcy. 108, Ct. of R.

Annotations:—**Refd.** *Re* Maberly, *Ex p.* Belcher (1835), 4 Deac. & Ch. 703, Ct. of R.; *Re* M'Neill, *Ex p.* Broadwood (1841), 1 Mont. D. & De G. 631, Ct. of R.

6430. —— —— Articles within Hellawell v. Eastwood.]—Assignees are entitled to all such fixtures set up for the purposes of trade as come within the principle of *Hellawell* v. *Eastwood* ((1851), 6 Exch. 295) & which the trader might remove.—*Re* GIBBS, *Ex p.* HUMPHREY (1853), 1 Bankr. & Ins. R. 68.

See, further, DISTRESS; LANDLORD & TENANT.

6431. —— —— Plant & fixtures of movable nature.]—Mtge. for a term of years of a brewery, tap, malt lofts, & premises together with plant, fixtures, & machinery, & assignment to mtgee. of plant, goods, utensils, implements, & things on or about the premises, the mtgor. to retain possession of the premises, etc., until default. The mtgor. remained in possession of the premises, etc., until his bkpcy.:—*Held:* plant & fixtures of a movable nature passed to the assignees.—*Re* CLARKSON, *Ex p.* LANGTON (1854), 1 Bankr. & Ins. R. 241.

6432. —— —— & ordinary house fixtures—Public-house.]—A., a publican, being indebted to C., deposited with him the lease of a public house & other houses accompanied by a memorandum expressly constituting C. equitable mtgee. of the leasehold premises & of the fixtures to the premises belonging. A. remained in possession of the premises & became bkpt.:—*Held:* (1) the fixtures, consisting of ordinary house fixtures & trade fixtures, were not in the order & disposition of bkpt. within 1849 Act, s. 125; (2) by the word "fixtures," was meant such things as were

6429 i. —— *Trade fixtures—Steam engine, shafting, & gearing.*]—M., tenant for lives renewable for ever of a flax-mill, erected in connection with it a steam-engine, boiler, shafting, & gearing. The boiler could not have been removed without substantial injury to the structure & the boiler-house. The steam-engine was attached to the boiler by screws & nuts, & was attached to the engine-house by various supports, all of which were capable of being removed without material injury to the structure of the engine-house or to the engine. The shafting & gearing could also have been so removed. The engine-house was constructed to contain a steam-engine, & was not suited for any other purpose. The steam-engine, shafting, & gearing were all fixtures, removable as between landlord & tenant. M. mortgaged the flax-mill, together with the steam-engine, boiler, shafting, & gearing, & other machinery. After the mtge., M. remained in possession of the flax-mill & machinery, & while in possession became bkpt.:—*Held:* the steam-engine, shafting, & gearing were not chattels in the order & disposition of bkpt.—*Re* M'KIBBIN, *Ex p.* MONTGOMERY & BRISTOW, (1855), 4 I. Ch. R. 520; 7 Ir. Jur. 342.—**IR.**

6429 ii. —— *Water wheel, beetling engines, shafting, & gearing.*]—A water-wheel, which, without injury to the freehold, can be removed by taking off the caps & boxes, is nevertheless a fixture not within the order & disposition clause; as are also the shafting & gearing moved by & connected with it, though they could be removed without injuring the freehold.

Beetling engines standing upon stones raised above the floor, attached to one another, made steady by their own weight, attached to the joists above by stays, & moved by the driving shaft of the outside wheel, are fixtures which go to bkpt.'s mtgee.—*Re* DILL (1862), 14 Ir. Jur. 123.—**IR.**

Sect. 9.—*Property in reputed ownership of bankrupt: Sub-sect.* 1.]

ordinarily affixed to the freehold for the convenience of the occupier & which might be removed without material injury to the freehold, & the removal of which by a tenant would not give a ground of action to the landlord.—*Re* GAWAN, *Ex p.* BARCLAY (1855), 5 De G. M. & G. 403; 25 L. J. Bcy. 1; 26 L. T. O. S. 97; 19 J. P. 804; 1 Jur. N. S. 1145; 43 E. R. 926; *sub nom.* GAWAN *v.* BARCLAY, *Ex p.* BARCLAY, 4 W. R. 80, L. C. & L. JJ.

Annotations:—**Consd.** Mather *v.* Fraser (1856), 2 K. & J. 536; Whitmore *v.* Empson (1857), 23 Beav. 313. **Apld.** Boyd *v.* Shorrock (1867), 5 L. R. Eq. 72. **Refd.** Begbie *v.* Fenwick, Fenwick *v.* Begbie (1871), 8 Ch. App. 1075, n.; Gough *v.* Wood, [1894] 1 Q. B. 713, C. A.; Reynolds *v.* Ashby, [1904] A. C. 466, H. L.

6433. —— —— Machinery & fixtures.]—Bkpt. held the lease of a paper mill, with the use of certain machinery & fixtures, which were to be delivered up to the lessor at the end of the term, subject to a proviso, that an allowance was to be made to or by bkpt., according to their improved or diminished value, & there was a proviso to restrain him from assigning without the licence of the lessor. Bkpt., after making some additions to the fixtures, assigned them, but not the mill, to petitioners, by way of mtge. for securing a sum of money, & the assignees under the fiat sold bkpt.'s interest in the mill & the fixtures for the remainder of the term:—*Held:* the assignees were bound to account to the mtgees. for the value of bkpt.'s interest in the fixtures.—*Re* ALLNUTT, *Ex p.* SPICER (1837), 3 Mont. & A. 213; 2 Deac. 335; *sub nom. Re* ALNUTT, *Ex p.* SPICER, 1 Jur. 266, Ct. of R.

6434. —— —— Movable & fixed machinery.]—Traders mortgaged a leasehold factory to A., & they afterwards mortgaged the machinery in it, separately, to B. Upon the bkpcy. of the traders, who had been allowed to retain possession of the machinery:—*Held:* the movable machinery passed to the assignees, as being within the order & disposition of bkpts., but the machinery fixed to the freehold did not, though mortgaged separately.—WHITMORE *v.* EMPSON (1857), 23 Beav. 313; 26 L. J. Ch. 364; 28 L. T. O. S. 300; 3 Jur. N. S. 230; 5 W. R. 217; 53 E. R. 123.

Annotation:—**Mentd.** *Re* Baldwin, *Ex p.* Foss, *Ex p.* Baldwin (1858), 30 L. T. O. S. 354.

6435. —— —— Machinery easily removable without damage to itself or property.]—In Jan., 1797, several persons carried on business in partnership as calico printers, & in the same month certain premises on which their works were principally carried on were conveyed to one of the partners in fee. The conveyance mentioned the premises to consist, besides land, of dwelling houses, machine-house, & other buildings & erections, & stated them to be in the possession of the partner to whom they were conveyed & another partner. Various buildings & machines were afterwards from time to time erected on the premises by the firm, for the purpose of extending the works. The whole was firmly fixed to the freehold, & stood on that part of the land which was conveyed to one of the partners in 1797, but the part in question could be removed without material injury to the buildings. In the different stock-takings of the firm, the land & buildings were always valued & classed separately from the machinery & fixtures. In the part of the country, where the premises were situated, machinery of that description was constantly bought & sold distinctly from the freehold. The freehold in the premises having been subsequently conveyed to two of the partners, they, in 1828, mortgaged them to pltf.'s wife, under the description of all the messuages, dwelling-houses, lands, & buildings therein mentioned, "& also, all that & those the steam-engine, mill-gearing, heavy gear to millwright work, fixed machinery, & other matters & things, etc., then standing & being in & upon the thereby demised buildings, works, & premises, which in any manner constituted fixtures & appendages to the freehold of the same or any part thereof." All the machinery, fixtures, etc., appeared to have been in the reputed ownership of the partners who carried on the works until 1831, when they became bkpt., & defts. were appointed their assignees. Pltf., who was the husband of the mtgee., had inspected statements of the affairs of the partners, which treated the machinery as not included in the mtge., & had made no objections to such statements. In Apr., 1831, the assignees sold all the machinery & fixtures, with the exception of two steam-engines, two water-wheels, an iron flooring, & other small articles, & the greater part of them were removed by the purchasers. The articles claimed by the mtgee. were all firmly fixed to the freehold, but in such a manner that they might easily be removed without material injury to themselves or to the buildings:—*Held:* the machinery did not belong to the inheritance, but was part of the personal estate of bkpts., & it passed to the assignees.—TRAPPES *v.* HARTER (1833), 2 Cr. & M. 153; 3 Tyr. 602; 3 L. J. Ex. 24; 149 E. R. 712.

Annotations:—**Consd.** *Re* Ogden, *Ex p.* Lloyd (1834), 1 Mont. & A. 494, Ct. of R.; *Re* Walsh, *Ex p.* King (1840), 4 Jur. 510. **Distd.** *Re* Stead, *Ex p.* Price & Backhouse (1842), 2 Mont. D. & De G. 518, Ct. of R. **Consd.** *Re* Gawan, *Ex p.* Barclay (1855), 5 De G. M. & G. 403, L. C. & L. JJ.; Whitmore *v.* Empson (1857), 23 Beav. 313. **Distd.** Walmsley *v.* Milne (1859), 7 C. B. N. S. 115. **Consd.** Cullwick *v.* Swindell (1866), L. R. 3 Eq. 249. **Expld.** Reynolds *v.* Ashby, [1904] A. C. 466, H. L. **Refd.** Boydell *v.* M'Michael (1834), 1 Cr. M. & R. 177; *Re* Butterworth, *Ex p.* Wilson (1835), 4 Deac. & Ch. 143, Ct. of R.; *Re* West, *Ex p.* Bentley, Harris & Dixon (1842), 2 Mont. D. & De G. 591, Ct. of R. **Mentd.** Minshall *v.* Lloyd (1837), 2 M. & W. 450; Hellawell *v.* Eastwood (1851), 6 Exch. 295; Wilde *v.* Waters (1855), 24 L. J. C. P. 193; Mather *v.* Fraser (1856), 2 K. & J. 536.

6436. —— —— Machinery not removable without damage.]—The owner in fee of a mill entered into a partnership, & out of the partnership funds erected new machinery, which could not be removed without damage. The owner mortgaged the mill & machinery to secure a partnership debt. The partnership became bkpt.,

6433 i. —— —— *Machinery & fixtures.*]—On June 23, 1893, A., the owner of a flour mill, mortgaged all the machinery engines, plant, stock, implements, utensils, trade fixtures, chattels & effects specified in sched. annexed to the deed of mtge., to pltf., & power was given to pltf. to sell same in default of payment. In Mar., 1899, A. became insolvent, & his estate thereupon vested in the official assignee. The greater portion of the mortgaged property consisted of articles fixed to various parts of the flour mill or of the machinery therein:—*Held:* (1) as to the articles not so fixed, they passed to the official assignee; (2) as to the fixed articles, they were not goods & chattels in the possession, order or disposition of insolvent as the reputed owner, & they were not in his reputed ownership.

Fixtures are not goods & chattels within the rules of reputed ownership laid down in Indian Insolvency Act (11 & 12 Vict. c. 21), s. 23, & the fact of such fixtures being removable by a tenant makes no difference.—MACLEOD *v.* KIKABHOY KHUSHAL (1901), I. L. R. 25 Bom. 659.—**IND.**

6435 i. —— —— *Movable Machinery.*]—A trader executed to one of his creditors a mtge. of the trade premises, with the buildings & machinery thereon. The trader was adjudicated bkpt. two months after the execution of the deed. The most valuable portion of the trader's property consisted of movable machinery in the mortgaged premises. The mtge. was not registered as a bill of sale:—*Held:* machinery not annexed to the freehold was not intended to pass.—*Re* GASS (1868), 2 I. R. Eq. 284.—**IR.**

& their assignees sold the machinery :—*Held :* the machinery was not in the order & disposition of bkpts.—*Re* ASHTON, *Ex p.* SCARTH (1840), 1 Mont. D. & De G. 240 ; 9 L. J. Bcy. 35 ; 4 Jur. 826, Ct. of R.

6437. —— —— Printing-presses.]—Printing-presses comprised in a mtge.-deed of leasehold premises under the terms "engines, machinery, chattels, & effects," but left in the possession & use of bkpt. at the time of his bkpcy., pass to the assignees as being in the "use, order, or disposition" of bkpt. at the time of his bkpcy. as movable chattels only, & they are not fixtures, notwithstanding the presses are fixed to the floor of the building by bolts & screws, & fastened by screws to posts let into the wall.—*Re* BEVAN, *Ex p.* LAW REVERSIONARY INTEREST SOCIETY TRUSTEES (1858), 30 L. T. O. S. 327.

6438. —— —— Mills with shafting sockets bolted to beams & rafters.]—Machinery consisting of mills, the shafts of which worked in sockets fixed to a timber frame strongly bolted to the beams & rafters of the freehold :—*Held :* not "goods & chattels" within 1849 Act, s. 125.—*Re* WALKER, *Ex p.* ACTON (1861), 4 L. T. 261.

6439. —— —— Main shafting, gearing, piping, etc.]—Trade fixtures, *e.g.*, main shafting, gearing, piping, etc., attached by a freeholder, who is mtgor. in possession, are not in his reputed ownership.—*Re* BUTTERWORTH, *Ex p.* WILSON (1835), 4 Deac. & Ch. 143 ; 2 Mont. & A. 61 ; 4 L. J. Bcy. 24, Ct. of R.

Annotation :—**Mentd.** *Re* Maberly, *Ex p.* Belcher (1835), 4 Deac. & Ch. 703, Ct. of R.

6440. —— —— Machinery erected to improve inheritance.]—A. mortgaged a piece of ground ; afterwards, still continuing in possession, he erected buildings, in which he put a steam engine, hay cutter, corn-crusher, malt mill, & mill stones, etc., all, except the stones, affixed to the freehold, but in such a way as to be removable at pleasure, without injury to the buildings or to themselves. A. became bkpt. :—*Held :* although the artieles were removable, & were put up with a view to the better carrying on of A.'s trade, yet, being put up with the object of permanently improving the inheritance, they were fixtures, & did not pass to the assignees of A.—WALMSLEY *v.* MILNE (1859), 7 C. B. N. S. 115 ; 29 L. J. C. P. 97 ; 1 L. T. 62 ; 6 Jur. N. S. 125 ; 8 W. R. 138 ; 141 E. R. 759.

Annotations :—**Consd.** Holland *v.* Hodgson (1872), L. R. 7 C. P. 328, Ex. Ch. ; Tottenham *v.* Swansea Zinc Ore Co. (1885), 52 L. T. 738. **Refd.** Cullwick *v.* Swindell (1866), L. R. 3 Eq. 249 ; R. *v.* Lee (1866), L. R. 1 Q. B. 241 ; Climie *v.* Wood (1869), L. R. 4 Exch. 328, Ex. Ch. ; Longbottom *v.* Berry (1869), L. R. 5 Q. B. 123 ; Tyne Boiler Works Co. *v.* Longbenton Overseers & Tynemouth Union (1886), Ryde, Rat. App. 1886–1890, 241 ; Gough *v.* Wood, [1894] 1 Q. B. 713, C. A. ; Hobson *v.* Gorringe, [1897] 1 Ch. 182, C. A. ; Reynolds *v.* Ashby, [1904] A. C. 466, H. L.

6441. —— —— Signboard of inn.]—At the Royal Oak Inn, Bettws-y-Coed, there was, in 1847, a signboard affixed to the wall of the house by staples. The inn was then held by E. as tenant from year to year. In 1866, owing to alterations in the house, the signboard, on which a picture of an oak tree with horsemen riding underneath had been painted by David Cox in 1847, was taken down & placed, first in a sitting-room & afterwards, being framed & glazed, in the hall of the inn, where it was affixed to the wall. In 1861 E. died, & was succeeded in the tenancy of the house by his son, R., who took a lease of the house from Lord W. for twenty-one years, containing a covenant to surrender the house & fixtures at the end of the term. In 1863 R. died, having devised all his property to his wife, who subsequently married X. In Aug., 1871, X. surrendered the lease to Lady W., who on the same day granted him a lease for fifty-eight years, containing a like covenant to surrender. X. died in 1876, & his widow thereupon conveyed all her interest in the inn, expressly reserving the signboard, to M., who, by arrangement, retained the signboard at the inn for two years. At the end of the two years Mrs. X. sent for the signboard, but Lady W.'s agents forbade its removal, & it remained in the hall of the inn till the filing of a petition for liquidation by M. :—*Held :* the signboard was not a chattel of which reputed ownership could be predicated, &, as against M. & her trustee in liquidation, Lady W. had a clear right of preventing the removal of the fixture.—*Re* THOMAS, *Ex p.* WILLOUGHBY D'ERESBY (BARONESS) (1881), 44 L. T. 781 ; 29 W. R. 527, C. A.

6442. —— —— Distinguished from house fixtures.]—As to trade fixtures, the assignees are entitled to such as the exor. could claim against the heir, or the tenant remove as against his landlord, having regard to the quality of the estate ; as to house fixtures, it is too much to say that whatever comes within the most comprehensive meaning of the word fixture forms part of the realty, but only such as by their removal would do injury & waste to the premises. In ordinary cases, house fixtures, as that term is commonly understood, are for the most part looked upon as a part of the house to which they are attached, & do not raise any credit from the possession thereof, but in the case of trade utensils & fixtures, it is otherwise, & the fact of the possession by the trader raises the presumption of property, & induces credit. In the former, instance, the possession may well remain in bkpt., without affecting the title of the mtgee., it not being within the mischief of 6 Geo. 4, c. 16, s. 72 (SIR J. ROSE).—*Re* WALSH, *Ex p.* KING (1840), 1 Mont. D. & De G. 119 ; 4 Jur. 510, Ct. of R.

6443. —— —— Fixtures purchased with copyhold.]—Bkpts. had purchased copyhold property with fixtures erected thereon, which were in law removable between landlord & tenant, as well as on the principle of the benefit of trade. They mortgaged the property, together with the fixtures, describing the property in the words of the purchase deed. After the mtge., they erected other fixtures of like nature, & continued in possession till their bkpcy. :—*Held :* all the fixtures were

a. —— —— *Railway or tramway.*]—A mtge. of freehold or leasehold property with fixtures thereon, although they are trade fixtures removable by the tenant, will pass the property with fixtures to the mtgee., & take such property out of the order & disposition clause, & gives such mtgee. a title to retain, as against assignees in bkpcy., fixtures not removable without injury to the freehold, although as between the landlord & tenant they might be removable during the tenancy. A tramway or railway is a fixture that is not removable.—THE PATENT PEAT CO., LTD. (1867), 17 L. T. 69.—IR.

b. —— —— *Seizable under fi. fa.*]—Where trade fixtures are seizable under a *fi. fa.* they will pass to the assignee under the reputed ownership clause in case of bkpcy.

Where there is a permanent annexation of machinery to the freehold, it will not be regarded as goods & chattels that will pass under the reputed ownership clause, but movable fixtures, that are chargeable with the condition of chattels by the severance of a tenant, will be held to be chattels for the benefit of his creditors generally, as well as for the benefit of a particular creditor who might seize under a *fi. fa.*

Fixtures that are totally unannexed to the freehold & are made steady by their own weight, but are worked by movable belts put on to communicate motive power, will pass to the assignees as goods & chattels, & where machinery is attached to the freehold for the purpose of making it steady in working, it will not be held to be so attached to the freehold as to prevent it becoming goods & chattels under the reputed ownership clause.—*Re* TREVEY (1866), 14 L. T. 193 ; 11 Ir. Jur. 100.—IR.

Sect. 9.—Property in reputed ownership of bankrupt: Sub-sect. 1.]

not "goods & chattels" in the order & disposition of bkpts.—*Re* GYE & HUGHES, *Ex p.* REYNAL (1841), 2 Mont. D. & De G. 443.

Annotations:—**Refd.** Walmsley *v.* Milne (1859), 29 L. J. C. P. 97; Branton *v.* Griffiths (1876), 45 L. J. Q. B. 588.

6444. —— —— Roller maps, fencing hurdles.]—An owner of a freehold house mortgaged it & remained in possession. He afterwards affixed fresh articles to the premises, including roller maps in frames, which could not be removed from the walls without trifling damage, & iron fence hurdles round trees for their permanent protection:—*Held:* all the fixtures were not subject to the doctrine of reputed ownership.—*Re* MABERLY, *Ex p.* BELCHER (1835), 4 Deac. & Ch. 703; 2 Mont. & A. 160; 4 L. J. Bcy. 29, Ct. of R.

Annotations:—**Refd.** Walmsley *v.* Milne (1859), 7 C. B. N. S. 115; Tottenham *v.* Swansea Zinc Ore Co. (1885), 52 L. T. 738.

6445. —— Tenant's fixtures.]—*Semble:* tenant's fixtures passed, when in the order & disposition of bkpt., under 6 Geo. 4, c. 16, s. 72.—*Re* KING, *Ex p.* AUSTIN (1832), 1 Deac. & Ch. 207; 1 L. J. Bcy. 19, Ct. of R.

Annotations:—**Consd.** *Re* Butterworth, *Ex p.* Wilson (1835), 4 Deac. & Ch. 143, Ct. of R. **Apprvd.** *Re* Maberly, *Ex p.* Belcher (1835), 4 Deac. & Ch. 703, Ct. of R.

6446. —— ——.]—Tenant's fixtures are not within 6 Geo. 4, c. 16, s. 72.—*Re* OGBOURNE, *Ex p.* HEATHCOATE (1842), 2 Mont. D. & De G. 711; 6 Jur. 1001, Ct. of R.

Annotation:—**Mentd.** *Re* Carter & Justins, *Ex p.* Sheffield Union Banking Co. (1865), 13 L. T. 477.

6447. —— Insurance policy.]—A policy of insurance is a chattel within 6 Geo. 4, c. 16, s. 72.—WEST *v.* REID (1843), 2 Hare, 249; 12 L. J. Ch. 245; 7 Jur. 147; 67 E. R. 104.

Annotations:—**Mentd.** Drysdale *v.* Piggott (1856), 22 Beav. 238; Saunders *v.* Dunman (1878), 7 Ch. D. 825; *Re* Leslie, Leslie *v.* French (1883), 23 Ch. D. 552; Lloyd's Banking Co. *v.* Jones (1885), 29 Ch. D. 221; Falcke *v.* Scottish Imperial Insce. (1886), 34 Ch. D. 234, C. A.

See, also, No. 6467, *post.*

6448. —— Life interest.]—*Qu.:* whether a life interest in the dividends of stock standing in the names of trustees is within 6 Geo. 4, c. 16, s. 72.—SMITH *v.* MASTERMAN (1833), 3 L. J. Ex. 42.

6449. —— Reversionary interest.] — Bkpt. being the assignee of the reversion of a certain sum of stock in 1846, assigned to A., but no notice was given to the trustee of such assignment. The tenant for life died subsequent to the bkpcy., which took place in Mar. 1853:—*Held:* the stock was "goods & chattels" within 1849 Act, s. 125.—*Re* PLIMMER, *Ex p.* PLIMMER (1853), 1 Bankr. & Ins. R. 83.

6450. —— ——.]—Bkpt.'s reversionary interest in a legacy:—*Held:* not exempted from the rule as to "order & disposition," by the mere circumstances of such interest being reversionary at the time of the act of bkpcy.—*Re* RAWBONE'S TRUST (1857), 3 K. & J. 476; 26 L. J. Ch. 588; 29 L. T. O. S. 326; 3 Jur. N. S. 837; 5 W. R. 796; 69 E. R. 1197.

Annotations:—**Folld.** Hensley *v.* Wills (1867), 16 L. T. 582. **Mentd.** *Re* Caughey, *Ex p.* Ford (1876), 1 Ch. D. 521, C. A.; Joseph *v.* Webb, Joseph *v.* Lyons, Joseph *v.* Pidcock, Joseph *v.* Jones (1883), Cab. & El. 262.

6451. —— —— Contingency.]—A contingent reversionary interest is included in the words "goods & chattels" in 1849 Act, s. 125.

These are words of most extensive import. Unless controlled by the context they comprise all the personal estate of whatsoever nature or description (TURNER, L.J.).—BARTLETT *v.* BARTLETT (1857), 1 De G. & J. 127; 26 L. J. Ch. 577; 29 L. T. O. S. 135; 3 Jur. N. S. 705; 5 W. R. 541; 44 E. R. 671, L. JJ.

Annotations:—**Folld.** *Re* Rawbone's Trust (1857), 3 K. & J. 476. **Consd.** Grainge *v.* Warner, *Re* Grainge (1863), 6 New Rep. 219. **Refd.** *Re* Vickress's Trusts (1859), 7 W. R. 542; Cooke *v.* Hemming (1868), L. R. 3 C. P. 334. **Mentd.** Day *v.* Day (1857), 1 De G. & J. 144, L. JJ.; *Re* Barr's Trusts (1858), 4 K. & J. 219; Webb's Policy (1867), 36 L. J. Ch. 341; Stuart *v.* Cockerell (1869), L. R. 8 Eq. 607; Semphill *v.* Queensland Sheep Investment Co. (1873), 29 L. T. 737; Rutter *v.* Everett, [1895] 2 Ch. 872.

6452. —— —— —— Jure mariti.]—E. had a reversionary contingent interest in personalty *jure mariti*, & assigned such interest, by way of mtge., became bkpt., & the interest then fell into possession:—*Held:* the interest, although subject to so many chances that it might never fall into possession, none the less come within the words "goods & chattels" in 1849 Act, s. 125.—*Re* VICKRESS'S TRUSTS (1859), 7 W. R. 542.

Annotation:—**Refd.** *Re* Webb's Policy (1867), 36 L. J. Ch. 341.

6453. —— Trading rights.]—A., a trader & an officer in East India Co.'s service, assigned his privilege, consisting of shipping goods from the East Indies to England, to B. for a valuable consideration, & in order to evade the bye-laws of East India Co., which prohibited such assignment, the goods were shipped, entered, warehoused, & sold by the co. in A.'s name, & the proceeds carried to his account, but before A. received those proceeds from the co. he became bkpt.:—*Held:* his assignees were entitled to recover the amount in an action for money had & received against East India Co. who retained same, this being such a possession of "goods & chattels" in bkpt., as falls within 21 Jac. 1, c. 19, s. 11.—GORDON *v.* EAST INDIA CO. (1797), 7 Term Rep. 228; 101 E. R. 946.

Annotations:—**Refd.** Cooke *v.* Hemming (1868), L. R. 3 C. P. 334. **Mentd.** Lucas *v.* Dorrien (1817), 7 Taunt. 278.

6454. —— —— Publishing.]—If the printer & publisher of a newspaper assign his interest therein to a creditor as a security, but continue to print & publish as before, & no affidavit of the change of interest be delivered to the comrs. of stamps, & the printer become bkpt., the right to the paper will pass to his assignees, under the assignment of the comrs.

This interest is not tangible, but it would be a very narrow construction to confine the operation of 21 Jac. 1, c. 19 to tangible property. It is true that the future labour of bkpt. cannot be transferred; but where there is some sort of interest, it may be transferred (CHAMBRE, J.).—LONGMAN *v.* TRIPP (1805), 2 Bos. & P. N. R. 67; 127 E. R. 547.

Annotations:—**Folld.** *Re* Baldwin, *Ex p.* Foss, *Ex p.* Baldwin (1858), 2 De G. & J. 230, L. JJ. **Refd.** Platt *v.* Walter (1867), 17 L. T. 157, L. C.; Kelly *v.* Hutton (1868), 3 Ch. App. 703, L. JJ.

6455. —— —— ——.]—The right of publishing a newspaper is "goods & chattels" within 1849 Act, s. 125.—*Re* BALDWIN, *Ex p.* FOSS, *Ex p.* BALDWIN (1858), 2 De G. & J. 230; 27 L. J. Bcy. 17; 31 L. T. O. S. 30; 4 Jur. N. S. 522; 6 W. R. 417; 44 E. R. 977, L. JJ.

Annotations:—**Refd.** Platt *v.* Walter (1867), 17 L. T. 157, L. C.; Kelly *v.* Hutton (1868), 3 Ch. App. 703, L. JJ. **Mentd.** *Re* Cuthbertson, *Ex p.* Edey (1875), L. R. 19 Eq. 264.

6456. —— Shares.]—*Semble:* shares are not "goods & chattels" within 21 Jac. 1, c. 19, s. 11.—BANKS *v.* FARQUHARSON (1752), cited in 2 Ves. Jun. Supp. at p. 178; 34 E. R. 1047, L. C.

6453 i. —— *Trading rights—Grocer's licence.]*—A grocer's licence issued under Licensing Act 1890 is not "goods & chattels" so as to be subject to reputed ownership within Insolvency Act, 1890.—JACK *v.* SMAIL (1905), 2 C. L. R. 684.—**AUS.**

6457. —— —— In company owning real estate.]—Shares in a co., which was seized of real estate :—*Held :* not within 21 Jac. 1, c. 19, s. 11.—*Re* LEYBURN, *Ex p.* VAUXHALL BRIDGE CO. (1821), 1 Gl. & J. 101.

Annotations :—**Dbtd.** Brockbank *v.* Dilworth (1829), 8 L. J. O. S. Ch. 1, L. C. ; *Re* Lashmar *Ex p.* Vallance (1837), 3 Mont. & A. 224, Ct. of R. ; Bradley *v.* Holdsworth (1838), 7 L. J. Ex. 153. **Distd.** Baxter *v.* Brown (1845), 7 Man. & G. 198. **Mentd.** *Re* Gregory, *Ex p.* Rodgers (1843), 3 Mont. D. & De G. 297.

6458. —— —— Declared to be personal estate.]—Shares in a canal co., which, by the Act incorporating the co., are declared to be personal estate & transmissible as such, are within 6 Geo. 4, c. 16, s. 72.—BROCKBANK *v.* DILWORTH (1829), 8 L. J. O. S. Ch. 1, L. C.

6459. —— —— ——.]—Canal shares, if deemed personal property, are within 6 Geo. 4, c. 16, s. 72.—*Re* DILWORTH, *Ex p.* LANCASTER CANAL NAVIGATION CO. (1832), 1 Deac. & Ch. 411 ; Mont. & B. 9, L. C.

Annotations :—**Consd.** *Re* Lashmar, *Ex p.* Vallance (1837), 6 L. J. Bcy. 521, Ct. of R. ; *Re* Pearse, *Ex p.* Littledale (1855), 6 De G. M. & G. 714, L. C. & L. JJ. **Refd.** Bradley *v.* Holdsworth (1838), 1 Horn & H. 156 ; Baxter *v.* Brown (1845), 7 Man. & G. 198. **Mentd.** *Re* Fox, *Ex p.* Marshall (1834), 3 Deac. & Ch. 120, Ct. of R. *Re* Lett, *Ex p.* Masterman (1835), 4 L. J. Bcy. 54, Ct. of R. ; *Re* Whitmore, Wells, & Others (1843), 3 De G. & Sm. 565.

6460. —— —— ——.]—Where a deed establishing a gas-light co. declared, "that all property purchased by the directors for the benefit of the co., should, as between the proprietors & their respective real & personal representatives, be considered as personal estate," & bkpt. deposited the certificates of shares with a third party, as a collateral security for a debt, & without any notice to the co. :—*Held :* the shares passed to the assignees, as in the order & disposition of bkpt.—*Re* LASHMAR, *Ex p.* VALLANCE (1837), 2 Deac. 354 ; 3 Mont. & A. 224 ; 6 L. J. Bcy. 52 ; 1 Jur. 359, Ct. of R.

6461. —— —— ——.]—Shares in a waterworks co. :—*Held :* subject to the law of reputed ownership, the co.'s Act of Parliament declaring them to be personal property.—*Re* BOWRING, *Ex p.* LAWRENCE (1846), De G. 269, Ct. of R.

6462. —— —— ——.]—Shares in a railway co. incorporated under Cos. Clauses Consolidation Act, 1845 (c. 17), are chattels within 1849 Act, s. 125 (KNIGHT BRUCE, L.J.).—*Re* SKETCHLEY, *Ex p.* BOULTON (1857), 1 De G. & J. 163 ; 26 L. J. Bcy. 45 ; 29 L. T. O. S. 71 ; 3 Jur. N. S. 425 ; 5 W. R. 445 ; 44 E. R. 685, L. JJ.

Annotations :—**Refd.** Société Générale de Paris *v.* Tramways Union Co. (1884), 14 Q. B. D. 424, C. A. ; Colonial Bank *v.* Whinney (1886), 11 App. Cas. 426, H. L. **Mentd.** Bartlett *v.* Bartlett (1857), 1 De G. & J. 127, L. JJ. ; *Re* Rawbone's Trust (1857), 3 K. & J. 476 ; Cory *v.* Eyre (1862), 1 De G. J. & Sm. 149, L. JJ. ; *Re* Shelley, *Ex p.* Stewart (1864), 4 De G. J. & S. 543, L. C. ; *Re* Worcester, *Ex p.* Agra Bank (1868), 3 Ch. App. 555, L. JJ.

6463. Choses in action—Shares.]—Shares in a co. are not "things in action" within 1869 Act, s. 15 (5).—*Re* JACKSON, *Ex p.* UNION BANK OF MANCHESTER (1871), L. R. 12 Eq. 354 ; 40 L. J. Bcy. 57 ; 24 L. T. 951 ; 19 W. R. 872.

Annotations :—**Apprvd.** Société Générale de Paris *v.* Tramways Union Co. (1884), 14 Q. B. D. 424, C. A. **Consd.** Colonial Bank *v.* Whinney (1885), 30 Ch. D. 261, C. A. **Refd.** Grimwade *v.* Mutual Soc., (1884), 52 L. T. 409. **Mentd.** Harris *v.* Truman (1881), 7 Q. B. D. 340.

6464. —— ——.]—Shares in an incorporated co. transferable only by deed are "things in action," & are excluded by the proviso in 1883 Act, s. 44 (iii.), from the operation of the doctrine of reputed ownership.—COLONIAL BANK *v.* WHINNEY (1886), 11 App. Cas. 426 ; 56 L. J. Ch. 43 ; 55 L. T. 362 ; 34 W. R. 705 ; 2 T. L. R. 747 ; 3 Morr. 207, H. L. ; *revsg.* S. C. (1885), 30 Ch. D. 261, C. A.

Annotations :—**Consd.** Sharman *v.* Mason, [1899] 2 Q. B. 679. **Refd.** Bradford Banking Co. *v.* Briggs (1886), 12 App. Cas. 29 ; Tennant *v.* Howatson (1888), 13 App. Cas. 489, P. C. ; Dawson *v.* Great Northern & City Ry., [1904] 1 K. B. 277. **Mentd.** *Re* Jenkinson, *Ex p.* Nottingham & Nottinghamshire Bank (1885), 15 Q. B. D. 441, D. C. ; Milnes *v.* Huddersfield Corpn. (1886), 11 App. Cas. 511, H. L. ; Nanney *v.* Morgan (1887), 56 L. J. Ch. 805 ; *Re* Harrison, *Ex p.* Official Receiver (1892), 10 Morr. 1. D. C. ; *Re* Goetz, Jonas, *Ex p.* Trustee (1898), 78 L. T. 399, C. A. ; Torkington *v.* Magee (1902), 18 T. L. R. 703, D. C. ; Rainford *v.* Keith & Blackman Co., [1905] 1 Ch. 296 ; Hollinshead *v.* Egan, [1913] A. C. 564, H. L.

6465. —— Debenture.]—A debenture of a joint-stock co., by which the co. undertake to pay a sum of money, with interest, & charge their undertaking & property with the payment thereof, is a chose in action within 1869 Act, s. 15 (5).—*Re* PEYCE, *Ex p.* RENSBURG (1877), 4 Ch. D. 685 ; 36 L. T. 117 ; 25 W. R. 432.

Annotation :—**Mentd.** *Re* Jenkinson, *Ex p.* Nottingham & Nottinghamshire Bank (1885), 15 Q. B. D. 441, D. C.

6466. —— Equity of redemption of shares.]—Bkpt., before his bkpcy., agreed to give, as security for a debt which he owed, his interest in some shares in a joint stock co., which was already subject to a prior mtge. At the commencement of the bkpcy. the shares were registered in the name of the first mtgee. It was not satisfactorily proved that notice of the second mtge. had been given to the first mtgee. :—*Held :* bkpt.'s interest in the shares at the time of the bkpcy. was a chose in action, & was not in the order or disposition of bkpt.—*Re* FOX, *Ex p.* BARRY (1873), L. R. 17 Eq. 113 ; 43 L. J. Bcy. 18 ; 29 L. T. 620 ; 22 W. R. 205.

6467. —— Insurance policy.]—A policy of life insurance is a "thing in action" & is excepted from the operation of 1869 Act, s. 15 (5).—*Re* MOORE, *Ex p.* IBBETSON (1878), 8 Ch. D. 519 ; 39 L. T. 1 ; 26 W. R. 843, C. A.

Annotation :—**Refd.** Colonial Bank *v.* Whinney (1885), 30 Ch. D. 261, C. A.

See, also, No. 6447, *ante.*

6468. —— Right to receive proceeds of sale of real estate—After conversion.]—A., in 1833, mortgaged certain real estate to B., with a power of sale, under which the property was sold in 1842 to a purchaser, who transferred his contract to B. There was a balance after paying off B., & there being accounts between A. & C., the balance was placed, under a deed of June 25, 1842, in the hands of trustees, to be dealt with by arbn. between A. & C. to whom in 1834 A. had made an equitable mtge. of the property. In Jan., 1840, C. deposited the deeds with pltf., by way of equitable mtge. In Apr., 1842, C. applied to pltf. for the loan of the deeds, telling him he wanted them to enable the purchase to be completed, & promising to return them forthwith. He did not return them forthwith, & pltf. never applied to have the deeds back for more than four years. In May, 1843, C. deposited the deeds, by way of mtge., with D. In 1846 C. became bkpt. :—*Semble :* the real estate, being converted into personalty before the bkpcy., the right of C. was merely a right to receive a certain sum of money, & no notice having been given by the pltf. or the holder of the deeds to the trustees, the right to receive the money remained in the order & disposition of C., & passed to his assignees.—WALDRON *v.* SLOPER (1852), 1 Drew. 193 ; 61 E. R. 425.

Annotations :—**Folld.** Barnes *v.* Pinkney (1867), 36 L. J. Ch. 815. **Mentd.** Cory *v.* Eyre (1862), 1 De G. J. & Sm. 149, L. JJ. ; Layard *v.* Maud (1867), L. R. 4 Eq. 397 ; Hunter *v.* Walters, Curling *v.* Walters, Darnell *v.* Hunter (1870), L. R. 11 Eq. 292 ; R. *v.* Shropshire Union Co. (1873), L. R. 8 Q. B. 420, Ex. Ch. ; Shropshire Union Rys. & Canal Co. *v.* R. (1875), L. R. 7 H. L. 496, H. L. ; Northern Counties of England Fire Insce. *v.* Whipp (1884), 26 Ch. D. 482, C. A. ; *Re* Vernon, Ewens (1886), 33 Ch. D.

Sect. 9.—Property in reputed ownership of bankrupt: Sub-sects. 1, 2 & 3, A. (a).]

402, C. A.; Taylor *v.* Russell, [1891] 1 Ch. 8; Taylor *v.* London & County Banking Co., London & County Banking Co. *v.* Nixon, [1901] 2 Ch. 231, C. A.; Walker *v.* Linom, [1907] 2 Ch. 104.

6469. —— Right to sum charged on real estate —Not yet payable.]—By a marriage settlement real estate was vested in trustees for a term of five hundred years, upon trust, after the death of the survivor of H. & his wife, to raise, by sale or mtge., £2,000 for the portions of their younger children. T., one of such younger children, assigned, by way of mtge., his interest in the £2,000, & notice of the mtge. was given to the surviving trustee of the settlement. Afterwards he executed a deed of further charge, of which, until after his bkpcy., no notice was given to the trustee, & subsequently he became bkpt. At the date of the deed of further charge the £2,000 had not become raisable. As between the owner of the further charge & the assignees in bkpcy. claiming under 1849 Act, s. 125:—*Held:* T.'s interest under the settlement was a chose in action only, & not an interest in land, & the claim of the assignees was entitled to priority.—*Re* HUGHES (1864), 33 L. J. Ch. 725; 10 L. T. 813; 10 Jur. N. S. 900.

Annotation:—**Mentd.** *Re* Richards, Humber *v.* Richards (1890), 63 L. T. 451.

SUB-SECT. 2.—"AT THE COMMENCEMENT OF THE BANKRUPTCY."

See 1914 Act, s. 37.

6470. Refers to date of act of bankruptcy—Not when commission issued.]—Goods were purchased under an irregular distress, after an act of bkpcy. by the party distrained on before the distress, & were allowed by the purchaser to remain in the possession of his wife:—*Held:* they did not vest in the assignees, as they did not come into the possession of bkpt. with the consent of the true owner, until after he had become bkpt., & the words of 21 Jac. 1, c. 19, s. 11, "at such time as they shall become bkpt.," had reference to the act of bkpcy., & not to the time of the issuing of the commission, or when the party should be declared bkpt.—LYON *v.* WELDON (1824), 2 Bing. 334; 9 Moore, C. P. 629; 3 L. J. O. S. C. P. 27; 130 E. R. 334.

Annotations:—**Folld.** Fawcett *v.* Fearne (1844), 6 Q. B. 20; The Ruby (1900), 83 L. T. 438. **Reid.** Load *v.* Green (1846), 15 M. & W. 216; *Re* Atkinson (1851), Fonbl. 271. **Mentd.** King *v.* England (1864), 4 B. & S. 782.

6471. —— Not when fiat issued.]—*Held:* under 6 Geo. 4, c. 16, s. 72, the time meant was that of committing the act of bkpcy., not the time when the fiat issued; & 2 & 3 Vict. c. 29, s. 1, did not make any alteration in that respect.—FAWCETT *v.* FEARNE (1844), 6 Q. B. 20; 13 L. J. Q. B. 300; 3 L. T. O. S. 298; 8 Jur. 645; 115 E. R. 8.

Annotations:—**Distd.** Young *v.* Hope (1848), 2 Exch. 105. **Mentd.** *Re* Pritchard, *Ex p.* Knowlys (1852), Fonbl. 238; *Re* James, *Ex p.* Harris (1874), L. R. 19 Eq. 253.

6472. —— Capable of supporting adjudication—Prior to act on which adjudication founded.]—*Held:* 1849 Act, s. 125, extended to goods which were in bkpt.'s order & disposition at the time of his committing any act of bkpcy. capable of supporting the adjudication, though such act were prior to the act on which the adjudication was founded.—STANSFELD *v.* CUBITT (1858), 2 De G. & J. 222; 27 L. J. Ch. 266; 31 L. T. O. S. 3; 4 Jur N. S. 395; 6 W. R. 320; 44 E. R. 973, L. JJ.

Annotations:—**Mentd.** Badger *v.* Shaw (1860), 2 E. & E. 472; Richards *v.* James, Sharpe *v.* James (1867), 8 B. & S. 302; Ashton *v.* Blackshaw (1870), L. R. 9 Eq. 510; Ramsden *v.* Lupton (1873), L. R. 9 Q. B. 17; *Re* Stevens, *Ex p.* Stevens (1875), L. R. 20 Eq. 786; Crawcour *v.* Salter (1881), 18 Ch. D. 30, C. A.; *Re* Ginger, *Ex p.* London & Universal Bank (1897), 76 L. T. 808, C. C.; Hollinshead *v.* Egan, [1913] A. C. 564, H. L.

6473. Goods in bankrupt's possession in any part of day of bankruptcy.]—A trader having goods lying in wharf, deposited blank delivery notes with a creditor to cover advances made, & became insolvent. The creditor, upon notice of the insolvency, filled up the blanks with his own name, & took possession of the goods on the day before the trader committed an act of bkpcy. In trover by the assignees against the creditor:—*Held:* goods lying in bkpt.'s name on any part of the day of the bkpcy. were within 21 Jac. 1, c. 19.—ARBOUIN *v.* WILLIAMS (1824), Ry. & M. 72, N. P.

Annotation:—**Mentd.** *Re* Baldwin, *Ex p.* Foss (1858), 2 De G. & J. 230, L. JJ.

6474. Possession resumed by true owner on same day as bankruptcy.]—The real owner of goods resumed possession & sold them on the same day on which the apparent owner became bkpt., but at a later hour:—*Held:* the law would take notice that the bkpcy. was prior to the resumption of possession.—DAVIS *v.* DALE (1830), L. & Welsb. 291.

SUB-SECT. 3.—"IN THE POSSESSION, ORDER, OR DISPOSITION OF BANKRUPT."

A. Sufficiency of Possession, etc.

(a) In General.

6475. Possession—Question of fact—Sufficiency of evidence.]—In Sept., 1861, A. contracted with B. for the purchase of B.'s interest in the lease of a public-house, but it being found that, owing to his official capacity, A. was unable to hold the licence in his own name, it was arranged that C., his father-in-law, should be put forward in his stead. On Oct. 10 following, the lease was assigned by B. to C., to whom also the licence was duly transferred, & to enable C. to complete the purchase deft. advanced him £230 on a mtge., by assignment, of the lease & the furniture & effects then in & upon the premises. The mtge.-deed, which was made between C., therein described as of the public-house, of the one part, & deft. of the other part, bore date Oct. 10, 1861, & the money which was advanced by deft. to C. was by him immediately paid to B. A. was present at the negotiation between C. & deft. for the loan, at the execution of the mtge. & the payment of the money, all of which was effected on Oct. 10. C.'s name was painted up outside the door where B.'s name

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PART XX. SECT. 9, SUB-SECT. 2.

6470 i. *Refers to date of act of bkpcy.*]—The grantor of a bill of sale was adjudged bkpt. on Jan. 11, having committed an act of bkpcy. on Nov. 5 previous. After the act of bkpcy., & with notice thereof, but before the order of adjudication, the grantee took possession of the goods, which till then continued in bkpt.'s order & disposition:—*Held:* the goods were in bkpt.'s order & disposition "at the time he became bkpt." because they were so at the time of his committing the act of bkpcy.—JAMES *v.* MACKEN, *Re* CAMPBELL (1878), 12 I. L. T. 161.—IR.

6470 ii. ——.]—M. was adjudicated bkpt. on Aug. 21, 1914, upon an act of bkpcy. committed on June 21. Between those dates he had deposited share certificates & a policy of insurance with a bank as security for his account:—*Held:* M. had become bkpt. within the order & disposition sect. at the date of the act of bkpcy.—*Re* MACKAY, [1915] 2 I. R. 347.—IR.

PART XX. SECT. 9, SUB-SECT. 3.—A (a).

6475 i. *Possession—Must be actual.*]—The difference between the reputed ownership clause in bkpcy. & the analogous clause in Bills of Sale Act is that under that Act the "apparent" possession is sufficient to work a forfeiture, whilst in bkpcy. there must be actual possession calculated to obtain a false credit.—*Re* HANKS (1858), 31 L. T. O. S. 208.—IR.

had been, but A. had the management of the business of the tavern behind the bar. A. became bkpt., & on trover being brought against deft. by A.'s assignees, for a wrongful conversion of the goods comprised in deft.'s mtge. :—*Held :* there was not sufficient evidence to warrant the conclusion that the goods were in the possession of A. at the time of the bkpcy. the conclusion to be drawn from the whole case being rather, that they were in the possession of C. with the consent of deft., the true owner.—EDMANDS *v.* BEST (1862), 1 New Rep. 30 ; 7 L. T. 279.

6476. —— —— ——.]—By a voluntary post-nuptial settlement, debtor assigned certain life policies & furniture to trustees upon trust for his wife, himself, & his family. The deed was duly registered as a bill of sale under Bills of Sale Act, 1854 (c. 36), but became void for want of renewal of registration. In Sept., 1887, the furniture was removed to the house of debtor's son & about the same time debtor & his wife took up their residence with their son, who was assisting to support them. On Oct. 11, 1887, debtor executed a deed supplemental to, & confirming the original deed, & the deed of 1887 was registered as a bill of sale :—*Held :* (1) the question whether the goods were in the actual possession of bkpt. was a question of fact ; (2) when the goods were removed to the son's house, while in transit they would be regarded as in the possession of the trustees of the deed, but afterwards on the facts they must be regarded as being in the possession of bkpt.—*Re* EMERY, *Ex p.* CHIEF OFFICIAL RECEIVER (1888), 21 Q. B. D. 405 ; 37 W. R. 21 ; 4 T. L. R. 701, C. A.

Annotation :—**Mentd.** *Re* Parsons & Furber (1893), 62 L. J. Q. B. 365, C. A.

6477. Order & disposition—Question of fact.]—The question of order & disposition is essentially a question of fact for the jury.—*Re* HAWKINS, *Ex p.* EMERSON (1871), 41 L. J. Bcy. 20 ; *sub nom. Re* HAWKINS, EMERSON *v.* BARNETT, 20 W. R. 110.

Annotations :—**Mentd.** *Re* Couston, *Ex p.* Watkins (1873), 8 Ch. App. 523, n. ; Chappell *v.* Harrison (1910), 103 L. T. 594.

6478. —— —— Assignment not acted on—Trustees not parties.]—Upon the question whether A., after executing a conveyance to trustees for the benefit of his wife, had the disposition of the property, evidence of his making an assignment of it is not admissible against the trustees, unless they were privy to it, or unless the property was delivered & the assignment acted on.—MEYER'S ASSIGNEES *v.* SEFTON (1817), 2 Stark. 274, N. P.

6479. —— Application in equity as in law.]—The mtgee. of a ship at sea, by bill of sale, who has omitted to procure an indorsement thereof on the certificate of registry, within thirty days after the return of the ship to port, the registered owner having after that time become bkpt., has no equity, distinct from his legal rights, to restrain the sale of the ship by the assignees, the title to the ship, after the bkpcy., depending upon the application of the rule of law with regard to order & disposition.—CAMPBELL *v.* THOMPSON (1842), 2 Hare, 140 ; 7 Jur. 59 ; 67 E. R. 58.

Annotation :—**Mentd.** Miles *v.* Lawrence (1848), 11 L. T. O. S. 432.

6480. —— How pleaded.]—In trover by the owner of goods against bkpt.'s assignees, the defence was that the goods at the time of the bkpcy. were in the order & disposition of bkpt., etc. :—*Held :* such defence was admissible under the plea of not possessed.—HESLOP *v.* BAKER (1853), 8 Exch. 411 ; 22 L. J. Ex. 333 ; 20 L. T. O. S. 191 ; 17 J. P. 136 ; 155 E. R. 1408.

Annotations :—**Refd.** Graham *v.* Furber (1853), 2 C. L. R. 10. **Mentd.** Quartermaine *v.* Bittleston (1853), 13 C. B. 133 ; Sturgis *v.* Evans (1864), 3 New Rep. 650 ; Fielding *v.* Lee (1865), 18 C. B. N. S. 499 ; Webb's Policy (1867), 36 L. J. Ch. 341 ; Cooke *v.* Hemming (1868), L. R. 3 C. P. 334 ; *Re* Button, *Ex p.* Haviside, [1907] 2 K. B. 180, C. A.

6481. Bankrupt having possession—Acting as owner till bankruptcy.]—A. being indebted to pltf. in £1,400, for securing payment thereof mortgaged to pltf. some leasehold estates, wharfs, & three hoys, but kept possession of the hoys, & some time after became bkpt. Pltf. brought an ejectment, & got possession of the leasehold estate, but the assignees got the hoys. The leasehold not being sufficient to pay pltf. his principal & interest, he brought a bill to foreclose, & to compel the assignees to redeem the hoys, or that they might be sold to pay his demands. The assignees insisted on their right to the hoys under 21 Jac. 1, c. 19, s. 11 ; bkpt. having the possession, & acting as owner thereof till declared bkpt. :—*Held :* the bill should be dismissed so far as it required an account of the profits of the hoys, which should be sold for the benefit of the creditors in general.—STEPHENS *v.* SOLE (1736), cited 1 Ves. Sen. at p. 352 ; 1 Atk. at pp. 157, 170 ; 27 E. R. 1077.

Annotations :—**Consd.** Bourne *v.* Dodson (1740), 1 Atk. 154. **Apld.** Ryall *v.* Rowles (1750), 1 Ves. Sen. 348 ; Hall *v.* Gurney (1784), 3 Doug. K. B. 356. **Mentd.** *Ex p.* Shank (1754), 1 Atk. 234 ; Robinson *v.* Macdonnell (1816), 5 M. & S. 228.

6482. —— Right of disposition restricted—Indorsement of restrictions on share certificates.]—By a clause in the deed of settlement of a banking co. it was stipulated that the co. should have a lien on the shares of such proprietors as were customers & indebted to the bank, & that no share should be transferred without the consent of the directors, & an abstract of those provisions was indorsed on the certificates of the shares held by each proprietor. Bkpt. at the time of his bkpcy. was the owner of thirty shares & had in his possession the certificates of ownership thus indorsed, being then largely indebted to the bank for advances :—*Held :* the shares did not pass to his assignee under the clause of reputed ownership in the Bkpcy. Act so as to defeat the lien of the bank which had been provided for in the deed.—*Re* BUTTERWORTH, *Ex p.* PLANT (1835), 4 Deac. & Ch. 160, Ct. of R.

6483. —— —— ——.]—A registered shareholder in an incorporated co. deposited his certificates, together with a blank transfer executed by himself, with his bankers as security for an advance. Each certificate contained a note that it must be surrendered with the deed of transfer before a new certificate could be issued. The shareholder became bkpt. :—*Held :* having regard to the note, the shares were not in the possession, order, or disposition of bkpt. in such circumstances that he was the reputed owner thereof.—COLONIAL BANK *v.* WHINNEY (1886), 11 App. Cas. 426 ; 56 L. J. Ch. 43 ; 55 L. T. 362 ; 34 W. R. 705 ; 2 T. L. R. 747 ; 3 Morr. 207, H. L. ; *revsg.* (1885), 30 Ch. D. 261, C. A.

Annotations :—**Consd.** Sharman *v.* Mason, [1899] 2 Q. B. 679. **Refd.** Bradford Banking Co. *v.* Briggs (1886), 12 App. Cas. 29, H. L. ; Rainford *v.* Keith & Blackmore, Co., [1905] 1 Ch. 296. **Mentd.** *Re* Jenkinson, *Ex p.* Nottingham & Nottinghamshire Bank (1885), 15 Q. B. D. 441, D. C. ; Milnes *v.* Huddersfield Corpn. (1886), 11 App. Cas. 511, H. L. ; Nanney *v.* Morgan (1887), 56 L. J. Ch. 805 ; Tennant *v.* Howatson (1888), 13 App. Cas. 489, P. C. ; *Re* Harrison, *Ex p.* Official Receiver (1892), 10 Morr. 1, D. C. ; Torkington *v.* Magee (1902), 18 T. L. R. 703, D. C. ; Dawson *v.* Great Northern & City Ry. Co., [1904] 1 K. B. 277 ; Hollinshead *v.* Egan, [1913] A. C. 564.

6484. Goods pawned—In possession or in order & disposition of bankrupt.]—Pawnees of goods, etc., permitting bkpts. to continue in possession, or in the order & disposition of them, have no specific lien on them against the assignees.—RYALL *v.* ROWLES

Sect. 9.—Property in reputed ownership of bankrupt: Sub-sect. 3, A. (a).]

(1750), 1 Ves. Sen. 348; 1 Atk. 165; 1 Wils. 260; 9 Bli. N. S. 377; 27 E. R. 1074.

Annotations:—**Consd.** West *v.* Skip (1749), 1 Ves. Sen. 239, L. C.; Lingham *v.* Biggs (1797), 1 Bos. & P. 82. **Apld.** Dearle *v.* Hall (1823), 2 L. J. O. S. Ch. 62. **Distd.** Reeves *v.* Capper (1838), 5 Bing. N. C. 136. **Apld.** Donald *v.* Suckling (1866), L. R. 1 Q. B. 585. **Refd.** Falkener *v.* Case (1781), 1 Bro. C. C. 125, L. C. **Mentd.** Row *v.* Dawson (1749), 1 Ves. Sen. 331, L. C.; Doddington *v.* Hallet (1750), 1 Ves. Sen. 497, L. C.; Ward *v.* Turner (1752), 2 Ves. Sen. 431, L. C.; *Ex p.* Dumas (1754), 2 Ves. Sen. 582, L. C.; *Ex p.* Shank (1754), 1 Atk. 234; Worsley *v.* Demattos (1758), 1 Burr. 467; Wilson *v.* Day (1759), 2 Burr. 827; Mason *v.* Vere (1779), 2 Wm. Bl. 1309; Atkinson *v.* Maling (1788), 2 Term Rep. 462; Plumb *v.* Flintt (1791), 2 Anst. 432; Gordon *v.* The East India Co. (1797), 7 Term Rep. 228; Evans *v.* Bicknell (1801), 6 Ves. 174, L. C.; Jones *v.* Gibbons (1804), 9 Ves. 407; Horn *v.* Baker (1808), 9 East, 215; Taylor *v.* Plumer (1815), 3 M. & S. 562; *Re* Frazer, *Ex p.* Monro (1818), Buck, 300; Hartley *v.* Smith (1819), Buck, 368; Storer *v.* Hunter (1824), 3 B. & C. 368; *Re* Severn, *Ex p.* Colville (1830-1), 9 L. J. O. S. Ch. 56; Hubbard *v.* Bagshaw (1831), 4 Sim. 326; Buck *v.* Lee (1834), 1 Ad. & El. 804; *Re* Ogden, *Ex p.* Loyd (1834), 3 Deac. & Ch. 765, Ct. of R.; Gardner *v.* Lachlan (1838), 4 My. & Cr. 129, L. C.; Belcher *v.* Capper (1842), 4 Man. & G. 502; Etty *v.* Bridges (1843), 2 Y. & C. Ch. Cas. 486; Belcher *v.* Bellamy (1848), 2 Exch. 303; Beckham *v.* Drake (1849), 2 H. L. Cas. 579; Bartlett *v.* Bartlett (1857), 1 De G. & J. 127, L. JJ.; North *v.* Gurney (1861), 1 J. & H. 509; Grainge *v.* Warner (1865), 6 New Rep. 219; Cooke *v.* Hemming (1868), L. R. 3 C. P. 334; *Re* Bainbridge, *Ex p.* Fletcher (1878), 8 Ch. D. 218; *Re* West of England & South Wales District Bank, *Ex p.* Dale (1879), 11 Ch. D. 772; *Re* Hallett's Estate, Knatchbull *v.* Hallett (1880), 13 Ch. D. 696, C. A.; Colonial Bank *v.* Whinney (1886), 11 App. Cas. 426, H. L.; *Re* Patrick, Bills *v.* Tatham (1890) 63 L. T. 752, C. A.; *Re* Richards, Humber *v.* Richards (1890), 45 Ch. D. 589; Thomas *v.* Scarles, [1891] 2 Q. B. 408, C. A.; English & Scottish Mercantile Investment Trust *v.* Brunton, [1892] 2 Q. B. 1; *Re* Wyatt, White *v.* Ellis, [1892] 1 Ch. 188, C. A.; Ward *v.* Duncombe, [1893] A. C. 369, H. L.; Sharman *v.* Mason, [1899] 2 Q. B. 679; Rose *v.* Buckett, [1901] 2 K. B. 449, C. A.; Glegg *v.* Bromley & Glegg (1911), 81 L. J. K. B. 334, D. C.

See, also, No. 6501, *post.*

6485. Goods sold—Right reserved to unpaid vendor to retake.]—If standing timber be sold to a trader, with a proviso that, in case of bkpcy., the vendor may retake it, such a condition is void under 21 Jac. 1, c. 19, s. 11, if bkpt. has the disposition of the goods.—HOLROYD *v.* GWYNNE (1809), 2 Taunt. 176; 1 Rose, 113; 127 E. R. 1044.

Annotation:—**Mentd.** *Re* Tollemache, *Ex p.* Ford, Huntingtower's Case (1843), 1 L. T. O. S. 83, Ct. of R.

6486. —— Possession after sale thereof.]—The enacting part of 21 Jac. 1, c. 19, s. 11, extends to bkpt.'s original property kept & disposed of by him as his own, after having conveyed it to a third party.—MACE *v.* CADELL (1774), 1 Cowp. 232; Lofft, 782; 98 E. R. 1060.

Annotations:—**Apld.** Horn *v.* Baker (1808), 9 East, 215. **Refd.** Cox *v.* Liotard (1784), 1 Doug. K. B. 166, n.; R. *v.* Pierce (1814), 3 M. & S. 62; **Mentd.** Batthews *v.* Galindo (1828), 4 Bing. 610; Edwards *v.* Farebrother (1828), 3 C. & P. 524; Langford *v.* Foot (1832), 2 Moo. & S. 349; Whitfield *v.* Brand (1847), 16 M. & W. 282; *Re* Gawan, *Ex p.* Barclay (1855), 5 De G. M. & G. 403; Cooke *v.* Hemming (1868), L. R. 3 C. P. 334.

6487. —— ——.]—A., a spirit merchant, sold to B., a wine merchant, several casks of brandy, some of which, at the time of the sale, were in A.'s own vaults, & others in the vaults of a regular warehouse-keeper. It was agreed between the parties that the brandies should remain where they were until the vendee could conveniently remove them. Immediately after the sale, the vendee marked the several casks with his initials. It was notorious to the persons carrying on the wine trade at the place where the parties resided that the sale had taken place, but no notice of such sale had been given to the warehouse-keeper, with whom some of the casks were deposited. A. having become bkpt. while the brandies remained where they were originally deposited:—*Held:* the whole of them passed to his assignees, as goods in his possession, order, & disposition, by the consent & permission of the true owner.—KNOWLES *v.* HORSFALL (1821), 5 B. & Ald. 134; 106 E. R. 1142.

Annotations:—**Consd.** Watson *v.* Peache (1834), 1 Bing. N. C. 327. **Distd.** *Re* Popple, *Ex p.* Dover (1841), 2 Mont. D. & De G. 259. **Expld.** Hamilton *v.* Bell (1854), 10 Exch. 545. **Distd.** Priestley *v.* Pratt (1867), L. R. 2 Exch. 101. **Apld.** *Re* Couston, *Ex p.* Bolland (1872), 28 L. T. 43. **Expld.** *Re* Couston, *Ex p.* Watkins (1873), 8 Ch. App. 520, L. JJ. **Refd.** *Re* Couston, *Ex p.* Ward (1872), 8 Ch. App. 146, n. **Mentd.** Lingard *v.* Messiter (1823), 1 B. & C. 308; Glyn Mills *v.* East & West India Dock Co. (1882), 7 App. Cas. 591, H. L.

6488. —— ——.]—A carriage finished & paid for before the bkpcy. of the maker, but suffered to remain on his premises at the request of the owner, on account of his being abroad, cannot be taken by the assignees as in the order or disposition of bkpt., although such bkpt. put it in his front shop, & actually sell it to another. In such case, an actual delivery of the carriage at the house of the person for whom it was made, is not necessary to constitute him the owner.—BARTRAM *v.* PAYNE (1827), 3 C. & P. 175.

6489. —— —— Possession taken by assignee of goods on arrest of bankrupt.]—Goods were assigned by S. to deft., but S. remained in possession of them up to his arrest under a *ca. sa.* After his commitment to gaol deft. took possession of the goods, & S. was afterwards adjudged bkpt. on his own petition *in formâ pauperis* under 1861 Act, ss. 98, 99:—*Held:* the goods passed to S.'s assignee under 1849 Act, s. 125, as in his order & disposition with the consent of the true owner; & deft. could not avail himself of the protection of s. 133.—BRAMWELL *v.* EGLINTON (1866), L. R. 1 Q. B. 494; 7 B. & S. 537; 14 L. T. 735; 14 W. R. 739; *sub nom.* EGLINTON *v.* BRAMWELL, 35 L. J. Q. B. 163; 12 Jur. N. S. 702, Ex. Ch.

Annotation:—**Mentd.** *Re* Southam, *Ex p.* Southam (1874), L. R. 17 Eq. 578.

6490. —— —— Mere temporary custody.]—M. sold to petitioners two-thirds of five hundred barrels of tar, & the other third he consigned to petitioners for sale at his risk, & on his account, & agreed that he should be at the charge of cartage & porterage, & shipping off the whole, & M. caused the tar to be put into a warehouse of his own, for the purposes of the agreement. Petitioners at the same time paid M. the amount of two-thirds, & M. made them out a bill of parcels. M. afterwards became bkpt., & his assignees took possession of the tar in his warehouse:—*Held:* the tar was not in the possession, order, & disposition of bkpts., it being only a mere temporary custody, till petitioners could ship it to Ireland, & the assignees must deliver the two-thirds of the tar.—*Re* MATHEWS, *Ex p.* FLYN & FIELD, FLYN *v.* MATHEWS (1748), 1 Atk. 185; 26 E. R. 120, L. C.

Annotations:—**Distd.** Knowles *v.* Horsfall (1821), 5 B. & Ald. 133. **Consd** Kirkley *v.* Hodgson (1823), 1 B. & C. 588. **Distd.** *Re* Popple, *Ex p.* Dover (1841), 5 Jur. 846, Ct. of R. **Mentd.** *Re* Gilpin (1823), 3 Dow. & Ry. K. B. 636.

6486 i. *Goods sold—Possession after sale thereof.*]—A purchaser of lots of cattle at a public roup allowed some of them to remain on the seller's farm for a few days, as permitted by the articles of roup, & granted bills for the full amount of the whole purchase. Delivery having subsequently been refused, on the ground that the seller had, in the meantime, declared his insolvency:—*Held:* the purchaser & not the trustee was entitled to delivery of the cattle.—LANG *v.* BRUCE (1832), 10 Sh. (Ct. of Sess.) 777.—**SCOT.**

6486 ii. —— ——.]—Applts. purchased bark from M., a manufacturer of bark, paying full value therefor, the bark remaining in M.'s possession at the time of his insolvency:—*Held:* M.'s curator was not entitled to retain property acquired by applts. from M. before, but not delivered to them at the time of, the insolvency.—CHURCH *v.* BERNIER (1892), Q. R. 1 Q. B. 257. —**CAN.**

6491. —— —— To creditor—Unfinished ship.]—Shipbuilders on Apr. 11, by a written agreement of that date, agreed to build a vessel for a purchaser, at a price payable by instalments. The agreement had been negotiated for the purchaser by a shipbroker, who had, pending the negotiations, & before the agreement was signed, advanced £400 to the shipbuilders, who had already commenced building the vessel upon the understanding that it was to be secured to him by an assignment of the agreement when perfected, & by a charge or lien on the vessel. By an indenture dated Apr. 12, the builders, in consideration, as was therein stated, of £500 on or immediately before the execution of the indenture paid by the broker to the builders, assigned the agreement of Apr. 11 to the broker, & it was agreed that, subject to a lien given by the agreement of Apr. 11 to the purchaser, the vessel & all stores about the builders' yard should be the property of the broker, to be held in lien to the extent of all money due from the builders to the broker, & that the aggregate of moneys secured should not exceed £500. Upon the execution of the agreement the broker advanced to the builders the further sum of £100. On May 19 the agreement of Apr. 11 was cancelled owing to differences between the builders & the purchaser, & the former, for the purpose of securing the broker from loss by reason of the cancellation, proposed to him that he should become the absolute owner of the vessel. He assenting thereto, an agreement was signed by the parties on & dated May 20, whereby the builders agreed to sell, & the broker agreed to purchase, the hull of a new vessel then in course of building by the builders at their yard, to be completed according to specification for £1,150, & it was agreed that £500, then already advanced by the broker to the builders, should be taken as part payment of the purchase-money, & that if the builders did not finish the vessel by June 21, or should before its completion cease working at it, the broker might enter the builders' yard & complete with their materials & at their cost. The builders made no further progress with the vessel, & were adjudicated bkpts. on June 2 :—*Held :* the vessel was not in the order & disposition of bkpts.—SWAINSTON *v.* CLAY (1863), 3 De G. J. & Sm. 558 ; 2 New Rep. 345 ; 32 L. J. Ch. 503 ; 8 L. T. 563 ; 11 W. R. 811 ; 1 Mar. L. C. 343 ; 46 E. R. 752, L. JJ.

6492. —— —— —— Fictitious lease by creditor to bankrupt.]—S. being possessed of dyer's plant, by an indenture dated Apr. 26, 1781, made between S. & pltf., after reciting that pltf. in Jan., 1780, sold to S. a plant, etc., for £165 6*s.* 6*d.* for which sum S. gave pltf. two promissory notes, dated Jan., 1780, one for £82 13*s.* 6*d.* payable Jan. 6, 1781, & the other for £82 13*s.*, the remainder of the sum, payable Jan. 6, 1782, & also reciting, that when the first note became due it was inconvenient for him to pay same, & that he promised, in consideration of the notes being given up to him, to assign over the plant, etc., to pltf., to which pltf. agreed, it was witnessed that as well in consideration of pltf.'s delivering up the notes, as also 5*s.* to S., paid by pltf., S. did assign & deliver to pltf. the plant, etc., to hold to pltf., his executors, administrators, & assigns for ever ; & also farther reciting, that it had been agreed between the parties that pltf. should let the plant to S. for three years, from Lady-day, 1781, S. paying pltf. £8 5*s.* 6*d.* per annum for the use & occupation thereof, & observing the covenants respecting same, it was agreed that if S. should make default in any of the quarterly payments, or in the performance of any of the other covenants, then the term granted should cease, & S. should deliver the plant, etc., & it should be lawful for pltf. to take immediate possession of same. There was a memorandum that S. had put pltf. into possession, by the delivering of one winch. On July 5, 1783, a commission issued against S., & deft. was chosen assignee, who took possession of the plant as part of the estate & effects of S. In an action of trover for the plant :—*Held :* the case was within 21 Jac. 1, c. 19, s. 11, & judgment must be entered for deft.—BRYSON *v.* WYLIE (1784), 1 Bos. & P. 83, n. ; 1 Cooke's Bankrupt Laws, 7th ed., p. 341 ; 126 E. R. 791.

Annotations :—**Distd.** Collins *v.* Forbes (1789), 3 Term Rep. 316 ; Lingham *v.* Biggs (1797), 1 Bos. & P. 82. **Apld.** Horn *v.* Baker (1808), 9 East, 215. **Distd.** Lucas *v.* Dorrien (1817), 7 Taunt. 278. **Apld.** Lingard *v.* Messiter (1823), 1 B. & C. 308. **Folld.** Spackman *v.* Miller (1862), 12 C. B. N. S. 659. **Consd.** Hollinshead *v.* Egan, [1913] A. C. 564, H. L. **Mentd.** Shrubsole *v.* Sussams (1864), 16 C. B. N. S. 452.

6493. Possession after assignment to creditor—Unfinished ship.]—A shipbuilder assigned to a creditor an unfinished ship, & agreed to complete it at his own expense, the value of the finished ship to be set off against an equal amount of the pre-existing debt. This shipbuilder's course of trade was to build ships on his own account & sell them when completed. Before he had completed the ship he became bkpt. :—*Held :* the ship did not pas to his assignees as being within his order & disposition.—HOLDERNESS *v.* RANKIN (1860), 2 De G. F. & J. 258 ; 29 L. J. Ch. 753 ; 3 L. T. 203 ; 6 Jur. N. S. 903 ; 8 W. R. 713 ; 45 E. R. 621, L. JJ.

Annotations:—**Folld.** Swainston *v.* Clay (1863), 3 De G. J. & Sm. 558, L. JJ. **Apprvd.** M'Bain *v.* Wallace (1881), 6 App. Cas. 588, H. L. **Refd.** Holderness *v.* Lamport (1861), 29 Beav. 129.

6494. —— Plant & machinery.]—T. was assignee of a lease of land & premises used for shipbuilding purposes. In the assignment to him there were separate assignments of the leasehold interest & of the fixtures, the purchase-money for the former being £2,000 & for the latter £500. T. deposited the lease & assignment with his bankers on the occasion of an advance to him. Subsequently, he erected additional buildings & machinery of considerable value. He afterwards filed a liquidation petition. The bankers claimed a lien on the machinery & trade fixtures by virtue of the deposit of the deeds :—*Held :* if the bankers could be held to be the true owners, the fixtures were in the order & disposition of bkpt. with their consent.—*Re* TRETHOWAN, *Ex p.* TWEEDY (1877), 5 Ch. D. 559 ; 46 L. J. Bcy. 43 ; 36 L. T. 70 ; 41 J. P. 596 ; 25 W. R. 399.

6495. Possession after mortgage—Fixtures.]—A., a worsted-dyer, by deed, mortgaged to B. fixtures used by A. in his business, which were in a house occupied by him as a tenant, & which he had a right to remove. He continued to be in possession of the fixtures after the mtge., & was

6493 i. *Possession after assignment to creditor—Unfinished ship.*]—B. & C., by verbal communing, agreed to make advances to A. on the security of a ship he had already completed building on his own account, provided A. entered into an absolute contract of sale of the vessel. An unqualified contract of sale was completed, by which A. agreed to complete & deliver to B. & C. the vessel, for a price to be paid in two instalments, with power to B. & C., in the event of A. failing to complete the contract, to enter into possession of the vessel & complete it, or sell it. Before the ship was completed or delivered A.'s estate was sequestrated :—*Held :* no reputation of ownership had been created in A., & B. & C. had a right to the ship.—M'BAIN *v.* WALLACE & CO. (1881), 6 App. Cas. 588 ; 45 L. T. 261 ; 30 W. R. 65, H. L.—**SCOT.**

6495 i. *Possession after mortgage.*]—Goods were mortgaged, & after default remained with the mtgor., who made an

Sect. 9.—Property in reputed ownership of bankrupt: Sub-sect. 3, A. (a).]

in possession of them at the time of his bkpcy. A petition by B. to have the benefit of his security was dismissed with costs, upon B.'s declining to file a bill in equity to have the question tried in a suit.—*Re* CLARKE, *Ex p.* SYKES (1849), 18 L. J. Bcy. 16; 13 L. T. O. S. 263; 13 Jur. 486.

Annotations:—**Consd.** Whitmore *v.* Empson (1857), 5 W. R. 217. **Mentd.** Gawan *v.* Barclay, *Ex p.* Barclay (1855), 4 W. R. 80, L. JJ.

6496. —— Stock-in-trade, furniture & effects.]—A mtgee. permitted stock-in-trade, furniture & effects mortgaged to him to remain in the possession of the mtgor. up to the time when the latter committed an act of bkpcy.:—*Held:* the stock-in-trade, furniture & effects passed to the assignees as being in bkpt.'s order & disposition.—*Re* ATKINSON (1851), Fonbl. 271; 18 L. T. O. S. 186; *affd.* without touching this point, *sub nom. Re* ATKINSON, *Ex p.* HESLOP (1852), 1 De G. M. & G. 477, L. JJ.

6497. —— Plant & fixtures of movable nature.]—Mtge. for a term of years of a brewery, tap, malt lofts, & premises, together with plant, fixtures, & machinery, & assignment to the mtgee. of plant, goods, utensils, implements & things on or about the premises, the mtgor. to retain possession of the premises, etc., until default. The mtgor. remained in possession up to his bkpcy.:—*Held:* plant & fixtures of a movable nature passed to the assignees.—*Re* CLARKSON, *Ex p.* LANGTON (1854), 1 Bankr. & Ins. R. 241.

6498. —— Goods retained under provision in mortgage deed.]—A trader assigned his goods by way of mtge., subject to a proviso, that it should be lawful for him to hold & use them, until default in payment of the money secured, after demand in writing. The mtgee. allowed the trader to continue in possession of the goods until after his bkpcy.:—*Held:* the goods were at the time of the bkpcy. in the order & disposition of bkpt., with the consent of the true owner.

An action of trover having been brought against the assignees, who had taken goods out of the possession of pltfs., defts. proved that before the mtge. to pltfs. bkpt. had assigned the goods, included in the mtge. to pltfs., to W., & that W. had allowed the goods to remain in the order & disposition of bkpt. until after the date of the fiat in bkpcy.:—*Held:* W. was the true owner, & the assignees, having a good title as against the true owner, had a right as against pltfs. to set up W.'s deed & the title acquired by them by reason of the goods having been left by W. in the order & disposition of bkpt.—FRESHNEY *v.* CARRICK (1857), 1 H. & N. 653; 156 E. R. 1363; *sub nom.* FRESHNEY *v.* WELLS, 26 L. J. Ex. 129.

Annotations:—**Apld.** Hornsby *v.* Miller (1858), 1 E. & E. 192. **Refd.** Spackman *v.* Miller (1862), 12 C. B. N. S. 659. **Mentd.** Nicholson *v.* Cooper (1858), 27 L. J. Ex. 393; Richards *v.* Johnson (1859), 28 L. J. Ex. 322; Paterson *v.* Harris (1862), 31 L. J. Q. B. 277; Fielding *v.* Lee (1865), 18 C. B. N. S. 499; Cooke *v.* Hemming (1868), L. R. 3 C. P. 334; Hollinshead *v.* Egan, [1913] A. C. 564.

6499. Possession obtained by exchange—Of bankrupt's draft on London for bills of exchange.]—A person having three bills of exchange, applied to a country banker, with whom he had had no previous dealings, to give for them a bill on London of the same amount. The bill given by the banker was afterwards dishonoured:—*Held:* (1) this was a complete exchange of securities; (2) if the exchange had not been complete, still the banker having become a bkpt., & the three bills having come to the possession of the assignees, must be considered as goods & chattels in the order & disposition of bkpt. at the time of his bkpcy.—HORNBLOWER *v.* PROUD (1819), 2 B. & Ald. 327; 106 E. R. 386.

Annotation:—**Apld.** Cumming *v.* Baily (1830), 6 Bing. 363.

6500. Possession of transfer tickets—Property transferable by transfer ticket.]—If property is assignable by transfer tickets, the reputed owner is the possessor of the tickets.—RIDOUT (ASSIGNEE OF LEWIS, A BANKRUPT) *v.* LLOYD & CO. & ALDER (1823), Mont. 103.

Annotation:—**Mentd.** West *v.* Reid (1843), 2 Hare, 249.

6501. Goods in warehouse—Warrants left with bankrupt.]—A. bought of B. goods in East India Co.'s warehouses, & left the warrants in B.'s hands, who pledged them, & afterwards became bkpt. whilst the warrants were in the possession of the pawnee:—*Held:* the goods were not in the possession, order, & disposition of B. at the time of his bkpcy., & did not pass to the assignees.—GREENING *v.* CLARK (1825), 4 B. & C. 316; 6 Dow. & Ry. K. B. 375; 3 L. J. O. S. K. B. 229; 107 E. R. 1077.

Annotations:—**Apld.** Webb *v.* Whinney (1868), 18 L. T. 523. **Refd.** Lincoln Waggon & Engine Co. *v.* Mumford (1879), 41 L. T. 655; Colonial Bank *v.* Whinney (1885), 30 Ch. D. 261, C. A. **Mentd.** West *v.* Reid (1843), 2 Hare, 249; Wilkins *v.* Bromhead (1844), 6 Man. & G. 963.

See, also, No. 6484, *ante.*

6502. —— Warrants in bankrupt's name—Held by creditor.]—A. having occasion to borrow money of B., left with him as a collateral security, warrants of a dock co. for sugars, deposited in their warehouses, & entered in his name in their books. A. afterwards became bkpt.:—*Held:* A. had not such a possession of the sugars as would enable his assignees to maintain trover for them, as the assignment in involvency, & handed them over to his assignee:—*Held:* the mtgee. could not take them out of the assignee's possession, but must enforce his claim under Insolvent Act.—DUMBLE *v.* WHITE (1871), 32 U. C. R. 601.—**CAN.**

6495 ii. —— *Fixtures—Covenant against removal.*]—On the sale of a woollen factory & machinery, it was stipulated that until the purchase-money should be fully paid, the purchasers were not to remove the machinery. The vendors afterwards conveyed to the purchasers, who executed a mtge. which covered not only machinery, fastened with nails or screws, but also machines, kept in their place by kleats, as well as the plates & paper used with the press. The purchasers resold, & the sub-purchaser, who had notice of the covenant against removal, subsequently became insolvent:—*Held:* his assignee in insolvency was not at liberty to remove the machinery.—CRAWFORD *v.* FINDLAY (1871), 18 Gr. 51.—**CAN.**

6496 i. —— *Stock-in-trade — Temporary possession by mortgagee—Redelivery to bankrupt.*]—A. passed a bond to B., specially pledging a waggon & live-stock. The waggon & live-stock were removed from A.'s farm to B.'s farm, where stock were branded. The waggon & certain stock were retained by B. for two days & then handed back to A., & the remainder was retained by B. for a month or upwards & then handed back to A., in whose possession the stock remained, on account of B., up to the date of A.'s insolvency:—*Held:* there had been so such *bonâ fide* delivery & retention of possession as were necessary for the purpose of creating a valid pledge as against third parties.—GUEST *v.* LE ROEX'S TRUSTEE (1887), 5 S. C. 119.—**S. AF.**

6497 i. —— *Plant & fixtures of movable nature.*]—Mtgees. are not entitled to any portion of fixtures or machinery that can be taken asunder & removed without doing any material injury to themselves or the buildings in which they are placed, & they having been permitted to remain in the apparent ownership of bkpt. till the time of his bkpcy., they will pass to his assignee.—*Re* M'KIBBON (1855), 25 L. T. O. S. 148.—**IR.**

d. —— *Ship.*]—When a trader makes an absolute bill of sale of two ships in payment of advances made to him by a creditor, although the ships still remain in possession of the trader they will not come under the reputed ownership clause.—*Re* CURRAN (1865), 17 Ir. Jur. 59.—**IR.**

e. *Possession obtained under contract for sale of goods—Proceeds appropriated to meet acceptances.*]—A. & Co., merchants carrying on business at Glasgow, brought a suit against the assignee of the estate of B. & Co.,

transfer of the warrants was a complete transfer of the possession before the bkpcy. so as to take them out of the order & disposition of bkpt. :—LUCAS *v.* DORRIEN (1817), 1 Moore, C. P. 29 ; 7 Taunt. 278 ; 129 E. R. 112.

Annotations :—**Mentd.** Barnett *v.* Brandao (1843), 6 Man. & G. 630 ; Lackington *v.* Atherton (1844), 7 Man. & G. 360 ; Farina *v.* Home (1846), 8 L. T. O. S. 277 ; Kingsford *v.* Merry (1856), 26 L. J. Ex. 83, Ex. Ch.

6503. —— —— —— But not as pledge.]—Goods entered in bkpt.'s name at the docks, warrants for which are held, but not strictly in pledge, by persons to whom he is under liabilities for advances, are goods "in the order & disposition of bkpt." & pass to his assignees.—WILKINSON *v.* REAY (1828), Dan. & Ll. 200.

6504. —— —— Transaction entered in vendor's books — Acknowledgment in warrant.]—Goods left in a bonded warehouse by the purchaser, but not transferred into his name in the books of the warehouse keeper, are within the order & disposition of the vendor, although the transaction is entered in the stock & bond books of the vendor in the name of the purchaser by distinctive marks & figures, & the vendor, in the warrant given by him at the date of the purchase, acknowledges that the goods are held by him to the order of the latter.—*Re* COUSTON, THOMSON & Co., *Ex p.* BOLLAND (1873), 28 L. T. 43.

6505. —— Warrants never in bankrupt's name.]—A. received warrants from B. not indorsed by B., & A. delivered & indorsed them to C., who afterwards procured B.'s indorsement. A. became bkpt. :—*Held :* for want of B.'s indorsement to A. & transfer into A.'s name in the dock co.'s books, A. never had the order & disposition of them.—*Re* LEECH, *Ex p.* DAVENPORT (1832), 1 Deac. & Ch. 397 ; Mont. & B. 165 ; 1 L. J. Bcy. 101, Ct. of R.

6506. —— Which would not have passed if in bankrupt's possession.]—Goods which would not pass to the trustee as being in the order or disposition of bkpt., if they were upon bkpt.'s premises, will not pass to the trustee if they are lying in the warehouse of a third party, in the name of bkpt.

R. & Co. deposited with E. & Co., wharfingers forty-four logs, which R. & Co. attempted to sell to A. for £194. A. having repudiated the sale, R. & Co. issued a writ for the price of the goods, & the action was compromised on the terms that A. should cut the logs into lengths, & in order to carry out the terms of the compromise, R. & Co. gave A. a delivery order to E. & Co., & A. from time to time drew thirty-three logs from E. & Co. A. subsequently failed, & his trustee claimed eleven logs at E. & Co.'s wharf as in bkpt.'s order & disposition :—*Held :* notwithstanding the logs were not on A.'s premises, the logs vested in his trustee as in his order & disposition.—*Re* KELLER, *Ex p.* ROSE BROTHERS (1913), 109 L. T. 880 ; 58 Sol. Jo. 155.

6507. —— Goods marked with vendee's name.]—KNOWLES *v.* HORSFALL, No. 6487, *ante*.

See, also, Nos. 6577 *et seq.*, *post*.

6508. Possession as tenant—Fixtures & movable articles held under demise—Only mere qualified right to use same.]—By lease, the lessor demised to the lessee a colliery, & all the engines, machinery, & other implements, effects, & things then lying on or about the colliery, or used or employed therewith, & mentioned in an inventory & valuation then made, *habendum* for twenty-one years, at a certain rent therein mentioned. The lease contained a proviso for re-entry in case the rent should be in arrear for the space of thirty days, & also a proviso that on the expiration, or other sooner determination of the demise, the lessee should leave & yield up to the lessor all engines, machines, effects, & things belonging to & used in the colliery, & that an inventory & valuation should, three months previous thereto, be made & taken by two indifferent persons, to be appointed by the parties respectively, or by an umpire, & such inventory should be compared with the then present inventory & valuation, & that the difference in the value of the engines, etc., should be paid by the landlord or tenant to the other, according as it was greater or less than the value at the time of the letting. The tenant failing in the payment of the rent, the lease became forfeited, & the landlord recovered judgment in ejectment in Trinity term, 1818, but did not execute his writ of possession until Nov. 9, 1819. On the following day the tenant committed an act of bkpcy. :—*Held :* the tenant never had, under the demise, the possession, order, or disposition of the fixtures or movable articles within 21 Jac. 1, c. 19, but a mere qualified right to use them during the term.—STORER *v.* HUNTER (1824), 3 B. & C. 368 ; 5 Dow. & Ry. K. B. 240 ; 3 L. J. O. S. K. B. 81 ; 107 E. R. 770.

Annotations :—**Distd.** Coombs *v.* Beaumont (1833), 5 B. & Ad. 72 ; Fairburn *v.* Eastwood (1840), 6 M. & W. 679. **Refd.** Clark *v.* Crownshaw (1832), 3 B. & Ad. 804. **Mentd.** R. *v.* Topping (1825), M'Cle. & Yo. 544 ; Watson *v.* Peache (1834), 1 Bing. N. C. 327.

6509. —— —— After judgment in ejection—Before writ of possession executed.]—During the intermediate time between the recovery of the judgment in Trinity term, 1818 (*see* No. 6508, *supra*), & the execution of the writ of possession on Nov. 9, 1819, bkpt. continued to work the colliery, & to have the use of the machinery & implements : —*Held :* during that period bkpt. had not the order or disposition of the machinery & implements within 21 Jac. 1, c. 19.—STORER *v.* HUNTER (1824), 3 B. & C. 368 ; 5 Dow. & Ry. K. B. 240 ; 3 L. J. O. S. K. B. 81 ; 107 E. R. 770.

Annotations :—**Mentd.** R. *v.* Topping (1825), M'Cle. & Yo.

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merchants carrying on business at Calcutta, & S. & Co., merchants carrying on business at London. A. & Co. alleged that they were the owners of certain goods, & sold same to B. & Co. & S. & Co., & drew for the price on S. & Co., who accepted the drafts, that the goods were shipped to B. & Co. at Calcutta, that at the time when the acceptances were given it was agreed upon between A. & Co., S. & Co., & B. & Co. that they should be met & paid out of the sale-proceeds of the goods, "which were thereupon specially appropriated thereto," that S. & Co. & B. & Co. subsequently suspended payment, in Dec., 1866, & Jan., 1867, that in Feb., 1867, B. & Co. filed their petition in the Ct. for the Relief of Insolvent Debtors at Calcutta, having previously delivered a portion of the goods, & indorsed the bills of lading for the remainder to J. & Co., who had notice of the insolvent state of S. & Co. & B. & Co., without any consideration & without the consent or authority of S. & Co., although the acceptances had not been met or returned, nor the goods in any way paid for, that the proceeds arising from the sale of the goods had been handed over by J. & Co. to the assignee, who threatened & intended to apply same in payment of the general body of creditors of B. & Co. NORMAN, J., decided the goods were in the possession, order, & disposition of B. & Co., as reputed owners, with the consent of A. & Co., & the goods & the sale-proceeds rightly passed to the assignee, & dismissed the suit :—*Held :* on other grounds, the ct. had jurisdiction to entertain the suit.—STERLING *v.* COCHRANE (1868), 1 B. L. R. 114.—**IND.**

6508 i. *Possession as tenant—Distillery utensils held under conditional sale.*]—The landlord of a distillery, who was also proprietor of the distillery utensils, granted a missive assigning the utensils to the tenant, & stipulating for 8 per cent. on the purchase-money while he had possessed them, & further bearing, "It is hereby declared & understood that you are to be obliged to take the utensils, betwixt the term of Martinmas, 1824, at the amount of what I paid for same, at which period the payment of 8 per cent. will cease upon the amount." The tenant was sequestrated subsequent to Martinmas, 1824, without payment of the price :—*Held :* the utensils were the property of the landlord.—WIGHT *v.* FORMAN (1828), 7 Sh. (Ct. of Sess.) 175.—**SCOT.**

Sect. 9.—*Property in reputed ownership of bankrupt: Sub-sect.* 3, *A.* (*a*).]

544; Clark *v.* Crownshaw (1832), 3 B. & Ad. 804; Coombs *v.* Beaumont (1833), 5 B. & Ad. 72; Watson *v.* Peache (1834), 1 Bing. N. C. 327; Fairburn *v.* Eastwood (1840), 6 M. & W. 679.

6510. —— —— Rent payable in advance—No default at bankruptcy.]—The rent of a cotton mill was made payable in advance, & the tenant covenanted with the landlord to keep in the mill machinery of the value of £3,000, as a security for the rent. The lessee became bkpt., no rent being due. The official assignee immediately entered, & claimed to be entitled to remove the machinery before the next instalment of rent became due, which claim the landlord resisted, on the ground that the covenant gave him a lien on the machinery:—*Held:* the provision as to reputed ownership applied, & the assignee was entitled to remove the machinery.—SHUTTLEWORTH *v.* HERNAMAN (1857), 1 De G. & J. 322; 29 L. T. O. S. 338; 22 J. P. 36; 3 Jur. N. S. 1313; 5 W. R. 853; *sub nom. Re* WALLWORTH, SHUTTLEWORTH *v.* HERNAMAN, 26 L. J. Bcy. 61, L. JJ.

Annotation:—**Distd.** *Re* Keen & Keen, *Ex p.* Collins, [1902] 1 K. B. 555.

6511. —— Fixtures after expiry of original & pending granting of new lease—New lease agreed to be deposited with creditor—Bankruptcy before new lease granted.]—A firm deposited a lease with their bankers as a security. Several fixtures on the premises were the property of the firm. The lease expired, & the firm continued to occupy the premises as yearly tenants, & afterwards made an agreement for a new lease, the counterpart of which was deposited with the bankers, & they engaged to deposit the new lease when they obtained it. The firm having become bkpt., the landlord declared forfeited the lease which had not been signed by himself:—*Held:* the tenant's fixtures were not in their order & disposition, so as to pass to their assignees.—FEARENSIDE *v.* DERHAM, THOMPSON *v.* DERHAM (1844), 13 L. J. Ch. 354; *sub nom. Re* DERHAM, *Ex p.* THOMPSON, FEARENSIDE *v.* DERHAM, THOMPSON *v.* DERHAM, 8 Jur. 633, L. C.

6512. —— Fictitious lease.]—Bkpt. was in the possession of property as apparent owner, under an instrument, which, though in appearance a lease, was, in effect, a contrivance to secure the seller of the property the price to be paid, together with 10 per cent. interest on the amount until it should be paid:—*Held:* bkpt.'s having obtained the apparent ownership by means of such fraud, would not prevent the assignees from recovering it under 21 Jac. 1, c. 19.—SINCLAIR *v.* STEVENSON (1825), 2 Bing. 514; 10 Moore, C. P. 46; 3 L. J. O. S. C. P. 61; 130 E. R. 404.

Annotations:—**Consd.** *Re* Walsh, *Ex p.* King (1840), 4 Jur. 510, Ct. of R.; Load *v.* Green (1846), 15 M. & W. 216. **Mentd.** Elmes *v* Ogle (1851), 15 Jur. 180; Burgess *v.* Bennett (1872), 20 W. R. 720.

6513. Possession as bailee—Securities deposited in sealed packet—For safe keeping.]—Bkpt., on Mar. 1, deposited with petitioner certificates of shares in a mining co., for securing a loan of money, with an agreement accompanying the deposit, by which he engaged to complete the transfer of the shares, when required. Petitioner sealed up the documents in a packet, which she entrusted to bkpt. to keep in his iron safe, for better security, where they remained until three weeks before the bkpcy., when it was reclaimed by petitioner:—*Held:* the shares were not in the order & disposition of bkpt. at the time of his bkpcy.—*Re* RICHARDSON, *Ex p.* RICHARDSON (1839), 3 Deac. 496; 1 Mont. & Ch. 43; 8 L. J. Bcy. 27, Ct. of R.

Annotations:—**Consd.** *Re* Worcester, *Ex p.* Agra Bank (1868), 3 Ch. App. 555, L. JJ. **Refd.** Colonial Bank *v.* Whinney (1886), 11 App. Cas. 426, H. L.

6514. —— Hired goods.]—Pltf. lent furniture on hire to defts., hotel-keepers, at a fixed sum to be paid by instalments, with a provision that until all the instalments were paid, the property should remain in pltf. & if any instalments should not be paid when due, pltf. was to be at liberty to retake possession of his goods & the instalments were to be forfeited, but upon all the instalments being paid the furniture was to become the property of defts. Upon one instalment being unpaid pltf. put a man in possession of the furniture, & defts. executed an assignment of the lease of the hotel, which had been previously mortgaged to persons whom pltf. had paid off, & of all their personal chattels & effects, including the hired furniture, to pltf., & afterwards became bkpt.:—*Held:* pltf.'s furniture, not having been paid for, remained the property of pltfs., & was not in the order & disposition of bkpts.—CRAWCOUR *v.* SALTER (1881), 18 Ch. D. 30; 51 L. J. Ch. 495; 45 L. T. 62; 30 W. R. 21, C. A.

Annotations:—**Distd.** *Re* Fowler, *Ex p.* Brooks (1883), 23 Ch. D. 261, C. A. **Consd.** *Re* Parker, *Ex p.* Turquand (1885), 14 Q. B. D. 636, C. A. **Refd.** Chappell *v.* Harrison (1910), 103 L. T. 594. **Mentd.** Moult *v.* Halliday (1897), 46 W. R. 318, D. C.

See, also, No. 6556, *post.*

6515. —— —— No right to use as own without fraud.]—H., on Aug. 30, 1869, agreed with B., a furniture dealer, to hire furniture from B., at the rate of £2 per week. In the memorandum of agreement there was a provision that if H. should be sued or become bkpt., etc., B. should be at liberty to possess himself of the furniture. The agreement was never registered under Bills of Sale Act, 1854 (c. 36). B., being still in possession of the furniture became bkpt. on June 9, 1871, & on July 6 the trustee under the bkpcy. took possession. On July 7 the trustee first received notice of B.'s claim to the furniture. The trustee applied that the furniture might be declared to be in the order & disposition of H., with the consent of the alleged true owner:—*Held:* the furniture was not in the order & disposition of bkpt. with the consent of the true owner, as bkpt. could not have used it as his own without a direct fraud.—*Re* HAWKINS, *Ex p.* EMERSON (1871), 41 L. J. Bcy. 20; *sub nom. Re* HAWKINS, EMERSON *v.* BARNETT, 20 W. R. 110.

Annotations:—**Refd.** Chappell *v.* Harrison (1910), 103 L. T. 594. **Mentd.** *Re* Couston, *Ex p.* Watkins (1873), 8 Ch. App. 523, n.

6516. —— —— In hands of auctioneer for sale.]—P., a trader, being in want of capital sold to pltfs. agricultural machinery, including a steam-engine & thrashing machine, with their appurtenances, for £700, & signed a sale or receipt note for same. Pltfs., by an agreement in writing, let the machinery on hire to P. for a term of three years at or for £882, payable by quarterly instalments of £73 10*s.*, & the agreement provided that in case of default being made by P. in the payment of the £882, or the quarterly instalments or any part thereof, or if P. during the term became bkpt., or assigned, or parted with possession of the machinery or any part thereof, without the consent of pltfs., it should be lawful for them to resume & take absolute possession of the said

6514 i. *Possession as bailee—Hired goods—"Gas fittings"—Engine.*]—Where there is a clause in an Act incorporating a gas co. providing that "fittings for the gas" let on hire by the co. are protected from the consequences of the bkpcy. of the person hiring them, a gas-engine is included in the protection of the Act.—AUCKLAND GAS CO. *v.* OFFICIAL ASSIGNEE (1887), 5 N. Z. L. R. 339.—**N.Z.**

machinery. Neither the sale note nor the agreement was registered under Bills of Sale Act, 1854 (c. 36), & P. paid two instalments of £73 10*s.* due under the agreement & no more. P., without the consent or knowledge of pltfs., & after he had made default in payment of the instalments, parted with the possession of the steam-engine & thrashing machine, with their appurtenances, & delivered same to deft., who had no notice of the above agreement, for the purpose of having them sold by auction, & deft. advanced £100 to P. on them, & also incurred expenses in attempting to sell them. P. then committed an act of bkpcy., & pltfs. demanded possession of the steam-engine & thrashing machine, with their appurtenances, from deft., who claimed a lien upon them in respect of his commission & charges as auctioneer in such attempted sale, & also in respect of the advance of £100 which had not been repaid by him to P. In an action to recover the steam-engine & machinery, with their appurtenances or their value & damages for their detention :—*Held :* pltfs. were entitled to judgment on the ground that the steam-engine & machinery, whether the agreement amounted to a bill of sale or not, were not in the order & disposition of P. within 1869 Act, s. 15 (5).—LINCOLN WAGGON & ENGINE CO. *v.* MUMFORD (1871), 41 L. T. 655.

6517. Possession through devastavit by bankrupt's wife.]—Testator bequeathed furniture to his wife, upon trust for sale with all convenient speed, & appointed her extrix. Eight years afterwards she married, having still the goods in her possession, & she & her husband used the furniture for six years, after which the husband became bkpt. :—*Held :* the assignees were entitled to the goods, which were in the order & disposition of bkpt., his possession not being consistent with the trust.—*Re* MOORE, *Ex p.* MOORE (1842), 2 Mont. D. & De G. 616 ; 11 L. J. Bcy. 35 ; 6 Jur. 828, Ct. of R.

6518. Possession of daughter's furniture—Bought by her from trustee in previous liquidation.]—A daughter purchased, with her own money, from her father's trustee in liquidation, his household furniture, but took no formal assignment. She lived with her father as before, & paid the rent, & her father paid the rates, taxes & other outgoings. Her father carried on his trade at the house, his name was on the door plate, & he voted at elections in respect of his occupation. He became bkpt. :—*Held :* the furniture passed to his trustee as in his order & disposition.—*Re* COOK, *Ex p.* MOORE (1877), 36 L. T. 560.

6519. Possession after sale of sheriff's officer—Purchaser allowing bankrupt to use goods on payment of interest.]—In 1877 a sheriff's officer took possession of the furniture & effects of debtor under a *fi. fa.* He sold the goods privately to a hosier, a friend of debtor, for £194 15*s.* It was agreed between debtor & the purchaser, that debtor should remain in possession of the furniture & effects, paying interest at the rate of 5 per cent. upon the purchase money. Debtor remained in possession until Apr. 15, 1879, when he filed his petition for liquidation. In Oct., 1882, the trustee applied to the county ct. for an order to enforce delivery of the furniture to him :—*Held :* the furniture was in the order & disposition of debtor as reputed owner, at the time of filing the petition for liquidation, & belonged to the trustee. —*Re* FOWLER, *Ex p.* BROOKS (1883), 23 Ch. D. 261 ; 48 L. T. 453 ; 47 J. P. 470 ; 31 W. R. 833, C. A.

Annotation :—**Refd.** Chappell *v.* Harrison (1910), 27 T. L. R. 85.

6520. Possession with consent of trustee in bankruptcy—To assist settling affairs—Property shown to belong to creditors in accounts—Second bankruptcy.]—If bkpt. after his certificate trades again for himself & is left for several years in possession of his house, household goods, & furniture, in order to assist in settling the affairs of the estate, the assignees repeatedly stating the goods, in their accounts with the creditors as part of the estate, such possession does not fall within 21 Jac. 1, c. 19, s. 11, so as to vest the goods in assignees under a second commission.—WALKER *v.* BURNELL (1780), 1 Doug. K. B. 317 ; 99 E. R. 205.

Annotations :—**Refd.** Collins *v.* Forbes (1789), 3 Term Rep. 316 ; Bartlett *v.* Bartlett (1857), 1 De G. & J. 127, L. JJ. **Mentd.** Lingham *v.* Biggs (1797), 1 Bos. & P. 82 ; Horn *v.* Baker (1808), 9 East, 215 ; Rankin *v.* Horner (1812), 16 East, 191 ; Oliver *v.* Bartlett (1819), 3 Moore, C. P. 592 ; Englebach *v.* Nixon (1875), 32 L. T. 831.

6521. Possession with consent of assignees for creditors—To assist in carrying on business.]—A., a horse-dealer & jobber, by a deed of trust, assigned all his stock-in-trade, etc., to trustees, for the benefit of his creditors, until all his then debts should be paid off, to hold on certain trusts (*inter alia*) that, so long as A. should observe the orders of the trustees, he was to be allowed to carry on & conduct the business, subject to their orders, but that they should have the power to determine his possession on his failing to observe their orders, that all money received in the business was to be paid to the account of the trustees, & all money paid by their cheques, & that A. was to receive a certain weekly salary. The creditors also advanced a large sum of money to carry on the business. The business was carried on by A. for some time, his name being over the door at the place of business, & he had dealings with various persons as if he carried on the business on his own account ; but on his neglecting to observe the orders of the trustees, they determined his right to carry on the business, & he admitted, in writing, that they had a right to & did assume possession of the stock-in-trade, etc. The trustees thereupon gave notice to the parties who had some of the horses, part of the stock-in-trade, that they belonged to them. Two days after such notice A. committed an act of bkpcy. :—*Held :* the trustees, by allowing A. to carry on the business in his own name, were not estopped from denying that the horses were A.'s, & the horses were not in the possession, order, & disposition of bkpt. at the time of the bkpcy., within 6 Geo. 4, c. 16, s. 72.—PRICE *v.* GROOM (1848), 2 Exch. 542 ; 17 L. J. Ex. 346 ; 154 E. R. 606.

Annotation :—**Mentd.** *Re* Whiteley, *Ex p.* Smith (1892), 66 L. T. 291, D. C.

6522. Possession for specific purpose.]—Where bkpt. is in possession of the goods of another, *bonâ fide* with the consent of the owner at the time of the bkpcy., for a specific purpose, beyond which he has not the right of disposition or alteration, that is not such a possession as entitles the assignees to recover the value of them under 21 Jac. 1, c. 19, s. 11.—COLLINS *v* FORBES (1789), 3 Term Rep. 316 ; 100 E. R. 596.

Annotations :—**Distd.** Gordon *v.* East India Co. (1797), 7 Term Rep. 228. **Dbtd.** Cooke *v.* Hemming (1868), L. R. 3 C. P. 334. **Refd.** Lingham *v.* Biggs (1797), 1 Bos. & P. 82 ; Crowfoot *v.* London Dock Co. (1834), 2 Cr. & M. 637.

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f. —— *Gratuitous bailment.*]—A. went to London for the purpose of her son's education, & left her piano with B., a friend of hers, for custody. B. died, & C., one of the exors., offered to store the piano for A. in his own house, & the offer was accepted. C. was adjudicated bkpt. —*Held :* the piano was not in the order & disposition of bkpt.—*Re* M'PARLAND, *Ex p.* MURPHY (1893), 31 L. R. Ir. 465.—IR.

Sect. 9.—Property in reputed ownership of bankrupt: Sub-sect. 3, A. (a).

6523. —— Unfinished ship.]—A shipbuilder, contracted to build a ship, to be paid for by four instalments. The ship was measured with the builder's privity, to the intent that the purchaser might get her registered in his name. On June 25 the shipbuilder signed the usual certificate of her building, & on the 26th the ship was registered in the purchaser's name, & on the same day the third instalment was paid. On the 30th the builder committed an act of bkpcy., upon which a commission issued. On July 2, the ship not being then completed, or launched, the purchaser, & a crew hired by him, took possession of her, & a rudder & cordage, the former of which was made by the shipbuilder, and the latter bought by him, for the express purpose of completing the ship: —*Held:* the property was not in the possession of bkpt. as reputed owner.—WOODS *v.* RUSSELL (1822), 5 B. & Ald. 942; 1 Dow. & Ry. K. B. 587; 106 E. R. 1436.

Annotations:—**Distd.** Bishop *v.* Crawshay (1824), 3 B. & C. 415. **Apld.** Carruthers *v.* Payne (1828), 2 Moo. & P. 429. **Consd.** Clarke *v.* Spence (1836), 4 Ad. & El. 448; Laidler *v.* Burlinson (1837), 2 M. & W. 602; Spanish & Portuguese Screw Steam Shipping Co. *v.* Bell, Wood *v.* Bell (1856), 25 L. J. Q. B. 148. **Apld.** Holderness *v.* Rankin (1860), 28 Beav. 180. **Consd.** Anglo-Egyptian Navigation Co. *v.* Rennie (1875), L. R. 10 C. P. 271; Seath *v.* Moore (1886), 11 App. Cas. 350, H. L. **Refd.** Wood *v.* Bell (1856), 6 E. & B. 355, Ex. Ch. **Mentd.** Atkinson *v.* Bell (1828), 8 B. & C. 277; Beale *v.* Mouls (1847), 10 Q. B. 976: Acraman *v.* Morrice (1849), 14 L. T. O. S. 292; Turley *v.* Bates (1863), 2 H. & C. 200; *Re* Lindsay, *Ex p.* Lambton (1875), 10 Ch. App. 405, L. JJ.; Banbury & Cheltenham Direct Ry. Co. *v.* Daniel (1884), 54 L. J. Ch. 265; Clarke *v.* Millwall Dock Co. (1885), 53 L. T. 316.

6524. —— —— Articles sent for repair.]—P. contracted with a shipbuilder to build him a ship for a certain sum, to be paid by instalments as the work proceeded. An agent for P. was to superintend the building. The vessel was built under such superintendence, all the materials being approved by the agent before they were used. The builder became bkpt. before the ship was completed. Afterwards the assignees completed the ship. In an action of trover by P. against the assignees for the ship:—*Held:* the ship did not pass to the assignees as having been in the possession, order, or disposition of bkpt. by consent of the true owner, within 6 Geo. 4, c. 16, s. 72.

This case is plainly not within the Act, for the vessel was not in the possession, order, or disposition of bkpt., any more than a vessel or other article sent to a builder or manufacturer to be repaired is within the above sect. (WILLIAMS, J.). —CLARKE *v.* SPENCE (1836), 4 Ad. & El. 448; 1 Har. & W. 760; 6 Nev. & M. K. B. 399; 5 L. J. K. B. 161; 111 E. R. 855.

Annotations:—**Consd.** Laidler *v.* Burlinson (1837), 2 M. & W. 602. **Apld.** Holderness *v.* Rankin (1860), 28 Beav. 180. **Consd.** Seath *v.* Moore (1886), 11 App. Cas. 350, H. L. **Refd.** Wood *v.* Bell (1856), 5 E. & B. 772; Anglo-Egyptian Navigation Co. *v.* Rennie (1875), L. R. 10 C. P. 271. **Mentd.** Tripp *v.* Armitage (1839), 1 Horn & H. 442; Turley *v.* Bates (1863), 2 H. & C. 200; Ilfracombe Ry. Co. *v.* Poltimore (1868), 37 L. J. C. P. 86; Clarke *v.* Millwall Dock Co. (1886), 17 Q. B. D. 494, C. A.

6525. —— Goods sent on approval.]—Goods were sent from J. in London to M. at Sunderland, accompanied with a letter expressing a hope that some of the articles would be approved of, & desiring to have those articles which were not approved of returned as speedily as possible. The letter contained an invoice, headed, "M. bought of J.," wherein the prices of the articles were set down, but not carried out. On the evening of the day of the arrival of the letter & the goods at Sunderland, the effects of M. were seized under a *fi. fa.*, & on the following morning his shop was shut by the sheriff, & never re-opened. In an action of trover for the goods, brought by J. against the assignees of M., who had been made bkpt.:—*Held:* the goods did not pass to the assignees under 21 Jac. 1, c. 19, s. 11, as bkpt. should have been allowed a reasonable time to select such goods as he was disposed to retain.—GIBSON *v.* BRAY (1817), 8 Taunt. 76; 1 Moore, C. P. 519; 129 E. R. 311.

Annotations:—**Refd.** Sadler *v.* Whitmore (1840), 5 Jur. 315; Smith *v.* Hudson (1865), 6 New Rep. 103; *Re* Watson, *Ex p.* Atkins, [1904] 2 K. B. 753, C. A.

6526. —— Goods alleged to be sent on approval —Evidence of absolute sale subject to fixing price.] —On the bkpcy. of a miller, C. claimed as his own, & removed from the mill without the knowledge of the receiver, one hundred & nine sacks of wheat, which he had sent five weeks previously, as he alleged, on approval. It was proved by the evidence of bkpt. & his clerk, & from his books, that he was not in the habit of receiving other people's corn to grind & return as flour, but that he used to receive corn from C. & keep it until a price was fixed for it, when he debited himself with such price. C. deposed that bkpt. might have found a purchaser for it, or have bought it for himself, or that he, C., might have taken it back:—*Held:* the wheat was in the order & disposition of bkpt. at the time of the bkpcy. with the consent of the true owner.—*Re* BELL, *Ex p.* CLARKE (1877), 47 L. J. Bcy. 33; 37 L. T. 509.

6527. —— Goods sent on sale or return—Not actually delivered before bankruptcy.]—Goods sent on sale or return, not actually delivered at bkpt.'s shop at the time of the bkpcy., are not in the reputed ownership of bkpt.—*Re* ASHTON (1851), Fonbl. 258; 19 L. T. O. S. 191.

See, also, Nos. 6820, 6821, *post.*

6528. —— For carrying on trade of another— Bankrupt acting as servant of father.]—If a man has goods in his possession, as the servant of his father, for the purpose of carrying on a trade for the father's benefit only, they will not pass to his son's assignees under 21 Jac. 1, c. 19.—STAFFORD *v.* CLARKE (1823), 1 C. & P. 24, N. P.

Annotation:—**Mentd.** Jackson *v.* Stopherd (1834), 4 Tyr. 330.

6529 i. *Possession for specific purpose —For carrying on trade of another—Bankrupt managing hotel for wife.*]—S., a married woman, owned household furniture & effects, which were, at the time of her husband's bkpcy. with her consent & permission on premises on which the husband carried on business as a hotel-keeper. The goods were entrusted by S. to her husband for the purpose of the business, which was carried on by him for his wife's benefit: —*Held:* the official assignee was entitled to such goods.—*Re* HACKING (1912), 12 S. R. N. S. W. 770.—**AUS.**

g. —— For carrying on own business—Loan by wife to husband.]—A married woman lent to her husband for the purpose of his business as hotel-keeper certain furniture, to which she was entitled as her separate property. On the husband's bkpcy.:—*Held:* the furniture was to be treated as assets of the husband.—*Re* DONALDSON, [1902] 2 I. R. 310.—**IR.**

h. —— —— ——.]—A wife entrusted a cab & horses to her husband for the purpose of his business as a cab-driver. The husband was subsequently adjudicated a bkpt. on his own petition:—*Held:* the wife's property became assets in the bkpcy.—O'HALLORAN'S OFFICIAL ASSIGNEE *v.* O'HALLORAN (1909), 29 N. Z. L. R. 79.—**N.Z.**

i. —— —— Stock supplied on wife's credit.]—B., a farmer, was for some months before his bkpcy., in an insolvent condition. In those circumstances his wife purchased a country hotel, including the furniture therein, in her own name. The stock-in-trade was supplied on the wife's credit, but the banking-account was in the husband's name. The licence was also in the husband's name. The husband became bkpt., while residing with his wife in the hotel, but all his debts were incurred before its purchase. No debts were incurred by, & no indulgence or

6529. —— —— Bankrupt managing hotel for trustee in bankruptcy of another.]—P., employed by the trustee under a bkpcy. to continue in the management of an hotel at weekly wages, presented a petition for liquidation :—*Held :* the doctrine of order & disposition could not arise.—*Re* GATEHOUSE, *Re* PORTER, *Ex p.* BOLLAND (1871), 24 L. T. 335.

6530. —— For sale.]—If a person sends his servants to sell his deals at another's wharf, the deals do not pass to the assignees of the owner of the wharf, as goods in his order & disposition, under 21 Jac. 1, c. 19.—BODDY *v.* ESDAILE (1823), 1 C. & P. 62, N. P.

6531. —— To retire bills.]—Share certificates were transmitted, clothed with a trust to retire bills :—*Held :* they were not within 6 Geo. 4, c. 16, s. 72.—*Re* WARWICK, *Ex p.* BROWN (1838), 3 Deac. 91 ; 3 Mont. & A. 471 ; 7 L. J. Bcy. 29 ; 2 Jur. 82, Ct. of R.

6532. —— Note to be exchanged for bills.]—A. being indebted to B., & pressed by him for payment, gave him a promissory note made by C., payable to A., without the words " or order," & indorsed by A. A. took the note, but in consequence of its not being negotiable, returned it to A., in order that B. might give him a negotiable security instead of it, & C. did, at A.'s request, accept negotiable bills of exchange, drawn by A. upon him, instead of the note, & at the same time that that was done, A. desired C. to hand the bills to B. On the same day, A. committed an act of bkpcy. :—*Held :* it not appearing that C. had any notice of the transaction that had passed between A. & B., or that the bills were given in substitution of the note, or that he had assented to B.'s title in any way, A.'s assignees were entitled to them.

The case stands in the same position as if the bills had been in the actual possession of bkpt. at the time of the bkpcy. ; but the bills cannot on that account be said to have been in the possession, or order & disposition of bkpt., by consent of defts. as true owners, within 6 Geo. 4, c. 16, s. 72, because they were substituted for the note, & any facts or argument applicable to that note are applicable to them. That note was placed in the possession of bkpt. by defts. for a specific purpose, that of being exchanged for the bills, which bills, or the note, if no such bills were given, were manifestly intended to be forthwith handed over to defts. Neither the note, nor the bills, would, by reason of being in the hands of bkpt. at the time of the bkpcy., come within s. 72 (LORD DENMAN, C.J.).—BELCHER *v.* CAMPBELL (1845), 8 Q. B. 1 ; 15 L. J. Q. B. 11 ; 5 L. T. O. S. 390 ; 9 Jur. 1073 ; 115 E. R. 773.

6533. Property subject to trust—Bankrupt's wife administering father's effects—Bankrupt continuing father's business for benefit of estate.]—Where the wife of bkpt. has administered to her father, & become possessed as administratrix of his effects, to which she & infant brothers & sisters are entitled, & the husband has continued the business of the father for their benefit, that is not such a possession of the goods as shall be deemed an ordering & disposition within 21 Jac. 1, c. 19. —VINER *v.* CADELL (1800), 3 Esp. 88, N. P.

Annotation :—**Mentd.** Caffrey *v.* Darby (1801), 6 Ves. 488.

6534. —— Furniture.]—*Held :* furniture, etc., in the possession of bkpt. according to the title under the trust of a will did not pass to the assignees under 21 Jac. 1, c. 19, s. 11.—*Re* MARTIN, *Ex p.* MARTIN (1815), 2 Rose, 331 ; 19 Ves. 491 ; 34 E. R. 598, L. C.

Annotations :—**Apld.** *Re* Horwood, *Ex p.* Horwood (1828), Mont. & M. 169. **Refd.** *Re* Kidder, *Ex p.* Burbridge (1835), 1 Deac. 131.

6535. —— ——.]—Testator being seised of the mansion-house of B. for his life, & being the owner of household furniture therein, bequeathed the latter to trustees upon trust, to permit same to be held & enjoyed by the person who, for the time being, would be entitled to the possession of his freehold estates, & he further directed that whilst the freehold estates should be held & enjoyed by the person entitled to his mansion-house, the chattels should be kept in the mansion-house, & not removed therefrom, unless with the consent of the trustees. Upon the death of testator, the goods were in the mansion-house, & his son then became seised of the freehold estates, & entitled to the mansion-house for his life, & remained in the occupation of same, & of the household furniture, etc., mentioned in the will :—*Held :* even if the son had been a trader, & become bkpt., & had had the goods in his possession at the time of the act of bkpcy., in the above circumstances, they would not have passed to his assignees as property in his order & disposition within 21 Jac. 1, c. 19. —SHAFTESBURY (EARL) *v.* RUSSELL (1823), 1 B. & C. 666 ; 3 Dow. & Ry. K. B. 84 ; 1 L. J. O. S. K. B. 202 ; 107 E. R. 244.

Annotations :—**Mentd.** *Re* Acraman, *Ex p.* Castle (1842), 3 Mont. D. & De G. 117 ; MacGregor *v.* Clamp, [1914 K. B. 288, D. C.

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delay granted to, bkpt. in consequence of such purchase or anything connected with it :—*Held :* the property did not form part of the property of bkpt.—*Re* BRICK, OFFICIAL ASSIGNEE *v.* BRICK (1899), 18 N. Z. L. R. 496.—**N.Z.**

j. —— *Material sent for manufacture into goods.*]—Claimant agreed with the execution debtor, an insolvent, to furnish material to the latter for the manufacture of carriages, from time to time, for one year, it being provided that no property in such goods should pass, but that notwithstanding any improvement or work upon same, or change of form or addition thereto or use thereof, same & every part thereof should be & remain the goods & property of claimant. The material was supplied & manufactured into carriages by the execution debtor, which were seized by defts., & claimant claimed same :—*Held :* in the absence of fraud claimant was entitled to succeed.—WELLBANKS *v.* HENEY (1890), 19 O. R. 549.—**CAN.**

6530 i. —— *For sale.*]—Where wine was ordered from B. & Co., & the bill of lading bore the wine to have been shipped by them, & it was indorsed by them to the buyer, & they drew a bill for the price :—*Held :* competent, in a question with their arresting creditors, for the payee in the bill, claiming the price, to prove the wine had been his own, & never was the property of B. & Co., & that they had acted merely as his agents.—CULLEN *v.* MACLEAN & STEWART, WARRES & MANDATORY (1833), 11 Sh. (Ct. of Sess.) 733.—**SCOT.**

6530 ii. —— ——.]—Wines were forwarded to a hotel-keeper for use in his business, the wine merchant retaining, according to the verbal agreement of the parties, the property of the wine, & having access from time to time to the cellars in order to take stock. The hotel-keeper, on stock being thus taken, paid for what had been used. After a number of years' dealing on such footing the hotel-keeper was sequestrated : —*Held :* the wines then in his cellars, & sent there under such course of dealing, did not fall under the sequestration.—BELL, RANNIE & CO. *v.* SMITH (WHITE'S TRUSTEE) (1885), 22 Sc. L. R. 597.—**SCOT.**

6530 iii. —— ——.]—W. supplied a wagon to G., a general dealer, & debited G. with the price. On Sept. 2, 1914, the sale was cancelled by mutual consent, G. being credited with the price, & G. agreed to hold the wagon on consignment for W. & to sell it on W.'s behalf. G.'s estate was sequestrated in Apr., 1915, & G.'s trustee, notwithstanding notice of W.'s claim, sold the wagon by auction :—*Held :* as the wagon was left in the possession of G., the pledgor, the dominium remained in W. & did not pass to G.—GOLDINGER'S TRUSTEE *v.* WHITELOW & SONS (1916), T. P. D. 230.—**S. AF.**

6533 i. *Property subject to trust—Widow administering husband's effects—& continuing to trade.*]—A trader died, leaving debts & assets. His widow continued to trade, contracted new debts, & took out administration to her husband's assets. Though the assets remained in her possession a considerable time, & a large portion of them was sold to pay a bond debt due to the trustees of her marriage settlement :—*Held :* they were not within the disposition & order clause.—*Re* ROBERTS (1862), 14 Ir. Jur. 339.—**IR.**

Sect. 9.—*Property in reputed ownership of bankrupt: Sub-sect.* 3, *A.* (*a*).]

6536. —— ——.]—A. assigned a leasehold messuage & household furniture to B., upon trust for the use of A. for life, & after his decease, for the use of C., his wife, for life, & after the decease of the survivor, for the use of their daughter, D. A. occupied the messuage, with the furniture, until Oct., 1816, when he died. In Oct., 1817, C., the widow, married E., who immediately took possession of the messuage & furniture, & continued in possession until Oct., 1828, when a commission of bkpcy. issued against him. In Oct., 1818, E. had procured B. to assign the messuage & furniture to him by a deed, which contained false recitals, & was in breach of the trust:—*Held:* in the circumstances, the furniture was not in the order & disposition of E., & his assignees should be restrained from selling same.—*Re* HORWOOD, *Ex p.* HORWOOD (1828), Mont. & M. 169; *affd. sub nom. Re* HORWOOD, *Ex p.* HENCLIFFE (1830), Mont. 24, L. C.

Annotation:—**Refd.** *Re* Kidder, *Ex p.* Burbridge (1835), 1 Deac. 131.

6537. —— **Specific chattels.**]—An exor., having in his possession specific chattels of testator, became bkpt. In a suit in Ch. to administer testator's estate, a demurrer to the bill, on the ground that the goods were in the reputed ownership of bkpt., was overruled.—*Re* BIDDULPH, *Ex p.* WRIGHT (1842), 2 Mont. D. & De G. 491; 6 Jur. 135.

6538. —— **Payments of debts.**]—M. & A., partners, were consignees of a West Indian estate, & became creditors to the estate. Prior to their bkpcy. the estate was conveyed to trustees, M. being one, upon trust for certain purposes, one of which was to pay off the debt due to M. & A., which they assigned to S. & Co. Prior to their bkpcy. M. & A. received sugar, which remained at the docks, earmarked in their name, & after the bkpcy. more sugar arrived, consigned by bills of lading to bkpts. Their assignees took possession of all the sugar:—*Held:* the sugars came into the hands of M. & A. clothed with trusts to pay the proceeds to M. as trustee, & must be applied to pay off the debt assigned to S. & Co., & in discharge of the other objects of the trust, M. as trustee being effected with notice to M. & A. of the assignment of their debt.—*Re* MANNING, *Ex p.* SMITH (1834), 4 Deac. & Ch. 579; 4 L. J. Bcy. 14, Ct. of R.

6539. —— **Property of wife.**]—Where the property of a wife is clothed with a trust, it will not pass as in the order & disposition of bkpt., although such property, in ordinary circumstances, would pass.—*Re* BLOXHAM, *Ex p.* ELLISTON (1835), 2 Mont. & A. 365; 5 L. J. Bcy. 3, Ct. of R.

6540. —— ——.]—By the terms of a settlement made previous to bkpt.'s marriage all the property of his intended wife was vested in trustees for her separate use, & she was to have all the rights & privileges of a *feme sole*. The property consisted of a hotel & furniture at Brighton, the business of which was conducted entirely by the wife, bkpt. never living at the hotel, nor in any way interfering in the management of it:—*Held:* the property was not in the reputed ownership of bkpt. as the possession was strictly consistent with the trusts of the deed.—*Re* MASSEY, *Ex p.* MASSEY (1835), 4 Deac. & Ch. 405; 2 Mont. & A. 173, Ct. of R.

6541. —— —— **Set aside to enable her to trade separately.**]—A woman may before marriage, with the consent of her intended husband, convey all her stock-in-trade & furniture to trustees, to enable her to carry on her business separately, & if the husband do not intermeddle with them, & there be no fraud, such effects, though fluctuating, are not in the order & disposition of the husband on his bkpcy., the trustee, the legal owner, having given no consent, & the possession of the wife not being evidence of fraud, she being the agent of the trustee. But whether the trade be carried on solely by the wife, or jointly with the husband, is a question of fact for the jury, & if they determine the latter, the stock-in-trade is liable to the debts of the husband. But even in such a case the furniture is not, though removed to the husband's house.—JARMAN *v.* WOOLLOTON (1790), 3 Term Rep. 618; 100 E. R. 765.

Annotations:—**Refd.** Lingham *v.* Biggs (1797), 1 Bos. & P. 82; Shaftesbury *v.* Russell (1823), 1 B. & C. 666; *Re* Massey, *Ex p.* Massey (1835), 2 Mont. & A. 173, Ct. of R.; Duncan *v.* Cashin (1875), L. R. 10 C. P. 554. **Mentd.** Gordon *v.* East India Co. (1797), 7 Term Rep. 228; Bird *v.* Peagrum (1853), 13 C. B. 639; Phillips *v.* Barnett (1876), 24 W. R. 345; Norman *v.* Villars (1877), 36 L. T. 663.

6542. —— **Bankrupt acting as administrator without taking out administration.**]—Two of the next-of-kin of an innkeeper, who died intestate, carried on the business in their own names, & paid some of intestate's debts, but did not take out administration to her estate. They afterwards became bkpt., & then another of the next-of-kin took out administration:—*Held:* the stock-in-trade & fixtures passed to the assignees under 6 Geo. 4, c. 16, s. 72.—*Re* THOMAS, *Ex p.* THOMAS (1842), 3 Mont. D. & De G. 40; 1 Ph. 159; 12 L. J. Ch. 59; 6 Jur. 979; 41 E. R. 591, L. C.

Annotations:—**Refd.** *Re* Marshall, *Ex p.* Zwilchenbart (1844), 3 Mont. D. & De G. 671, Ct. of R.; *Re* Marshall, *Re* Marshall & Rodgers (1848), De G. 273, L. C.

6543. —— **Secret trust to defeat limitation on number of shares held.**]—By the rules of an insurance co. no person, except a director, was permitted to hold more than two shares in his own name, but no rule prevented a person from being beneficially entitled to more than two shares, by holding them in the name of another party. A proprietor, who was already the holder of two shares, having purchased two others, caused them to be entered in the name of bkpt. in the co.'s books, with the knowledge of one of the directors & the actuary. Bkpt. signed a declaration of trust, that he held the shares as trustee for the proprietor, but no notice of the trust was taken in the books of the co., & bkpt. held the certificates of the shares, & continued to receive the dividends thereon, accounting for them from time to time to the proprietor, up to the period of his bkpcy., when the shares were still standing in his name. During all that time he was treated as owner by the co., had notice of meetings served upon him, attended meetings of the shareholders, & voted as a shareholder:—*Held:* there was such a secret trust as was not within 6 Geo. 4, c. 16, s. 79, & the shares were in the order & disposition of bkpt. as reputed owner.—*Re* KIDDER, *Ex p.* BURBRIDGE (1835), 1 Deac. 131; 2 Mont. & A. 348; 5 L. J. Bcy. 56, L. C.

Annotations:—**Explд.** *Re* Ord, *Ex p.* Ord (1835), 1 Deac. 166, Ct. of R. **Distd.** *Re* Stokes, *Ex p.* Pemberton, *Ex p.* Hancox (1835), 1 Deac. 421, Ct. of R.; *Re* Medley, *Ex p.* Harrison (1838), 7 L. J. Bcy. 48, Ct. of R. **Consd.** *Re* Theobald, *Ex p.* Bignold (1838), 3 Deac. 151, Ct. of R. **Distd.** G. E. Ry. Co. *v.* Turner (1872), 8 Ch. App. 149, L. C. **Refd.** *Re* Warwick, *Ex p.* Brown (1838), 3 Deac. 91, Ct. of R.; Thompson *v.* Spiers (1845), 13 Sim. 469; *Re* Strahan, Paul, *Ex p.* Snow (1857), 28 L. T. O. S. 52; *Re* Barr's Trusts (1859), 32 L. T. O. S. 9. **Mentd.** *Re* Borrow, *Ex p.* Parratt (1836), 1 Deac. 696, Ct. of R.; Tibbits *v.* George (1836), 5 Ad. & El. 107; *Re* Higgonson & Deane, *Ex p.* Hinds (1849), 14 L. T. O. S. 449; G. E. Ry. Co. *v.* Turner (1872), 26 L. T. 819.

See, also, No. 6635, *post.*

6544. —— Stock in name of bankrupt—Not entered as trustee.]—Stock standing in the name of bkpt., in trust for other persons, does not pass to the assignees under 6 Geo. 4, c. 16, s. 72, although it is not entered in the name of bkpt., as trustee, in the bank books.—*Re* BIDDULPH, WRIGHT, ROBINSON & JERNINGHAM, *Ex p.* WITHAM (1841), 1 Mont. D. & De G. 624, Ct. of R.

6545. —— Under deed of assignment for creditors.]—*Held:* (1) the possession taken under a deed of assignment for creditors was incapable of creating reputed ownership within 6 Geo. 4, c. 16, s. 72; (2) where both assignors & assignees became bkpts., & the fiat against the assignees was issued first, the question did not arise whether the assignees in bkpcy. of the assignors could be held, by relation, to have assented, before their appointment, to the assigned property being in the order & disposition of the assignees under the deed.—*Re* MARSHALL, *Ex p.* ZWILCHENBART (1844), 3 Mont. D. & De G. 671; 13 L. J. Bcy. 19; 8 Jur. 1081, Ct. of R.; *affd.* (1846), De G. 273, L. C.

Annotations:—**Consd.** Leake *v.* Young (1856), 5 E. & B. 955. **Refd.** *Re* Sinclair, *Ex p.* Chaplin (1884), 26 Ch. D. 319, C. A. **Mentd.** Graham *v.* Chapman (1852), 12 C. B. 85.

6546. —— ——.]—At the time of the execution by A. of a composition deed all the assigned property was in the possession of mtgees. of the premises & machinery, who subsequently gave up possession to B., on his guaranteeing payment of the mtge. money. Immediately after the execution of the deed B. gave the creditors his promissory notes for the amount of the composition. B. remained in possession till his bkpcy., & afterwards a fiat was sued out against A.:—*Held:* the assigned property was not in the reputed ownership of B.—*Re* MARSHALL, *Re* MARSHALL & RODGERS (1846), De G. 273, L. C.

Annotations:—**Consd.** Leake *v.* Young (1856), 5 E. & B. 955. **Refd.** *Re* Sinclair, *Ex p.* Chaplin (1884), 26 Ch. D. 319, C. A. **Mentd.** Graham *v.* Chapman (1852), 12 C. B. 85.

6547. —— Furniture settled on wife.]—Household furniture, linen, & plate belonging to B. were assigned by him, by deed, in contemplation of his marriage, to pltfs., in trust, after the marriage, to stand possessed thereof during the joint lives of B., the settlor, & his intended wife, for her sole & separate use, independently of B. The marriage took place & B. afterwards became bkpt. The settled furniture, etc., was then in the house in which he resided with his wife:—*Held:* it was not, at the time of his bkpcy., in his order & disposition, with consent of the true owner, so as to pass the property in it, under 6 Geo. 4, c. 16, s. 72, to defts., his assignees, & the fact of the furniture, etc., not having been the wife's before the marriage was immaterial.—SIMMONS *v.* EDWARDS (1847), 16 M. & W. 838; 11 Jur. 592; 153 E. R. 1431.

Annotations:—**Refd.** *Re* Sketchley, *Ex p.* Boulton (1857), 1 De G. & J. 163, L. JJ.; Colonial Bank *v.* Whinney (1886), 56 L. J. Ch. 43, H. L. **Mentd.** Rogers, Eungblut *v.* Martin (1910), 103 L. T. 527, C. A.

6548. —— Allowed to be deposited by partner of bankrupt firm as security for advance—Advance repaid at time of bankruptcy & property in possession of firm.]—The owner of negotiable notes allowed partners of a firm, one of whom was her trustee, to deposit them with a bank as security for advances. They were afterwards redeemed &, without the knowledge of the owner, deposited with another bank as security for a loan. Upon the eve of bkpcy., the trustee, out of the partnership funds, paid off the debt & withdrew the notes. The notes had been treated by the firm as partnership property, but while not deposited they were kept in the possession of the trustees alone. On the bkpcy. of the firm:—*Held:* the notes remained trust property, & were not in the order & disposition of the firm.—SINCLAIR *v.* WILSON (1855), 20 Beav. 324; 24 L. J. Ch. 537; 25 L. T. O. S. 58; 1 Jur. N. S. 967; 52 E. R. 627.

Annotation:—**Mentd.** *Re* Goldsmid, *Ex p.* Taylor (1886), 18 Q. B. D. 295, C. A.

6549. —— Shares in name of bankrupt on behalf of company of which he was chairman.]—The chairman of a co., with the assent of the co., held in his name shares in another co., which had been purchased with the money of the first-named co. The chairman became bkpt.:—*Held:* though the purchase by one co. of shares in another co. was illegal, the shares were not within the order & disposition of bkpt. so as to pass to his assignees, & he must transfer them as the co. should direct.—GREAT EASTERN RY. CO. *v.* TURNER (1872), 8 Ch. App. 149; 42 L. J. Ch. 83; 27 L. T. 697; 21 W. R. 163, L. C.

Annotations:—**Mentd.** Percival *v.* Wright, [1902] 2 Ch. 421; Young *v.* Naval, Military & Civil Service Co-op. Soc. of South Africa, [1905] 1 K. B. 687.

6550. —— To collect & pay over dividends.]—A., for good consideration, gave B. a written undertaking to "pay over" to him all dividends that he should receive on his proof against C.'s estate. A. became bkpt. & B. then gave notice of his claim to the trustees in the first bkpcy.:—*Held:* there was a good equitable assignment of the dividends, & as A. was the assignor to, & at the same time the trustee for, B. of the dividends, the question of order & disposition was disposed of by 1869 Act, s. 15 (1), & B. was entitled as against A.'s trustee in bkpcy.—*Re* IRVING, *Ex p.* BRETT (1877), 7 Ch. D. 419; 47 L. J. Bcy. 38; 37 L. T. 507; 26 W. R. 376.

Annotation:—**Mentd.** West & Wright *v.* Newing (1900), 82 L. T. 260.

6551. —— Goods held as security for accommodation indorser.]—A. drew two bills upon B., which C. indorsed upon the security of cement in A.'s possession, & stored in A.'s warehouse. A. packed the cement in barrels, which he set apart in his own warehouse, which he marked with the initial letters of B.'s name, to whom also the invoice was sent, as on a purchase by him. A.'s bankers discounted the bills, & A. received the

6547 i. —— *Furniture settled on wife.*]—Furniture & household goods were settled by a husband on his wife, the conveyance being to trustees to permit her to have the use & enjoyment thereof:—*Held:* such use & enjoyment by permission of the trustees did not, on the husband's insolvency thereafter, bring the case within the reputed ownership clause, notwithstanding that he resided with his wife & in effect equally had with her the use of the goods.—COHEN *v.* SLADE (1871), 12 N. S. W. S. C. R. 88.—**AUS.**

6547 ii. —— ——.]—In contemplation of a marriage, it was agreed that the father of the intended wife should give to M., the intended husband, £200 as a marriage portion, to be applied by M. in the purchase of furniture, which was to be settled on the wife, & by a settlement, reciting that M. was possessed of a house, premises, & furniture, M. assigned same to trustees on trust to permit M. to occupy & enjoy the house & premises so long as he should continue solvent, & upon the bkpcy. of M., to raise, by sale or mtge. of the premises & furniture, the sum of £500, & to hold same in trust for the separate use of the intended wife, & of any children of the marriage. The furniture so put in settlement comprised articles purchased by M. partly out of the £200, & partly out of money belonging to M. M. continuing in possession of the furniture was adjudged bkpt., & his assignees having claimed liberty to realise & sell the furniture:—*Held:* the furniture did not pass to his assignees under the reputed ownership clause, as M.'s possession was either in pursuance of the settlement, if the furniture could be considered as coming within the term "premises," or was under a trust, in the nature of a resulting trust for his benefit during his solvency, unprovided for by the settlement.—JAMES *v.* WHARTON, *Re* MASON (1878), 12 I. L. T. 181.—**IR.**

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proceeds. A. filed his petition, at which time the cement remained in his warehouse, set apart & marked as stated. One bill became due before & one after the filing of A.'s liquidation petition, & both were paid by C. C. claimed the cement as being held by A. as a trustee for him :—*Held :* A. did not hold the cement as a trustee, & it passed to his trustee, as being in his order & disposition with the consent of the true owner.—*Re* COHN, *Ex p.* COHEN (1878), 38 L. T. 884.

6552. Possession through others—Possession of servant.]—A warrant under a *fi. fa.* against the goods of a trader was directed to his servant & another, as special bailiffs. They took possession of the goods in his shop, but the business was carried on apparently as usual, though without the trader's interference. While things were so situated the trader committed an act of bkpcy. : —*Held :* the goods passed to his assignees as being in the order & disposition of bkpt. at the time of his bkpcy., the possession of the servant being the possession of his master.—JACKSON *v.* IRVIN (1809), 2 Camp. 48, N. P.

Annotations :—**Consd.** *Re* Baldwin, *Ex p.* Foss (1858), 2 De G. & J. 230. **Mentd.** Toussaint *v.* Hartop (1816), Holt, N. P. 335.

6553. —— Goods at wharf in agent's name.]—A trader having goods lying in wharf, deposited blank delivery notes with a creditor to cover advances made, & became insolvent. The creditor upon notice of the insolvency, filled up the blanks with his own name, & took possession of the goods on the day before the trader committed an act of bkpcy. In trover by the assignees against the creditor :—*Held :* goods of bkpt. lying in wharf in the names of his agents, & for which he had given delivery orders in his own name, were not within 21 Jac. 1, c. 19, s. 11, there being no reputed ownership.—ARBOUIN *v.* WILLIAMS (1824), Ry. & M. 72, N. P.

Annotation :—**Refd.** *Re* Baldwin, *Ex p.* Foss (1858), 2 De G. & J. 230, L. JJ.

6554. —— Possession through agent & manager.]—A Scottish firm had a branch in London, which was wholly conducted by an agent & manager at a salary, but in their name. By contract, he was to have a lien on goods consigned to him for bills accepted by him for the firm. The firm became bkpt. in Scotland :—*Held :* the goods under the manager's control at the time were within the order & disposition of bkpts., & passed to their assignees unaffected by his lien.—HOGGARD *v.* MACKENZIE (1858), 25 Beav. 493 ; 4 Jur. N. S. 1008 ; 6 W. R. 572 ; 53 E. R. 725.

6555. —— Temporary occupier of furnished house.]—A mtgor. in possession of a furnished house allowed it to be occupied free of charge for a short time before & up to his bkpcy. :—*Held :* actual possession was not essential to the operation of the doctrine of reputed ownership, & the possession of the occupier was to be regarded as the possession of bkpt.—*Re* MABERLY, *Ex p.* BELCHER (1835), 4 Deac. & Ch. 703 ; 2 Mont. & A. 160 ; 4 L. J. Bcy. 29, Ct. of R.

Annotations :—**Refd.** *Re* Gye & Hughes, *Ex p.* Reynal (1841), 2 Mont. D. & De G. 443 ; Walmsley *v.* Milne (1859), 7 C. B. N. S. 115 ; *Re* Walker, *Ex p.* Acton (1861), 4 L. T. 261 ; Tottenham *v.* Swansea Zinc Ore Co. (1885), 52 L. T. 738.

6556. —— Temporary possession by party to whom engine hired.]—L., a maker & seller of agricultural implements, having purchased a portable steam-engine of pltfs., assigned it to them by deed, to secure the payment of the balance of the purchase-money, with power to them to take possession of it at any time & sell, & after paying themselves any balance due to them, to pay the residue to L., with a proviso that, until default by L. in payment of the balance due after a demand, L. might possess & use the engine, & a proviso that, on payment of the balance by L. before a sale, the assignment should be void. The engine was delivered to L., & he was in the habit of letting it out on hire in the ordinary way of his trade. He afterwards, while a balance was still due to pltfs., became bkpt., & at the time of his bkpcy. the engine was in the possession of a farmer, to whom it had been let on hire :—*Held :* temporary possession by the farmer at the time of the bkpcy. did not make the engine the less in the possession, order & disposition of bkpt. as reputed owner.—HORNSBY *v.* MILLER (1858), 1 E. & E. 192 ; 28 L. J. Q. B. 99 ; 32 L. T. O. S. 125 ; 7 W. R. 53 ; 5 Jur. N. S. 938 ; 120 E. R. 880.

Annotations :—**Consd.** Spackman *v.* Miller (1862), 12 C. B. N. S. 659 ; Webb *v.* Whinney (1868), 18 L. T. 523. **Refd.** *Re* Head, *Ex p.* Cobbold (1863), 9 L. T. 613.

See, also, No. 6514, *ante.*

6557. —— Temporary possession by party to whom horses lent.]—A horse-dealer supplied a customer with a pair of horses, for which she paid £170, but finding the horses not according to warranty, she returned them. The dealer sent another pair, requesting the customer to keep them until he could furnish her with a better pair. That she did, until the dealer became bkpt., without having repaid the £170, when it was found that the horses did not belong to him but to an employer, for whom he was agent to sell, but not to pledge, the horses :—*Held :* the horses were in bkpt.'s order & disposition, & the customer could not enforce a lien on them as against the trustee.—*Re* SILLENCE, *Ex p.* ROY (1877), 7 Ch. D. 70 ; 47 L. J. Bcy. 36 ; 37 L. T. 508 ; 26 W. R. 82.

(b) Possession, etc., of Firm or continuing Partner.

6558. Possession for purposes of firm—House taken & furnished in name of partner.]—A member of a firm took & furnished a house in his own name. The house was used entirely for the purposes of the firm as a boarding-house for their apprentices :—*Held :* the arrangement made the furniture partnership property, independently of the operation of 6 Geo. 4, c. 16, s. 72. *Semble :* the furniture was in the reputed ownership of the partners (SIR J. CROSS).—*Re* FEAR & COWARD, *Re* COWARD, *Ex p.* HARE (1835), 1 Deac. 16 ; 2 Mont. & A. 478, Ct. of R.

6559. Possession by firm as bailees—Goods of another firm in which one partner was member.]—S. & O. called a meeting of creditors, at which trustees were appointed to wind up their affairs as in bkpcy. An agreement to that effect was signed by most of the creditors, but no assignment was executed. The partnership was dissolved, & S. obtained permission from the trustees to use the premises for a new branch of trade. He afterwards took H. into partnership, upon the terms that the business should be carried on in S.'s

6557 i. *Possession through others—Temporary possession by wife to whom jewels lent.*]—V. bequeathed, to trustees, jewels upon trust that the trustees for the time being should permit his widow to enjoy them for life, & that after her decease they should form part of the residue of his personal estate. Shortly after his death the widow lent the ornaments to her daughter on her marriage. In the daughter's possession they remained until near her death, when she pledged them. Her husband released them, & became insolvent :—*Held :* they did not pass to the assignees as being in insolvent's order & disposition with the consent of the legal owners, the trustees.—*Re* ROBERTSON (1864), 10 L. T. 105 ; 15 Ir. Jur. 418.—IR.

name. H. put capital into the business & had a share of the profits, but he took no part in the business & was not known to be a partner. Part of the stock of S. & O. remained on the premises separately warehoused. It was not adapted for the trade of S. & H., & was insured in the names of S. & O., & the premiums were paid by the trustees out of their assets. There was no evidence that H. was aware of the existence of that stock. H. & S. & O. became bkpts. :—*Held :* 6 Geo. 4, c. 16, s. 72, did not apply & the assignees of S. & O. were entitled to the stock.

There is no authority for saying that when two persons are the joint owners of property, & one becomes bkpt., the claim of reputed ownership applies to the joint property of the other partner (SIR J. CROSS).—*Re* SWANSBOROUGH & OAKE, *Re* HARRIS, *Ex p.* VARDON (1842), 2 Mont. D. & De G. 694, Ct. of R.

6560. Possession after announcement of partnership—No real partnership—Alleged partner mere servant.]—A merchant announced by circular that he had taken his nephew into partnership but in fact the nephew received a salary, & did not participate in the capital, profits, or losses. Both became bkpts. Part of the stock-in-trade was at the docks, which the uncle, on announcing the partnership, directed the dock co. to deliver to the order of the new firm :—*Semble :* the stock was in the reputed ownership of the two.—*Re* REAY & REAY, *Ex p.* ARBOUIN, *Ex p.* GONNE (1846), De G. 359, Ct. of R.

Annotation :—**Consd.** *Re* Pulsford, *Ex p.* Hayman (1878), 8 Ch. D. 11, C. A.

6561. Possession by firm—Only one partner bankrupt.]—Premises with the machinery & plant thereon were let on lease to two partners, one of whom was an infant. Both partners committed an act of bkpcy., but the adult partner was alone made bkpt. :—*Held :* in order to bring goods within 1869 Act, s. 15 (5), they must be in the sole possession & sole reputed ownership of bkpt., & the goods which belonged to the landlord, & which were by his permission in the possession of the firm, did not pass to bkpt.'s trustee.—*Re* LAKE, *Ex p.* DORMAN (1872), 8 Ch. App. 51 ; 42 L. J. Bcy. 20 ; 27 L. T. 528 ; 21 W. R. 94, L. JJ.

Annotations :—**Distd.** *Re* Cooke, *Ex p.* Moore (1877), 36 L. T. 560. **Folld.** *Re* Bainbridge, *Ex p.* Fletcher (1878), 8 Ch. D. 218.

6562. —— ——.]—B., as trustee & exor. of his father's will, became entitled to one half share in a business lately carried on in partnership between his father & another. In pursuance of a provision in the will, B. continued the partnership business, & afterwards purchased the interest of the beneficiaries under the will, & executed mtges. to secure the purchase-money. New articles of partnership were then entered into between B. & the old partner, in which the former appeared as the owner of one half the business. B. was afterwards adjudicated bkpt., & his share in the partnership was sold to the other partner :—*Held :* to bring partnership goods within 1869 Act, s. 15 (5), they must have been in the sole & absolute possession of bkpt., &, as the mtgee. of B.'s share had not acquired the right to take possession of any of the partnership property, B. was not in possession with the consent of the true owner.—*Re* BAINBRIDGE, *Ex p.* FLETCHER (1878), 8 Ch. D. 218 ; 47 L. J. Bcy. 70 ; 38 L. T. 229 ; 26 W. R. 439.

Annotations :—**Refd.** Colonial Bank *v.* Whinney (1885), 30 Ch. D. 261, C. A. ; *Re* Webber, *Ex p.* Slater (1891), 64 L. T. 426.

6563. Possession by purchaser of firm assets—Sale under order of court.]—By the decree in a suit a partnership between pltf. & deft. was dissolved, & the business & partnership property were ordered to be sold as a going concern, either party being at liberty to bid. Under a subsequent order pltf. became the purchaser, he having in the meantime been carrying on the business for the benefit of the purchaser. Under the order approving of the purchase by him he was allowed to go into possession at once as purchaser. He continued in possession for some time, & ultimately became bkpt. :—*Held :* in the circumstances the business & partnership property were in the order & disposition of bkpt. with the consent of the true owner.—GRAHAM *v.* MCCULLOCH (1875), L. R. 20 Eq. 397 ; 32 L. T. 748 ; 23 W. R. 786.

Annotation :—**Consd.** *Re* Webber, *Ex p.* Slater (1891), 64 L. T. 426.

6564. Possession by continuing partner—Retiring partner's property used in business.]—Property of one partner was used in the partnership business. On the retirement of that partner it was agreed by deed that a new firm should carry on the business & use the property in consideration of an annuity to the retiring partner. On the bkpcy. of the new firm :—*Held :* the property passed to their assignees, as being left by the true owner in the order & disposition of bkpts. as reputed owners.—HORN *v.* BAKER (1808), 9 East, 215 ; 103 E. R. 555.

Annotations :—**Distd.** Gibson *v.* Bray (1817), 8 Taunt. 76 ; *Re* Stokes, *Ex p.* Pemberton, *Re* Stokes, *Ex p.* Hancox (1835), 1 Deac. 421, Ct. of R. **Refd.** Thackthwaite *v.* Cock (1811), 3 Taunt. 487 ; Lucas *v.* Dorrien (1817), 7 Taunt. 278 ; Trappes *v.* Harter (1833), 2 Cr. & M. 153. **Mentd.** Holroyd *v.* Gwynne (1809), 2 Taunt. 176 ; Oliver *v.* Bartlett (1819), 1 Brod. & Bing. 269 ; Monkhouse *v.* Hay (1820), 4 Moore, C. P. 549, Ex. Ch. ; Steward *v.* Lombe (1820), 1 Brod. & Bing. 506 ; Storer *v.* Hunter (1824), 3 B. & C. 368 ; Hubbard *v.* Bagshaw (1831), 4 Sim. 326 ; Clark *v.* Crownshaw (1832), 3 B. & Ad. 804 ; Coombs *v.* Beaumont (1833), 5 B. & Ad. 72 ; Hare *v.* Horton (1833), 2 Nev. & M. K. B. 428 ; Boydell *v.* M'Michael (1834), 1 Cr. M. & R. 177 ; *Re* Ogden & Walmsley, *Ex p.* Loyd (1834), 3 Deac. & Ch. 765, Ct. of R. ; Watson *v.* Peache (1834), 4 L. J. C. P. 49 ; *Re* Walsh, *Ex p.* King (1840), 4 Jur. 510, Ct. of R. ; Whitfield *v.* Brand (1847), 16 M. & W. 282 ; *Re* Gawan, *Ex p.* Barclay (1855), 5 De G. M. & G. 403, L. C. & L. JJ. ; Whitmore *v.* Empson (1857), 23 Beav. 313 ; Horwich *v.* Symond (1914), 110 L. T. 1016.

6565. —— Plant & stock-in-trade—Purchase price thereof unpaid.]—The plant & stock-in-trade of a dissolved partnership was taken possession of by the continuing partner & used in his separate trade after the dissolution :—*Held :* it was in his separate reputed ownership, notwithstanding he had not paid the purchase price.—*Re* BREWSTER, *Ex p.* SPRAGUE (1853), 4 De G. M. & G. 866 ; 22 L. J. Bcy. 62 ; 43 E. R. 746, L. JJ.

Annotation :—**Refd.** Reynolds *v.* Bowley (1866), 7 B. & S. 67.

B. Termination.

(*a*) *In General.*

6566. Assignment without delivery—Ship at sea—Not goods on land.]—Assignment of a ship at sea for a valuable consideration may be good against assignees of bkpts., though no possession is taken thereof ; but if of goods on land, it is otherwise.—BOURNE *v.* DODSON (1740), 1 Atk. 154 ; Barn. Ch. 200 ; 26 E. R. 100, L. C.

Annotations :—**Refd.** Ryall *v.* Rolle (1749), 1 Atk. 165. **Mentd.** Worseley *v.* Demattos (1758), 1 Burr. 467.

6567. —— Ship & cargo at sea—Delivery of unindorsed bills of lading—Delivery of indorsed policies.]—R. & his partner gave a bond to H. for £1,200, & the same day by deed assigned to H. or order, the goods in two ships then at sea, & also thirteen bills of lading, & policies of insurance, containing the goods as a collateral security, the latter indorsed to H., the former not. R. became bkpt. :—*Held :* every thing which could

Sect. 9.—*Property in reputed ownership of bankrupt: Sub-sect.* 3, *B.* (*a*).]

show a right to the ships & cargo having been delivered over to H., R. could no longer be said to have the order & disposition of them, & they were not within 21 Jac. c. 19, & H. had a right to retain the ships & cargo, till the principal sum of £1,200 & interest was satisfied.—BROWN *v.* HEATHCOTE (1746), 1 Atk. 160 ; 26 E. R. 103.

Annotations :—**Consd.** Ryall *v.* Rowles (1750), 1 Ves. Sen. 348. **Distd.** *Ex p.* Matthews (1751), 2 Ves. Sen. 272, L. C. **Consd.** Lempriére *v.* Pasley (1788), 2 Term Rep. 485 ; *Re* Severn, *Ex p.* Colvile (1831), 9 L. J. O. S. Ch. 56 ; Burn *v.* Carvalho (1834), 1 Ad. & El. 883, Ex. Ch. ; Belcher *v.* Capper (1842), 4 Man. & G. 502 ; Belcher *v.* Bellamy (1848), 2 Exch. 303 ; **Mentd.** West *v.* Skip (1749), 1 Ves. Sen. 239, L. C.

6568. —— Goods at sea—Subsequent indorsement of bill of lading.]—An assignment of goods at sea as a collateral security for a debt, & a subsequent indorsement of a bill of lading, are good as against the assignees of the assignor, who committed an act of bkpcy. between the assignment of the goods & the indorsement of the bill of lading.—LEMPRIERE *v.* PASLEY (1788), 2 Term Rep. 485 ; 100 E. R. 262.

Annotations :—**Apld.** Lucas *v.* Dorrien (1817), 1 Moore, C. P. 29. **Consd.** Nichols *v.* Clent (1817), 3 Price, 547 ; Belcher *v.* Oldfield (1839), 6 Bing. N. C. 102. **Distd.** Burn *v.* Carvalho (1834), 1 Ad. & El. 883, Ex. Ch. **Refd.** Belcher *v.* Capper (1842), 4 Man. & G. 502. **Mentd.** Walley *v.* Montgomery (1803), 3 East, 585 ; *Re* Severn, *Ex p.* Tennyson (1832), Mont. & B. 67, L. C. ; Peruvian Guano Co. *v.* Dreyfus (1887), [1892] A. C. 170, n., H. L.

6569. Mortgage without delivery—Ship & cargo at sea.]—A mtge. of ships abroad, or of cargoes upon the high seas, by a trader to anybody, is good, notwithstanding 21 Jac. 1, c. 19, the possession has not been actually delivered, for a bill of sale is all the possession that can be delivered till the ship comes home.—FOXCROFT *v.* DEVONSHIRE (1760), 2 Burr. 931, 941 ; 97 E. R. 638, 644.

Annotations :—**Mentd.** Copland *v.* Stein (1799), 8 Term Rep. 199 ; Houghton *v.* Matthews (1803), 3 Bos. & P. 485 ; Cash *v.* Young (1823), 3 Dow. & Ry. K. B. 652.

6570. —— —— Possession not taken on arrival.]—A ship at sea was transferred, as security for money lent, by the execution & delivery of a bill of sale of the ship, together with the policy upon the ship. The transferee neglected, upon the ship's return & notice thereof, to take possession, or to do any act to notify the transfer. The transferor became bkpt. :—*Held* : the property passed to his assignees as being in bkpt.'s possession, order, & disposition.—MAIR *v.* GLENNIE (1815), 4 M. & S. 240 ; 105 E. R. 823.

Annotations :—**Consd.** Harrington *v.* Churchward (1860), 29 L. J. Ch. 521. **Mentd.** Green *v.* Beesley (1835), 2 Bing. N. C. 108 ; R. *v.* Wortley (1851), 2 Den. 333, C. C. R. ; Stocker *v.* Brocklebank (1851), 3 Mac. & G. 250 ; Boon *v.* Quance (1909), 102 L. T. 443, C. A. ; Whelan *v.* Great Northern Steam Fishing Co. (1909), 100 L. T. 913, C. A.

6571. —— —— Possession taken on arrival—Proviso that mortgagor should remain in possession till failure in payment—No demand before bankruptcy.]—Where a ship was mtged. at sea, with a proviso that the mtgor. should continue in possession till failure of payment of the mtge. money on demand, the grand bill of sale was delivered, & the mtgor. became bkpt. before the arrival of the ship, & the mtgee. took possession on her arrival :—*Held* : he might maintain trover against the assignees who took the ship from him, notwithstanding he made no demand either on bkpt. or his assignees.—ATKINSON *v.* MALING (1788), 2 Term Rep. 462 ; 100 E. R. 249.

Annotations :—**Distd.** Gordon *v.* The East India Co. (1797), 7 Term Rep. 228. **Mentd.** Robinson *v.* Macdonnell (1816), 5 M. & S. 228.

6572. —— Ship lying in port—Mortgagee not taking possession—Mortgagor & other part owners acting as visible owners.]—The owner of the major part of a vessel then lying in port mortgaged it, & transferred the grand bill of sale to the mtgees. The mtgees. did not take possession, but suffered the mtgor. & the other part owners to have the management, & act as the visible owners of the vessel. The mtgor. having become bkpt. :—*Held* : his share in the vessel passed to his assignees, under 21 Jac. 1, c. 19.—HALL *v.* GURNEY (1784), 3 Doug. K. B. 356 ; 99 E. R. 694.

Annotation :—**Refd.** Robinson *v.* Macdonnell (1816), 5 M. & S. 228.

6573. Mortgage of ship in Irish port—Second mortgage by mortgagee—Second mortgagee taking possession on arrival in English port.]—Mortgage of a ship in the port of Dublin, & delivery of muniments. The mtgee. insured her there & made a second mtge., & the second mtgee. took possession as soon as he was informed she was in an English port :—*Held* : a sufficient possession to take it out of 21 Jac. c. 19.—*Re* GOOCH & COTTON, *Ex p.* BATSON (1791), 3 Bro. C. C. 362 ; 29 E. R. 584.

Annotation :—**Refd.** Robinson *v.* Macdonnell (1816), 5 M. & S. 228

6574. Assignment of ship—Assignee becoming registered owner—Allowing assignor to have possession, order & disposition until bankruptcy.]—A trader assigned a ship to A., to pay a debt due to A. & his partners, but with their permission retained the possession & disposition of the ship at the time of his bkpcy. :—*Held* : the ship passed to the assignees, although before the act of bkpcy. the register was indorsed to A., & shortly afterwards, three months before the issuing of the commission, the ship was newly registered in his name, & continued so registered at the time the commission was issued.—MONKHOUSE *v.* HAY (1820), 2 Brod. & Bing. 114 ; 8 Price, 256 ; 4 Moore, C. P. 549 ; 129 E. R. 901, Ex. Ch.

Annotations :—**Refd.** Kirkley *v.* Hodgson (1823), 1 B. & C. 588 ; *Re* Daniel, *Ex p.* Ashby (1855), 25 L. T. O. S. 188.

6575. Assignment without giving possession—Equity of redemption.]—C. having assigned a vessel, together with the policy of insurance upon it, to pltf.'s testator, & having covenanted that he would keep up the insurance, made an insurance for the benefit of pltf.'s testator, & left the policy in the hands of the broker, who was a creditor of C. C. becoming a bkpt., the assignees having satisfied the broker, insisted that, he being the agent of C., & having the policy in his custody, it was a leaving by pltf.'s testator in bkpt.'s possession within 21 Jac. 1, c. 19, & refused to deliver up the policy :—*Held* : it was not a leaving in bkpt.'s possession within 21 Jac. 1, c. 19, s. 11.—FALKENER *v.* CASE (1781), 1 Bro. C. C. 125 ; cited 2 Term Rep. at p. 491 ; 28 E. R. 1029.

Annotations :—**Apld.** Lempriére *v.* Pasley (1788), 2 Term Rep. 485. **Distd.** Gordon *v.* East India Co. (1797), 7 Term Rep. 228. **Consd.** *Re* Severn, *Ex p.* Colvile (1831), 9 L. J. O. S. Ch. 56 ; Burn *v.* Carvalho (1834), 1 Ad. & El. 883, Ex. Ch. **Expld.** Belcher *v.* Capper (1842), 4 Man. & G. 502. **Refd.** *Re* Daintry & Ryle, *Re* Ravenscroft, *Ex p.* Arkwright (1843), 3 Mont. D. & De G. 129, Ct. of R. ; West *v.* Reid (1843), 2 Hare, 249.

6576. Assignment of furniture to trustee for wife—Not registered as bill of sale.]—A married woman gave up to her husband £500, held upon trust for her separate use, upon the understanding that the husband would settle his furniture upon her for her separate use. The husband assigned the furniture to a trustee to hold for the use & benefit of his wife, & the property remained in the joint possession of husband & wife. The assignment was not registered under Bills of Sales Act,

1854 (c. 36), & the husband afterwards became bkpt. Upon bill filed by the wife to have the assignment reformed, so as to create a binding trust for her separate use, & to restrain the assignee from keeping possession of the furniture :—*Held :* independently of the above Act, pltf. would have been entitled to have the furniture secured for her separate use, but the assignment operating as a bill of sale came within the Act, & not being registered under the Act, the furniture remained in the order & disposition of bkpt., & could not be protected against the assignee.—ASHTON *v.* BLACKSHAW (1870), L. R. 9 Eq. 510 ; 39 L. J. Ch. 205 ; 22 L. T. 197 ; 34 J. P. 453 ; 18 W. R. 307.

Annotations :—**Apld.** *Re* Broadbent, *Ex p.* Homan (1871), L. R 12 Eq. 598. **Apprvd.** *Re* Fairbrother, *Ex p.* Harding (1873), L. R. 15 Eq. 223. **Expld.** Wright *v.* Redgrave (1879), 11 Ch. D. 24, C. A. **Apprvd.** Crawcour *v.* Salter (1881), 18 Ch. D. 30, C. A. **Consd.** Casson *v.* Churchley (1884), 53 L. J. Q. B. 335 ; Hollinshead *v.* Egan, [1913] A. C. 564, H. L.

6577. Delivery order on wharfinger—Transferred into purchaser's name—Before bankruptcy of seller.]—The purchaser of goods, lying at a wharf in the name of the seller, received from him at the time of the sale an order on the wharfinger for the delivery of the goods, but suffered them to remain in the name of the seller for several months after. During that time the seller disposed of a part thereof, but upon notice of the seller's insolvency, the purchaser carried the order to the wharfinger, & had the goods transferred into his own name, & nine days after that the seller became bkpt. :—*Held :* the assignees were not entitled to the goods under 21 Jac. 1, c. 19, s. 11, for there was a complete transfer of the possession before the bkpcy.—JONES *v.* DWYER (1812), 15 East, 21 ; 1 Rose, 339 ; 104 E. R. 752.

Annotations :—**Distd.** Lyon *v.* Weldon (1824), 9 Moore, C. P. 629. **Mentd.** *Re* Baldwin, *Ex p.* Foss (1858), 2 De G. & J. 230, L. JJ.

6578. —— Deposited in blank—Blanks filled up & possession taken before bankruptcy.]—A trader having goods at a wharf, deposited blank delivery notes with a creditor to cover advances. The creditor filled up the blanks in his own name, & took possession on the day before the trader committed an act of bkpcy. :—*Held :* the goods were not in the reputed ownership of bkpt.—ARBOUIN *v.* WILLIAMS (1824), Ry. & M. 72, N. P.

Annotation :—**Refd.** *Re* Baldwin, *Ex p.* Foss (1858), 2 De G. & J. 230.

6579. —— Lodged with wharfinger—Reweighing & rehousing unnecessary.]—The lodging a delivery order with a wharfinger is sufficient to transfer the property in goods lying at a wharf, without any reweighing or rehousing, & if the party giving the order afterwards become bkpt., his assignees cannot maintain trover in such circumstances, as for goods in his order & disposition.—TUCKER *v.* RUSTON (1825), 2 C. & P. 86, N. P.

6580. Order on bill discounter to pay proceeds to creditor—Bankruptcy when funds in transit.]—Bkpt. before his bkpcy. drew a bill, which he discounted, & gave a creditor an order directing the discounter to transmit the money to the creditor. While the money was in the hands of a carrier, bkpt. committed an act of bkpcy. His assignees brought *assumpsit* against the creditor to recover the amount :—*Held :* while the money was in the hands of the carrier the property remained unaltered, & the assignees were entitled to recover it as being in bkpt.'s order & disposition.—HERVEY *v.* LIDDIARD (1815), 1 Stark. 123 ; 2 Rose, 463, N. P.

Annotation :—**Distd.** Thomas *v.* Da Costa (1818), 8 Taunt. 345.

6581. Possession by man left in possession by sheriff—Bankrupt continuing to carry on his trade as usual.]—A. levied an execution on the goods of B., a trader, & directed the sheriff's officer not to sell, but to leave a man in possession with the warrant. B. carried on his trade as usual, &, five months afterwards, became a bkpt. :—*Held :* notwithstanding the execution, & the possession of the officer, the goods seized passed to the assignees, by virtue of 21 Jac. 1, c. 19, s. 11.—TOUSSAINT *v.* HARTOP (1816), Holt, N. P. 335, N. P.

Annotations :—**Folld.** Doker *v.* Hasler (1825), 3 L. J. O. S. C. P. 109. **Mentd.** Quartermaine *v.* Bittleston (1853), 20 L. T. O. S. 236.

6582. Possession by agent for creditor—Bankrupt & his servants allowed to continue in house.]—M., in consideration of money lent & advanced by W., covenanted with W. that if default were made by him in payment, W. should be at liberty to enter & take possession of the premises & effects of M. & to sell same & apply the purchase-money in payment of expenses & of the debts due to him, & account to M. for the surplus. M. made default in payment, & W. by his agent entered in & took possession of the premises, but did not sell. A few days after W. had taken possession M. was adjudicated a bkpt. :—*Held :* (1) the premises & effects passed to the assignees ; (2) if bkpt. & his servants were allowed to continue in the house, the goods would pass to the assignees as being in the use, order, & disposition of bkpt.—*Re* MELLOR, *Ex p.* WAYMAN (1854), 1 Bankr. & Ins. R. 213.

6583. Possession resumed by landlord—Demised plant, etc.]—By lease, the lessor demised to the lessee a colliery, & all the engines, machinery, & other implements, effects, & things then lying on or about the colliery, or used or employed therewith, & mentioned in a certain inventory & valuation then made, *habendum* for twenty-one years,

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PART XX. SECT. 9, SUB-SECT. 3.—B. (a).

6577 i. *Delivery order on warehouseman—Indorsed for value & presented before bankruptcy.*]—P. & Co. sold to H. several parcels of whiskey in bond. Delivery orders were made out by P. & Co., their store-keeper, to deliver the whiskey to H. or order. The payment was by bills. H. indorsed some of the delivery orders to C. for value before bkpcy., & C. presented the orders to the store-keeper of H. Some formalities were required to be gone through at the Custom-house, & the whiskey was not immediately delivered to C. Nothing remained to be done by P. & Co., in order to complete the sale to H. :—*Held :* the whiskey was not in the order & disposition of H. at the date of the bkpcy.—*Re* HUGHES (1862), 12 I. Ch. R. 463 ; 14 Ir. Jur. 336.—**IR.**

k. *Delivery warrant indorsed before bankruptcy—Notice of indorsement to warehouseman after act of bankruptcy.*]—D. deposited iron with a warehouse-keeper, who granted warrants acknowledging receipt & promising redelivery of the iron to D.'s order by indorsement on, & return of, the warrants :—*Held :* a claim by L., an onerous indorsee was preferable to a claim by the inspectors in bkpcy. of D., who were appointed under a deed registered subsequently to the indorsation in favour of L., but before it had been intimated to the warehouse-keeper.—CONNAL & Co. *v.* DAUNT & Co. (1868), 40 Sc. Jur. 624.—**SCOT.**

6582 i. *Possession by agent for creditor—Bankrupt & his servants allowed to continue in house.*]—A. executed the following document in favour of M. & Co. : " In consideration of your having advanced to me R8,700, I hereby assign to you the whole of the furniture & fittings now lying at my house, the whole of which I declare to be my property, free & unencumbered, & hereby authorise you to proceed to a sale of the property by auction, should I fail to refund the R8,700 on or before July 10 next." The document was duly stamped & registered under Registration Act, s. 53. A. failed to pay the R8,700, & on the following day, M. & Co. placed a durwan, their own servant, on the premises, to assert their right to the possession of the furniture & to prevent its removal without their premission. A. continued to reside in the house, & to use & enjoy the furniture as before, with the knowledge & consent of M. & Co. Before any sale took place, A. filed his petition in the Insolvent Ct., & the usual vesting order was made :—*Held :* the furniture was in the " possession, order & disposition " of insolvent.—*Re* AGABEG (1867), 2 Ind. Jur. N. S. 340.—**IND.**

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at a certain rent therein mentioned. The lease contained a proviso for re-entry in case the rent should be in arrear for the space of thirty days, & also a proviso that on the expiration, or other sooner determination of the demise, the lessee should leave & yield up to the lessor all engines, machines, effects, & things belonging to & used in the colliery, & that an inventory & valuation should, three months previous thereto, be made & taken by two indifferent persons, to be appointed by the parties respectively, or by an umpire, & such inventory should be compared with the then present inventory & valuation, & that the difference in the value of the engines, etc., should be paid by the landlord or tenant to the other, according as it was greater or less than the value at the time of the letting. The tenant failing in payment of the rent, the lease became forfeited, & the landlord recovered judgment in ejectment in Trinity term 1818, but did not execute his writ of possession until Nov. 9, 1819. On the following day the tenant committed an act of bkpcy. The lease having become forfeited by the act of the tenant, no inventory or valuation of the machines, & other effects & things belonging to the collieries, was made three months before the determination of the demise :—*Held :* if the fixtures or movable articles had been in the tenant's possession, etc., within 21 Jac. 1, c. 19, s. 11, that would have ceased when the landlord resumed possession on Nov. 9.—STORER *v.* HUNTER (1824), 3 B. & C. 368 ; 5 Dow. & Ry. K. B. 240 ; 3 L. J. O. S. K. B. 81 ; 107 E. R. 770.

Annotations :—**Consd.** Clark *v.* Crownshaw (1832), 3 B. & Ad. 804. **Expld.** Coombs *v.* Beaumont (1833), 5 B. & Ad. 72. **Apld.** Watson *v.* Peache (1834), 1 Bing. N. C. 327. **Distd.** Fairburn *v.* Eastwood (1840), 6 M. & W. 679. **Mentd.** R. *v.* Topping (1825), M'Cle. & Yo. 544.

6584. Disclaimer of lease of works with loose tools & machinery.]—Iron works with loose tools & machinery were demised together at an entire rent. The trustee of the lessee disclaimed the lease, & afterwards claimed the tools & machinery as being in the order & disposition of debtor :—*Held :* the tools & machinery were, upon the execution of the disclaimer, surrendered to the lessor, & the trustee could not claim them under 1869 Act, s. 15.—*Re* FUSSELL, *Ex p.* ALLEN (1882), 20 Ch. D. 341 ; 51 L. J. Ch. 724 ; 47 L. T. 65 ; 30 W. R. 601, C. A.

Annotations :—**Refd.** *Re* Morrish, *Ex p.* Hart Dyke (1882), 22 Ch. D. 410, C. A. **Mentd.** Lybbe *v.* Hart (1885), 29 Ch. D. 8, C. A.

6585. Goods distrained.]—Goods of a third party on the premises of bkpt. at the time of his committing an act of bkpcy., are not in the order & disposition of bkpt. if at the time of such act of bkpcy. there is a distress for rent upon such goods.—SACKER *v.* CHIDLEY (1865), 11 Jur. N. S. 654 ; 13 W. R. 690.

6586. —— Goods left after appraisal for use of bankrupt's wife.]—A landlord distrained for rent & left the goods when appraised on the premises for the use of bkpt.'s wife, while the tenant was in prison. On the tenant's bkpcy. :—*Held :* the goods passed to the assignees as being in the order & disposition of bkpt.—*Re* DEANE, *Ex p.* SHUTTLEWORTH (1832), 1 Deac. & Ch. 223, Ct. of R.

6587. —— For fictitious rent.]—On the demise of a bakery by W. to debtor, certain chattels were to become the property of debtor at the end of the term, upon his regularly paying the rent reserved. The lease contained a proviso for re-entry on breach of covenant. On Apr. 6, 1880, W. put a man in possession for breach of covenant & non-payment of rent. A liquidation petition was filed in Apr. 8, 1880 :—*Held :* 1869 Act, s. 15, had no application, because actual apparent possession had been taken by W. before the commencement of the liquidation, & the fixtures, machinery, & apparatus included in the so-called lease had never become the property of debtor, & the trustee was not entitled to them, but he was entitled to the proceeds of the distress which W. had levied on chattels of debtor, the so-called rent being a fiction.—*Re* GELDER, *Ex p.* SERGEANT, [1881] W. N. 37, C. A.

6588. Taking goods out of possession—By best delivery available.]—A. having contracted with a canal co. to build locks & bridges on the canal as their engineer, purchased timber & other materials for the purpose, which were laid on the co.'s premises on the banks of the canal, & on the co.'s advancing money to him, they took a bill of sale of those goods, & a symbolical delivery of them by a halfpenny. Afterwards the co. took out execution upon a judgment confessed by A., & the sheriff seized the goods, & A. became a bkpt. :—*Held :* A. had not such a possession of the goods as would enable his assignees to take them under 21 Jac. 1, c. 19, s. 11, for the best delivery was given that the nature of the goods would admit of, they being before on the co.'s premises.—MANTON *v.* MOORE (1796), 7 Term Rep. 67 ; 101 E. R. 858.

Annotations :—**Distd.** Gordon *v.* The East India Co. (1797), 7 Term Rep. 228. **Consd.** Crowfoot *v* London Dock Co. (1834), 2 Cr. & M. 637. **Refd.** Hawthorn *v.* Newcastle-upon-Tyne & N. Shields Ry. Co. (1840), 2 Ry. & Can. Cas. 288 ; Lindon, Saunders & Fox *v.* Sharpe (1843), 13 L. J. C. P. 67.

6589. —— Wrongfully.]—Goods, the property of a widow & children, were upon her second marriage assigned to trustees in trust to suffer the husband to enjoy them, on condition he should pay to the trustees for the use of the children £800 by yearly instalments of £100 from 1789. He continued in possession till 1797, having paid only £250, & the day before his bkpcy. the trustees repossessed themselves of the goods :—*Held :* this was fraudulent as against creditors, & the assignee of bkpt. was entitled to the goods under 21 Jac. 1, c. 19.—DARBY *v.* SMITH (1798), 8 Term Rep. 82 ; 101 E. R. 1278.

Annotations :—**Consd.** Jones *v.* Dwyer (1812), 15 East, 21 ; *Re* Bakewell, *Ex p.* Smith (1818), Buck, 149 ; Shaftesbury *v.* Russell (1823), 1 B. & C. 666. **Expld.** Smith *v.* Topping (1833), 2 Nev. & M. K. B. 421 ; *Re* Massey, *Ex p.* Massey (1835), 4 Deac. & Ch. 405, Ct. of R. **Consd.** *Re* Jordan, *Ex p.* Symmons (1880), 14 Ch. D. 693, C. A. The case of *Darby* v. *Smith*, so far as it is intelligible at all, appears not to have been a case of voluntary preference ; it was not like any other case which can well happen (JAMES, L.J.). **Refd.** *Re* Mellor, *Ex p.* Wayman (1854), 1 Bankr. & Ins. R. 213.

6590. —— Between act of bankruptcy & fiat—No notice of act of bankruptcy.]—Goods suffered by the true owner to remain in the possession of a trader till after a secret act of bkpcy., but taken possession of before the fiat, do not pass to the assignees.—PARIENTE *v.* PENNELL (1843), 2 Mood. & R. 517, N. P. ; *subsequent proceedings* (1844), 3 L. T. O. S. 161.

Annotations :—**Consd.** Young *v.* Hope (1848), 2 Exch. 105 ; *Re* Atkinson (1851), Fonbl. 271. **Mentd.** *Re* Brock, *Ex p.* Tanner (1853), 1 Bankr. & Ins. R. 156.

6591. —— —— ——.]—The true owner of goods, which are by his consent in the possession, order, or disposition of bkpt., may, at any time between the act of bkpcy. committed, & the date of the fiat or the filing of the petition, provided he has not in the meantime had notice of the act of bkpcy., take the goods out of the possession, order, & disposition of bkpt., & sell them for his own benefit. In such circumstances, it makes no

alteration in the rights of the true owner that, at the time when he resumed possession of his goods, he contemplated that bkpt. would shortly become bkpt.—GRAHAM *v.* FURBER (1853), 14 C. B. 134; 23 L. J. C. P. 10; 22 L. T. O. S. 119; 2 W. R. 39; 18 Jur. 61; 2 C. L. R. 10; 139 E. R. 56.

Annotations :—**Consd.** Krehl *v.* Great Central Gas Consumers' Co. (1870), L. R. 5 Exch. 289; *Re* Seaman, *Ex p.* Furness Finance Co., [1896] 1 Q. B. 412. **Refd.** *Re* Jenvey (1854), 24 L. T. O. S. 192; Brewin *v.* Short (1855), 5 E. & B. 227. **Mentd.** *Re* O'Shea's Settlmt., Courage *v.* O'Shea, [1895] 1 Ch. 325, C. A.

6592. —— Placing goods in possession of third party.]—At a meeting of debtor's creditors, a creditor claimed property pledged to him, & by agreement it was placed in the hands of a third party for sale. Debtor became bkpt. :—*Held :* the property was not in the order & disposition of debtor.—TATHAM *v.* ANDREE (1863), 1 Moo. P. C. C. N. S. 386; 2 New Rep. 554; 9 L. T. 2; 9 Jur. N. S. 1019; 12 W. R. 22; 15 E. R. 747, P. C.

6593. —— Not mere colourable possession—Proper direction to jury.]—The holder of a bill of sale of the household furniture & other effects of a trader, other than his stock-in-trade, by agreement with the trader sent a woman to take & preserve possession of the furniture & effects for the holder, who lived with the trader in all respects as one of his family, the apparent possession of the trader continuing as before. The trader became bkpt., & his assignees having brought an action against the holder of the bill of sale to recover the value of the goods assigned by it, the jury were directed to find a verdict for deft., if they believed that the woman actually & not merely colourably, took possession of the goods on the part of the holder of the bill of sale, & would not allow them to be dealt with without his instructions :—*Held :* this was not a misdirection, &, the jury having found for deft., the furniture & effects were not in the "possession, order, or disposition" of the trader at the time of his bkpcy.—VICARINO *v.* HOLLINGSWORTH (1869), 20 L. T. 362; 17 W. R. 613.

Annotations :—**Distd.** *Re* Vining, *Ex p.* Hooman (1870), L. R. 10 Eq. 63. **Consd.** *Re* Blenkhorn, *Ex p.* Jay (1874), 9 Ch. App. 699, n. **Refd.** *Re* Francis, *Ex p.* National Guardian Assce., [1879] 10 Ch. D. 408.

6594. —— Day after act of bankruptcy—No notice of act of bankruptcy—Notice of intention to file petition.]—The holder of a bill of sale, given to secure a debt, received notice on Mar. 10 from debtor's solr. that debtor was about to file a liquidation petition. The creditor at once sent a man to demand payment of the debt, & to take possession of the property comprised in the bill of sale, if payment was not made. Possession was obtained on Mar. 11. The petition had been filed on Mar. 10, but neither the creditor, nor the man who was sent to take possession, knew that until after possession had been obtained :—*Held :* the taking possession of the property took the goods out of the order & disposition of bkpt., notwithstanding the prior act of bkpcy.—*Re* WRIGHT, *Ex p.* ARNOLD (1876), 3 Ch. D. 70; 45 L. J. Bcy. 130; 35 L. T. 21; 24 W. R. 977, C. A.

Annotations :—**Distd.** *Re* Turner, *Ex p.* Attwater (1876), 35 L. T. 682, C. A. **Apld.** *Re* Gibson, *Ex p.* Bolland (1878), 26 W. R. 481. **Refd.** *Re* O'Shea's Settlmt., Courage *v.* O'Shea, [1895] 1 Ch. 325, C. A.

6595. —— Possession by receiver—Action to enforce agreement to give bill of sale.]—In an action to enforce an agreement by B., an innkeeper, to give a bill of sale of his furniture & effects, A. obtained the appointment of a receiver, who entered into possession on Mar. 16, & served the customers. During the night B. absconded, & next day filed a petition, under which a receiver was appointed in bkpcy. The two receivers remained in joint possession :—*Held :* the possession of A.'s receiver had taken the goods out of the order & disposition of B. at the time of his bkpcy.—TAYLOR *v.* ECKERSLEY (1877), 5 Ch. D. 740; 36 L. T. 442; 25 W. R. 527.

6596. —— Real possession though friendly.]—A real possession, although friendly & not such as to disturb the apparent possession of debtor, is sufficient to exclude the operation of 1869 Act, s. 15.—*Re* FRANCIS, *Ex p.* NATIONAL GUARDIAN ASSURANCE CO. (1878), 10 Ch. D. 408; 40 L. T. 237; 27 W. R. 498.

6597. —— By act itself fraudulent preference.]—If the grantee under an unregistered bill of sale has, before the bkpcy. of the grantor, acquired possession of the goods so as to exclude the apparent possession of the grantor, it is immaterial whether the possession has been obtained by means of a transaction which, taken *per se*, would have amounted to a fraudulent preference.—*Re* JORDAN, *Ex p.* SYMMONS (1880), 14 Ch. D. 693; 43 L. T. 106; 28 W. R. 803, C. A.

6598. —— Putting manager in possession—Bankrupt allowed to reside in house.]—Debtor was lessee of three public-houses; the licence of one was in his name, that of the other two in the names of his nominees. He granted a bill of sale over trade utensils & equipment in the three houses. At the commencement of the bkpcy. the mtgees. of the houses had entered, & had appointed managers who were carrying on the business, but they allowed debtor to reside at the house of which he held the licence. The goods in the bill of sale remained on the premises, & there was no default under the bill of sale :—*Held :* the goods at all three houses were at the commencement of the bkpcy. in the possession of bkpt. in his trade or business, & they passed to his trustee.—*Re* ELLIOTT, *Ex p.* THE TRUSTEE (1901), 84 L. T. 325.

6599. —— Of bankrupt executor or administrator—Possession in personal capacity.]—The holders for value of an unregistered bill of sale of goods, supplied to an innkeeper for use in his business, allowed them to remain in the hands of his administratrix after his death. She continued the business & remained in possession of the goods for fifteen months after taking out letters of administration to him, at the end of which time she became

l. *Taking goods out of possession—By holder of unregistered bill of sale.*]—Where the holder of an unregistered bill of sale takes possession of the goods comprised in such bill of sale before the grantor's insolvency, the title of the holder to the goods is complete as against the assignee of the insolvent estate of the grantor.—DAVIDSON *v.* COMMERCIAL BANK OF AUSTRALIA, LTD. (1897), 23 V. L. R. 257.—**AUS.**

m. —— *No notice of act of bankruptcy.*]—G. gave a bill of sale over goods to defts., & subsequently gave a second bill of sale over the same goods to pltfs. Defts. seized the goods with notice of an available act of bkpcy. committed by G., & afterwards assigned the goods to pltfs. In an action by pltfs. against defts. for breach of covenant for title, defts. sought to give evidence that the goods were not in the order & disposition of bkpt., because pltfs. had previously seized under the bill of sale without notice of an available act of bkpcy., but such evidence was rejected :—*Held :* the evidence should have been admitted.—DENHAM *v.* FOLEY (1889), 19 N. S. W. L. R. 414.—**AUS.**

n. —— *Goods left in custody of bankrupt's caretaker.*]—A trader executed a bill of sale to pltf. The goods were subsequently seized formally by pltf., but left in the custody of the trader's caretaker & on his premises. They were then seized by the sheriff under a *fi. fa.*, & were claimed by pltf., but refused. While they remained in the sheriff's possession the trader was adjudicated bkpt. on a subsequent act of bkpcy :—*Held :* the seizure & demand by the true owner, though actuated by a mixed motive partly for the trader's benefit, prevented the operation of the reputed ownership clause.—MCCUE *v.* JAMES (1870), 19 W. R. 158; 5 I. L. T. 77.—**IR.**

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bkpt. :—*Held :* independently of the bill of sale the lapse of more than a year, during which the goods were in the hands of the administratrix & used by her for the purposes of her business, precluded any claim as against her creditors by the creditors of the estate of which she was administratrix, she having dismissed the character of administratrix, & assumed that of absolute owner.—KITCHEN *v.* IBBETSON (1873), L. R. 17 Eq. 46; 43 L. J. Ch. 52; 29 L. T. 450; 38 J. P. 212; 22 W. R. 68.

6600. —— —— ——.]—Testator directed his debts to be paid & gave the residue of his estate to his wife, whom he appointed extrix. The widow proved the will, paid some of the debts, & for four years carried on, ostensibly on her own account, her late husband's business of a cow-keeper. At the end of that period she married a second husband, who shortly afterwards became bkpt. There were then creditors of testator still unsatisfied, who had been throughout aware of the widow's dealings in relation to the business: —*Held :* they had no interest in the stock & property of the business as against the trustee.—*Re* FELLS, *Ex p.* ANDREWS (1876), 4 Ch. D. 509; 46 L. J. Bcy. 23; 36 L. T. 38; 25 W. R. 382.

6601. —— —— ——.]—Testator bequeathed his personal estate to his wife & another, whom he also appointed exors., upon trust to permit his wife to retain the possession & enjoyment of his household goods, furniture, & the annual income of his residuary personal estate for her life, with remainder to his sons. The will contained no power for the trustees to carry on his farming business. The widow, with the sanction of her co-trustee, took a lease of testator's farm. An account was opened at a bank by the trustees, as "exors." into which all money received from the produce of the farm were paid, & from which all outgoings were drawn. Thirteen years after testator's death, the widow filed a petition, & the trustees claimed the furniture & the stock on the farm :—*Held :* the property claimed was earmarked as trust property, & only the life interest of the widow passed to the trustees.—*Re* ANSLOW, *Ex p.* BARBER (1880), 42 L. T. 411; 28 W. R. 522.

6602. Attempt to take possession early on day of act of bankruptcy—Possession successfully taken next day.]—H. discounted for P. two bills of exchange payable on Oct. 12, & P. gave H. a bill of sale as security, requesting him not to register it unless the bills were dishonoured at maturity. H. did not register it. The bills were dishonoured, on which H. took them up, & P. gave him two fresh bills for the same amount, & a new bill of sale of the same chattels. On Oct. 30 the new bills were dishonoured, & H. gave directions to take possession of the chattels. Early on the 31st a broker went to take possession, but could not on that day get into the house where they were. On the same day the bill of sale was registered, & P. committed an act of bkpcy. by filing a petition, on which he was adjudged bkpt. On Nov. 1 H. obtained possession of the goods :—*Held :* the goods belonged to H. & not to the trustee in bkpcy. for they were not in the order & disposition of bkpt. with the consent of the true owner at the time of the act of bkpcy.—*Re* PULLING, *Ex p.* HARRIS (1872), 8 Ch. App. 48; 42 L. J. Bcy. 9; 27 L. T. 501; 21 W. R. 44, L. JJ.

Annotation :—**Mentd.** Ramsden *v.* Lupton (1873), 22 W. R. 129, Ex. Ch.

6603. Seizure by sheriff.]—Goods, which had been mortgaged before the bkpcy., were at the time of the bkpcy. in the hands of the sheriff, under an execution against bkpt. :—*Semble :* they did not pass to his assignees, as being in his order & disposition, with the consent of the true owner. —FLETCHER *v.* MANNING (1844), 12 M. & W. 571; 13 L. J. Ex. 150; 2 L. T. O. S. 371; 152 E. R. 1326.

Annotations :—**Apld.** *Re* Baldwin, *Ex p.* Foss (1858), 2 De G. & J. 230, L. JJ. **Consd.** *Re* Grant (1862), 7 L. T. 536. **Mentd.** Lee *v.* Rowley (1858), 27 L. J. Q. B. 193.

6604. ——.]—Type & plant used in the publication of a newspaper had been seized by a sheriff under an execution. On the subsequent bkpcy. of debtor :—*Held :* the type & plant were not within his order & disposition.—*Re* BALDWIN, *Ex p.* FOSS, *Ex p.* BALDWIN (1858), 2 De G. & J. 230; 27 L. J. Bcy. 17; 31 L. T. O. S. 30; 4 Jur. N. S. 522; 6 W. R. 417; 44 E. R. 977, L. JJ.

Annotations :—**Distd.** *Re* Rouse, *Ex p.* Lamb (1865), 14 W. R. 112. **Refd.** *Re* Cuthbertson, *Ex p.* Edey (1875), L. R. 19 Eq. 264. **Mentd.** Platt *v.* Walter (1867), 17 L. T. 157, L. C.; Kelly *v.* Hutton (1868), 3 Ch. App. 703, L. JJ.

6605. —— **Wrongfully.**]—Goods of pltf., remained by his consent in the possession, order, & disposition of bkpt. Prior to the bkpcy. the sheriff seized the goods under a *fi. fa.* issued against bkpt., but allowed him to continue in possession of them as before :—*Held :* the seizure by the sheriff, being a mere wrongful act, did not affect the possession which bkpt. had by the consent of pltf., & the goods passed to his assignees.—BARROW *v.* BELL (1855), 5 E. & B. 540; 25 L. J. Q. B. 2; 26 L. T. O. S. 71; 2 Jur. N. S. 159; 4 W. R. 16; 119 E. R. 581.

Annotations :—**Distd.** *Re* Baldwin, *Ex p.* Foss (1858), 2 De G. & J. 230, L. JJ. **Consd.** *Re* Cuthbertson, *Ex p.* Edey (1875), L. R. 19 Eq. 264. **Refd.** *Re* Rouse, *Ex p.* The Assignees (1865), 13 L. T. 337.

6606. —— ——.]—A piano, which bkpt.'s father-in-law had lent to his daughter remained in bkpt.'s house for three or four years, when it was seized by the sheriff under a *fi. fa.*, but not removed by him. The sheriff remained in possession until after the bkpcy., which occurred a few days after :—*Held.:* it passed to the assignees as being in the reputed ownership of bkpt. at the time of the bkpcy. with the consent of the true

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6603 i. *Seizure by sheriff.*]—On Oct. 6, 1885, deft. gave pltf. a bill of sale, which was never registered, over household furniture. On Apr. 9, 1886, deft. gave a second bill of sale, which was registered on Apr. 28, over the same furniture, to A. On May 11, deft. became insolvent, the furniture at the time being in the possession of a bailiff under a writ of execution :—*Held :* at the time of the insolvency, the furniture was in the hands of a bailiff, & not in the "possession, order, or disposition" of insolvent.—DAVIDSON *v.* DENNIS (1887), 8 N. S. W. L. R. 2821.—**AUS.**

6603 ii. ——.]—Ten months before his bkpcy. a trader assigned all his goods to pltf. by bill of sale, executed under a threat of seizure. Six days before the issuing of the fiat, upon the sheriff's seizing the goods under a *fi. fa.*, pltf. claimed them as his, & he also claimed the goods from the messenger of the Ct. of Bkpcy. :—*Held :* the goods & chattels did not remain in the "order & disposition" of bkpt.—MCCUE *v.* JAMES (1870), 19 W. R. 158; 5 I. L. T. 77.—**IR.**

6603 iii. ——.]—In 1883 B. mortgaged to D. furniture standing in a house leased by him from V. The mtge. deed provided that until default the mtgor. should have free use of the mortgaged property, that the mtgee. should be at liberty to place a durwan in charge of the furniture, & that on default by the mtgor. the mtgee. should have power to enter the premises & deal with the goods as his own. A durwan was placed in charge, & in Jan., 1884, the mtgor. defaulted, & was pressed for payment at different times previous to Aug. On Aug. 1, the mtgee. sent to the premises people for the purpose of cataloguing the furniture. On Aug. 4, the furniture was attached by V. in execution of a decree for rent. On Aug. 6, B. filed his petition in insolvency :—*Held :* the attachment under V.'s execution took the goods out of the order & disposition of B.—*Re* BROWN (1886), I. L. R. 12 Calc. 629.—**IND.**

owner, he not having claimed it until after that event, & the seizure by the sheriff being wrongful. —*Re* ROUSE, *Ex p.* THE ASSIGNEES (1865), 13 L. T. 337; *sub nom. Re* ROUSE, *Ex p.* LAMB, 14 W. R. 112.

6607. —— ——.]—On May 2 a bill of sale of chattels was executed, & it was afterwards duly registered. The mtgee. did not demand possession of the goods until June 15. The goods had been seized on June 5 by the sheriff under an execution issued by another creditor, & on June 13 debtor had filed a liquidation petition. The sheriff remained in possession till June 20:—*Held:* the sheriff's possession, being wrongful as against the mtgee., did not prevent the goods from being in the order or disposition of debtor at the commencement of the liquidation, & they passed to the trustee.—*Re* CUTHBERTSON, *Ex p.* EDEY (1875), L. R. 19 Eq. 264; 44 L. J. Bcy. 55; 31 L. T. 851; 23 W. R. 519.

Annotations:—**Expld.** M. P. Sales Agency *v.* Elite Theatres (1917), 86 L. J. K. B. 1060, C. A. **Refd.** Payne *v.* Cales (1877), 38 L. T. 355.

6608. —— **Property not capable of seizure.**]—A sheriff seized in execution the right to publish newspapers, & while in possession debtor became bkpt.:—*Held:* the right of publication was not capable of seizure by the sheriff, & as nothing had been done to make it apparent that bkpt. was not the owner, the doctrine of reputed ownership applied.—*Re* BALDWIN, *Ex p.* FOSS, *Ex p.* BALDWIN (1858), 2 De G. & J. 230; 27 L. J. Bcy. 17; 31 L. T. O. S. 30; 4 Jur. N. S. 522; 6 W. R. 417; 44 E. R. 977, L. JJ.

Annotations:—**Distd.** *Re* Rouse, *Ex p.* The Assignees (1865), 13 L. T. 337. **Refd.** *Re* Cuthbertson, *Ex p.* Edey (1875), L. R. 19 Eq. 264. **Mentd.** Platt *v.* Walter (1867), 17 L. T. 157, L. C.; Kelly *v.* Hutton (1868), 3 Ch. App. 703, L. JJ.

6609. Tying up certificates in separate parcels labelled to show ownership.]—A. & B. were exors. A. without knowledge of his co-exor. lent the trust funds to a banking firm in which he was a partner, & as security he placed in his desk certain railway & mining shares wrapped in a paper cover, with an indorsement to the effect that the shares belonged to A. & B. B. had no notice of the transactions, nor had either of the cos. any notice of transfer of the shares, nor was there any deposit note. On the firm becoming bkpt. the shares were found as above stated:—*Held:* no legal transfer had been made of the shares to the exor., but they passed to the assignees as being in the order & disposition of bkpts.—*Re* STRAHAN, PAUL & CO., *Ex p.* SNOW (1857), 28 L. T. O. S. 52.

6610. Delivery of key of house in which goods deposited.]—A. by bill of sale assigned furniture in a house to B., to secure payment of £150 in Nov., 1861, or at some earlier day upon notice given in writing, with interest in the mean time, with liberty to B., in default of payment of interest, & after notice requiring payment, to enter & take possession & sell, but until default & notice, A. to occupy & enjoy. The key of the house was subsequently given up by A.'s wife, at A.'s suggestion, to B., who locked up the house & took away the key. A. a few days after became bkpt., under a petition previously presented:—*Held:* the mere delivery of the key, without more, was not a delivery of the goods in the house.—*Re* BODY, *Ex p.* STANER (1859), 33 L. T. O. S. 244.

6611. Deposit of mortgage deeds—Mortgage only transferable by indorsement.]—Where the registered mtgees. of three fishing-boats deposited the mtge. deeds with their bankers as security for a debt & afterwards became bkpt.:—*Held:* the statutory form of assignment being by indorsement, the mtges. could not be dealt with by bkpts., & were not in their order & disposition.—LACON *v.* LIFFEN (1862), 4 Giff. 75; 1 New Rep. 44; 32 L. J. Ch. 25; 7 L. T. 411; 9 Jur. N. S. 13; 11 W. R. 135; 1 Mar. L. C. 262; 66 E. R. 626; *affd.* (1863), 32 L. J. Ch. 315, L. C.

Annotations:—**Mentd.** *Re* Nurse, *Ex p.* Foxley (1868), 17 L. T. 623; Martin *v.* Willyams (1869), 20 L. T. 350.

6612. Goods stopped in transitu—Change in destination.]—An agent of bkpt. who has made himself responsible for the price of goods, may stop them *in transitu.* But, if, after they have reached a certain place, he give them a new destination in furtherance of bkpt.'s business, & in the course of bkpt.'s trade, when they arrive at the place of such destination, they vest in bkpt., & pass to his assignees.

Deft. received from A. some bacon, really the property of bkpt., & the messenger under the commission asked him if he had not got some bacon of bkpt., to which he replied that he had some belonging to A., upon which the messenger desired him to take care of it, & not part with it, as more would be heard of it. Afterwards deft. allowed the bacon to be returned by A. to the person from whom A. had received it:—*Held:* this was evidence of a conversion.—HAWKES *v.* DUNN (1831), 1 Cr. & J. 519; 1 Tyr. 413; 9 L. J. O. S. Ex. 184.

Annotation:—**Distd.** Heald *v.* Carey (1852), 11 C. B. 977.

6613. —— **No acceptance thereof by bankrupt to satisfy Statute of Fraud—Sale by sample.**]—Deft., a corn merchant, sold by sample to J. goods under a verbal contract. He delivered them, in accordance with trade usage, at a railway station to J.'s order. J. became bkpt., & previous to his bkpcy., he had taken no active step with respect to the acceptance or declining of the goods, which were unpaid for, & had not been returned. The next day he was adjudicated an insolvent:—*Held:* the goods in the godown were not in the order & disposition of B.—*Re* BUNGSEEDHUR KHETTEY, RAMLALL BUDREE DOSS'S CLAIM (1877), I. L. R. 2 Calc. 359.—**IND.**

6610 i. *Placing creditor's lock on door of warehouse—Bankrupt replacing his own lock.*]—On the night previous to B.'s being adjudicated insolvent, about 10 p.m., A. & Co. promised to give B. a loan of R5,000 if he would the next morning deliver to them goods to that amount, & would, in the meantime, satisfy them that he had sufficient goods in his godown, & allow the firm to put their lock on the door of the godown to secure the goods, until they had received the value of the loan. B. took the gomastah of the firm to his godown, let him see that it contained goods worth more than R5,000, & allowed him to put a lock on the door, B. at the same time replacing his own locks. The firm then paid R5,000 to B., who promised to deliver the next morning R5,000 worth of goods out of the locked-up godown, but who absconded that same night, & never

6611 i. *Deposit of letter of credit.*]—A. letter of credit was drawn in favour of A., who afterwards became bkpt. Before the bkpcy., A., for valuable consideration, made an equitable assignment to B. of part of the money covered by the letter, & by way of additional precaution it was agreed that the letter of credit should, in the interest of B., be forwarded to C. At the date of the bkpcy. the letter of credit was in the hands of C.:—*Held:* the letter of credit was not in the order & disposition of bkpt.—*Re* JONES (1890), 8 N. Z. L. R. 695.—**N.Z.**

o. *Deposit of policy of insurance—Delivery of policy necessary before payment.*]—B. deposited a life policy of insurance with a bank, with a letter pledging it as a security for £50 advanced by the bank to him. There was a condition printed in the margin of the policy requiring its delivery before payment of the money secured. Afterwards B. died insolvent, & an order was made that his estate should be administered by the official assignee under Administration Act, 1879, Amendment Act, 1888. The official assignee having paid off the bank & obtained possession of the policy:—*Held:* assuming the doctrine of reputed ownership applied, it could not be resorted to in the circumstances, as the policy was not in fact in deceased's possession at his death, but in that of the bank.—*Re* LOWTHER BROAD'S ESTATE, *Ex p.* WELDON (1893), 12 N. Z. L. R. 666.—**N.Z.**

Sect. 9.—*Property in reputed ownership of bankrupt: Sub-sect.* 3, *B.* (*a*) & (*b*), *i.*]

compared with the sample. Deft. gave the railway co. notice not to part with the goods to bkpt.'s assignees without his consent. The assignees claimed them, but the railway co. redelivered them to deft. :—*Held :* the goods were not, at the time of the bkpcy., in the order & disposition of bkpt.—SMITH *v.* HUDSON (1865), 6 B. & S. 431 ; 6 New Rep. 103 ; 34 L. J. Q. B. 145 ; 12 L. T. 377 ; 11 Jur. N. S. 622 ; 13 W. R. 683 ; 122 E. R. 1254.

Annotations :—**Distd.** *Re* Bell, *Ex p.* Clarke (1877), 47 L. J. Bcy. 33. **Consd.** *Re* Watson, *Ex p.* Atkin, [1904] 2 K. B. 753, C. A. **Mentd.** Taylor *v.* Smith, [1893] 2 Q. B. 65, C. A.

6614. Attornment by parties holding goods for bankrupt.]—Bankers from time to time made advances to traders to enable them to purchase goods for shipment to the East. The course of business was for the traders to send the goods to bleachers to be bleached, & afterwards they were returned to the traders or sent to packers to be packed for shipment ; & on the occasion of each advance the traders sent the bank a letter of lien accompanied by the bleachers' receipts for the goods. The letter was a printed form & was in the following terms : "We beg to advise having drawn a cheque on you for £——, which amount please place to the debit of our loan account, as a loan on the security of goods in course of preparation for shipment to the East. As security for this advance we hold on your account & under lien to you the under-mentioned goods in the hands of (here followed list of goods & names of bleachers) as per their receipt enclosed. These goods when ready will be shipped to Calcutta, & the bills of lading, duly indorsed, will be handed to you, & we then undertake to repay the above advance . . ." A few days before the commencement of the bkpcy. the bank gave notice to the bleachers whose receipts they held, claiming all the goods specified in such receipts, & on the same day also gave notice to the traders claiming the goods held by bleachers against which the bank had outstanding advances made to the traders. Bleachers holding for the traders goods not covered by any letters of lien then, at the request of the traders, attorned to the bank before the commencement of the bkpcy., except in one case in which the attornment was made subsequently :—*Held :* none of the goods either specified in the receipts or in respect of which attornment had been made before the commencement of the bkpcy. were, at the commencement of the bkpcy., in the possession, order, or disposition of bkpts. as the reputed owners thereof within 1887 Act, s. 44.—*Re* HAMILTON, YOUNG & CO., *Ex p.* CARTER, [1905] 2 K. B. 772 ; 74 L. J. K. B. 905 ; 93 L. T. 591 ; 54 W. R. 260 ; 21 T. L. R. 757 ; 12 Mans. 365, C. A.

(*b*) *Notice of Transfer.*

i. *Necessity for Notice.*

6615. Policy of insurance—Assignment of.]—The assignment of a policy of assurance on a life does not take it out of the order & disposition of the assignor, if no notice of the assignment is given to the insurers.—WILLIAMS *v.* THORP (1828), 2 Sim. 257 ; 57 E. R. 785.

Annotations :—**Consd.** Duncan *v.* Chamberlayne (1840), 11 Sim. 123 ; *Re* Webb's Policy (1867), 36 L. J. Ch. 341. **Refd.** *Re* Severn, *Ex p.* Tennyson (1832), Mont. & B. 67, L. C. ; Gibson *v.* Overbury (1841), 7 M. & W. 555 ; West *v.* Reid (1843), 2 Hare, 249 ; *Re* Gibbs, *Ex p.* Price (1844), 2 L. T. O. S. 426 ; Edwards *v.* Martin (1865), 35 L. J. Ch. 186. **Mentd.** Gardner *v.* Lachlan (1836), 5 L. J. Ch. 332 ; Société Générale de Paris *v.* Tram. Union Co. (1884), 14 Q. B. D. 424, C. A.

6616. —— ——.]—Where a party effects a policy on his life, & assigns same, by way of mtge., as a security for a debt, & afterwards becomes bkpt., & the person to whom the assignment is made, though for valuable consideration, does not give notice of his claim to the persons liable to pay the money assured, the policy is within the order & disposition of bkpt., at the time of his bkpcy.—*Re* SEVERN, *Ex p.* COLVILL (1831), Mont. 110 ; 2 Sim. 570, n. ; 9 L. J. O. S. Ch. 56 ; 57 E. R. 787, n. ; *sub nom. Re* SEVERN, *Ex p.* TENNYSON (1832), Mont. & B. 67, L. C.

Annotations :—**Refd.** Gibson *v.* Overbury (1841), 7 M. & W. 555 ; *Re* Gibbs, *Ex p.* Price (1844), 13 L. J. Bcy. 15.

6617. —— ——.]—R. sold an annuity to H., effected an insurance upon his life, & assigned the policy upon trusts, for the benefit of the annuitant. The exors. of H. sold & assigned to A. the annuity, & their right & interest in the policy of assurance, which was then delivered to A., in whose possession it remained until after the bkpcy. of R. The assignment to A. was in trust for W., who in 1820 sold & assigned the existing arrears of the annuity to B. :—*Held :* (1) the policy, at the time of R.'s bkpcy., was not in his order & disposition ; (2) in any case R.'s assignees could have no interest, the insurance office having had notice of the transactions.—BOZON *v.* BOLLAND (1832), Unreported, cited in 1 Mont. & B. at p. 74 ; & in 11 Sim. at p. 124 ; 59 E. R. 821.

Annotations :—**Consd.** *Re* Severn, *Ex p.* Tennyson (1832), Mont. & B. 67, L. C. ; Duncan *v.* Chamberlayne (1840), 11 Sim. 123. **Refd.** West *v.* Reid (1843), 2 Hare, 249.

6618. —— ——.]—The assignment of a policy of insurance without notice to the office does not prevent the operation of the clause of reputed ownership.—*Re* SEVERN, *Ex p.* TENNYSON (1832), Mont. & B. 67, L. C.

Annotations :—**Refd.** Duncan *v.* Chamberlayne (1840), 11 Sim. 123 ; *Re* Daintry & Ryle, *Re* Ravenscroft, *Ex p.* Arkwright (1843), 3 Mont. D. & De G. 129 ; West *v.* Reid (1848), 2 Hare, 249.

6619. —— ——.]—*Held :* express notice of an assignment of a policy effected with the E. Assurance Society need not be given, in order to take the policy out of the order & disposition of the assignor.—DUNCAN *v.* CHAMBERLAYNE (1840), 11 Sim. 123 ; 10 L. J. Ch. 307 ; 4 Jur. 819 ; 59 E. R. 821.

Annotations :—**Dbtd. & Expld.** Thompson *v.* Speirs (1845), 13 Sim. 469. On reconsideration I am of opinion that the decision in *Duncan* v. *Chamberlayne* ought not to be supported (SHADWELL, V.-C.). **Mentd.** Pinkett *v.* Wright (1842), 2 Hare, 120.

6620. —— ——.]—A person who had effected a policy of insurance upon his life in an assurance society, whereby he had become a partner in that society, assigned his policy without giving notice to the society, & became bkpt. :—*Held :* the policy still remained in the order & disposition of bkpt.—THOMPSON *v.* SPEIRS (1845), 13 Sim. 469 ; 14 L. J. Ch. 453 ; 9 Jur. 933 ; 60 E. R. 182.

6621. —— **Mortgage of.**]—Where a policy of assurance is mortgaged it is necessary for the mtgee. to give notice to the office, in order to take such policy out of the order & disposition of mtgor. in the event of his becoming bkpt.—THOMPSON *v.* TOMKINS (1862), 2 Drew. & Sm. 8 ;

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p. *Pledge of shares—Transferred to bankrupt to enable him to qualify as director.*]—B. transferred shares in a gas co. to R., to enable the latter to qualify as a director of the co. On June 21, 1892, R., as owner, pledged the shares with his bank to secure advances. R. committed acts of bkpcy. on June 25, 1892, & on July 13, 1892, he became bkpt. :—*Held :* the pledge of the shares by R. to the bank was a determination of possession by him, & took them out of the order & disposition at the time of his bkpcy.—BOWER *v.* ROSS' OFFICIAL ASSIGNEE (1894), 13 N. Z. L. R. 193.—**N. Z.**

31 L. J. Ch. 633 ; 6 L. T. 305 ; 8 Jur. N. S. 185 ; 10 W. R. 310 ; 62 E. R. 524.

Annotations :—**Mentd.** Mutual Life Assce. Soc. *v.* Langley (1886), 32 Ch. D. 460, C. A. ; *Re* Nettlefold's Trusts (1888), 59 L. T. 315.

6622. —— Assignment of mortgage of.]—Policies of assurance were mortgaged & delivered to A., who gave notice to the assurance offices. A. mortgaged & delivered the policies to B., who gave no notice to the offices, & did not make the transaction public. A. afterwards became bkpt. : —*Held :* the policies were in the order & disposition of A. at the time of his bkpcy.—*Re* DAINTRY, *Ex p.* POTT (1843), 12 L. J. Bcy. 33 ; 7 Jur. 159, Ct. of R.

Annotation :—**Folld.** West *v.* Reid (1843), 2 Hare, 249.

6623. —— ——.]—A. mortgaged a policy of assurance to B., who gave no notice of the mtge. to the office. B. mortgaged the policy to C., who gave no notice either to A. or the office. B. afterwards became bkpt. :—*Held :* as against C., the policy was in the order & disposition of B. at the time of the bkpcy.—*Re* LOOSEMORE, *Ex p.* WOOD (1843), 3 Mont. D. & De G. 315 ; 12 L. J. Bcy. 42 ; 1 L. T. O. S. 263 ; 7 Jur. 521, Ct. of R.

Annotations :—**Folld.** Thompson *v.* Tomkins (1862), 2 Drew. & Sm. 8. **Refd.** Thompson *v.* Speirs (1845), 9 Jur. 933.

6624. —— Deposit as security.]—A policy of insurance on life, effected by bkpt., & deposited by him, before his bkpcy., with defts., who gave no notice to the insurance co. of the deposit, as a security for money then & previously advanced by defts. to him, is not in the order & disposition of bkpt., with the consent of the true owner, within 6 Geo. 4, c. 16, s. 72.—GIBSON *v.* OVERBURY (1841), 7 M. & W. 555 ; 10 L. J. Ex. 219 ; 151 E. R. 887.

Annotations :—**Distd.** Green *v.* Ingham (1867), L. R. 2 C. P. 525. **Refd.** West *v.* Reid (1843), 2 Hare, 249 ; *Re* Gibbs, *Ex p.* Price (1844), 3 Mont. D. & De G. 586 ; Belcher *v.* Campbell (1845), 8 Q. B. 1. **Mentd.** Heath *v.* Crealock (1873), L. R. 18 Eq. 215.

6625. —— ——.]—Three policies of assurance on a life were deposited by A. with B. to secure a debt due from A. to B. No notice of the deposit was given to the offices with which the insurances had been effected. A. afterwards became bkpt: —*Held :* the policies were in the order & disposition of A. at the time of his bkpcy.—*Re* GIBBS, *Ex p.* PRICE (1844), 3 Mont. D. & De G. 586 ; 13 L. J. Bcy. 15 ; 2 L. T. O. S. 477 ; 8 Jur. 545, Ct. of R.

Annotations :—**Refd.** Thompson *v.* Speirs (1845), 9 Jur. 933. **Mentd.** *Re* Goetz, Jonas, *Ex p.* Trustee (1898), 78 L. T. 399, C. A.

6626. —— —— By way of equitable mortgage —Mutual assurance.]—Notwithstanding a policy of insurance may have been effected with a mutual insurance co., express notice of a deposit of it by way of equitable mtge. must be given to the co. in order to take it out of the order & disposition of the depositor.—*Re* BROMLEY, *Ex p.* WILKINSON (1845), 13 Sim. 475 ; 9 Jur. 934, n. ; 60 E. R. 185, Ct. of R.

Annotation :—**Refd.** Thompson *v.* Speirs (1845), 13 Sim. 469.

6627. —— With other securities—Memorandum of deposit.]—A. debt was secured by the deposit of a policy of assurance & other securities, accompanied by a memorandum of deposit containing an undertaking by debtor to make a proper transfer when required to do so. No transfer was required by, or made to, the creditor, & no notice was given to the assurance office of such transfer. On the bkpcy. of debtor :—*Held :* the creditor was entitled to be paid out of the proceeds of the policy in the hands of the official assignee.—*Re* HALL, *Ex p.* HALL (1859), 33 L. T. O. S. 96.

6628. —— Deposit with intention of giving security.]—A. delivered to B. a policy of insurance on his own life, to secure a loan from B., with the intention of giving B. an interest in the sum insured. No notice of the transaction was given to the insurance office :—*Held :* the policy remained in the order & disposition of A., & on his bkpcy., his assignee was entitled to recover it from B.—GREEN *v.* INGHAM (1867), L. R. 2 C. P. 525 ; 36 L. J. C. P. 236 ; 16 L. T. 455 ; 15 W. R. 841.

Annotation :—**Refd.** Cooke *v.* Hemming (1868), L. R. 3 C. P. 334.

6629. —— Deposit of mortgaged policies—Mutual assurance.]—Bkpts., being mtgees. of various policies of life assurance, of which the respective insurance offices had notice, deposited them with their bankers to secure the repayment of advances, but the bankers gave no notice of such deposit to the different offices :—*Held :* the policies must be considered as in the order & disposition of bkpts., within 6 Geo. 4, c. 16, s. 72, & the same principle applied to one of the policies, which was effected with a mutual assurance co.—*Re* DAINTRY, *Ex p.* ARKWRIGHT (1843), 3 Mont. D. & De G. 129, Ct. of R.

Annotations :—**Folld.** Thompson *v.* Tomkins (1862), 2 Drew. & Sm. 8. **Refd.** Thompson *v.* Speirs (1845), 9 Jur. 933.

6630. Shares—Company officer assigning his shares—As security to third party.]—A holder of shares in a railway co., which was subject to Co. Clauses Consolidation Act, 1845 (c. 17), was one of the secretaries of the co. & a solr. He borrowed money of a client on a deposit of the certificates of the shares, but no further notice of the deposit was given to the co. On the solr. becoming bkpt. : —*Held :* the shares were in his order & disposition with the consent of the client.—*Re* SKETCHLEY, *Ex p.* BOULTON (1857), 1 De G. & J. 163 ; 26 L. J. Bcy. 45 ; 29 L. T. O. S. 71 ; 3 Jur. N. S. 425 ; 5 W. R. 445 ; 44 E. R. 685, L. JJ.

Annotations :—**Consd.** *Re* Shelley, *Ex p.* Stewart (1864), 4 De G. J. & Sm. 543, L. C. ; *Re* Worcester, *Ex p.* Agra Bank (1868), 3 Ch. App. 555 ; Colonial Bank *v.* Whinney (1886), 11 App. Cas. 426, H. L. **Refd.** *Re* Rawbone's Trusts (1857), 3 K. & J. 476 ; Société Générale de Paris *v.* Tram. Union Co. (1884), 14 Q. B. D. 424, C. A. **Mentd.** Bartlett *v.* Bartlett (1857), 1 De G. & J. 127 ; Cory *v.* Eyre (1862), 1 De G. J. & Sm. 149, L. JJ.

6631. —— —— —— Contract that no notice be given.]—Bkpt., a director of a joint stock co., mortgaged his shares to secure an advance of money, but stipulated that no notice should be given of the transaction to the co., not wishing it to be known to his brother directors. The mtgee. acceded to such stipulation :—*Held :* the shares were in the order & disposition of bkpt. within 6 Geo. 4, c. 16, s. 72.—*Re* HAMLET, *Ex p.* NUTTING (1841), 2 Mont. D. & De G. 302 ; 5 Jur. 829, Ct. of R.

6632. —— —— —— No evidence of contract that notice should not be given.]—A. was the owner of sufficient amount of stock in a dock co.,

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PART XX. SECT. 9, SUB-SECT. 3.—B(b) i.

6622 i. *Policy of insurance—Deposit of mortgage of.*]—On Oct. 7, 1874, B. mortgaged a life policy to P., who on Oct. 9 gave notice of the mtge. to the co. P. being indebted to the M. Bank on foot of a promissory note, in which he joined for the accommodation of B., deposited the policy & mtge. deed with the bank on Feb. 21, 1878, but notice of the deposit was not given to the co. until July, 1880. B. filed a petition for arrangement on Sept. 12, 1877, & under a resolution of Mar. 12, 1878, all his estate & effects were vested in the official assignees & a trustee for the benefit of his creditors. P. also filed a petition for arrangement on June 13, 1879, &, under a resolution, all his estate & effects were vested in the official assignees & a trustee in trust for his creditors. On Nov. 19, 1879, P. & C., who were partners, were adjudicated bkpts. on a creditor's petition :—*Held :* the policy of insurance was, at the date of the adjudication, in the order & disposition of P. with the consent of the true owners.—*Re* POWER, *Ex p.* MUNSTER BANK (1882), 11 L. R. Ir. 93.—**IR.**

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& of shares of £500 each in an assurance co., to qualify him as *bonâ fide* holder as a director of each co. & he was a director of each. He executed in 1846 an assignment by way of mtge. of such stock & of two such shares (by mistake called £1,000 stock) to C. to secure repayment of money lent. The Act of Parliament of the dock co., & the deed of settlement of the insurance co., respectively required all transfers to be in a stated form. A. was in a state in which bkpcy. was inevitable on June 9, 1854, when C. gave notice of the assignment to the respective cos., & on the 17th of the same month A. committed an act of bkpcy., upon which he was adjudicated bkpt. A. retained his office of director of the dock co. down to the end of May, 1853, & of the assurance co. down to June 9, 1854:—*Held:* there being no evidence of a contract between bkpt. & C. that notice should not be given to the cos. by which bkpt. would be disqualified as director, the stock & shares were not in the order & disposition of bkpt. *Qu.:* whether the shares did not remain in bkpt.'s possession with the consent & permission of C., the true owner.—*Re* PEARSE, *Ex p.* LITTLEDALE (1855), 6 De G. M. & G. 714; 24 L. J. Bcy. 9; 24 L. T. O. S. 318; 1 Jur. N. S. 385; 3 W. R. 307; 43 E. R. 1410, L. C. & L. JJ.

Annotations:—**Consd.** Tatham *v.* Andree (1863), 1 Moo. P. C. C. N. S. 386, P. C. **Refd.** *Re* Sketchley, *Ex p.* Boulton (1857), 1 De G. & J. 163, L. JJ.; Société Générale de Paris *v.* Tram. Union Co. (1884), 14 Q. B. D. 424, C. A.

6633. —— —— —— For loan to company.]—The managing director, who was also the sole secretary of a co. registered under Joint Stock Co. Act, 1856 (c. 47), joined with all his co-directors in making an equitable mtge. of their shares to a bank, as a security for an advance to the co. The bank gave no notice to the co. On the bkpcy. of the managing director:—*Held:* his shares were not in his order & disposition with the consent of the bank as the true owners thereof.—*Re* SHELLEY, *Ex p.* STEWART (1864), 4 De G. J. & Sm. 543; 5 New Rep. 200; 34 L. J. Bcy. 6; 11 L. T. 554; 11 Jur. N. S. 25; 13 W. R. 356; 46 E. R. 1029, L. C.

Annotations:—**Distd.** *Re* Jackson, *Ex p.* Union Bank of Manchester (1871), L. R. 12 Eq. 354. **Consd.** Colonial Bank *v.* Whinney (1886), 11 App. Cas. 426, H. L. **Refd.** *Re* Worcester, *Ex p.* Agra Bank (1868), 3 Ch. App. 555; Société Générale de Paris *v.* Tram. Union Co. (1884), 14 Q. B. D. 424, C. A; *Re* Crouch, *Ex p.* Smith (1902), 83 L. T. 746.

6634. —— Partner in company depositing his shares.]—In deposits of shares of insurance cos., where the parties are partners thereof, the transaction itself is sufficient notice to prevent reputed ownership.—*Re* RAIKES, *Ex p.* WAITHMAN (1835), 2 Mont. & A. 364; 4 Deac. & Ch. 412, Ct. of R.

Annotation:—**Refd.** Thompson *v.* Speirs (1845), 14 L. J. Ch. 453.

6635. —— Bought in name of bankrupt—Verbal declaration of trust.]—By the rules of a joint stock co., only principals could become subscribers. Petitioner purchased forty shares in the name of bkpt., who verbally declared that he held them as a trustee for petitioner, & the certificates of the shares were kept in the possession of petitioner, but no notice was given to the co. of the trust, nor did bkpt. sign a written declaration of trust until seven days before the fiat was issued:—*Held:* the shares were in the order & disposition of bkpt. as reputed owner, & passed to his assignees.—*Re* ORD, *Ex p.* ORD (1835), 2 Mont. & A. 724; 1 Deac. 166; 4 L. J. Bcy. 84, Ct. of R.

Annotation:—**Refd.** G. E. Ry. Co. *v.* Turner (1872), 21 W. R. 163, L. C.

See, also, No. 6543, *ante.*

6636. —— Assigned by deed—Transfer not completed in company books—Shares remaining in name of bankrupt at bankruptcy.]—If shares in a canal co., which, by the Act incorporating the co., are declared to be personal estate & transmissible as such, are assigned by A. to B. as purchaser for valuable consideration, by deed, but the transfer is not completed in the books of the co., & the shares continue standing in the name of A. & he becomes bkpt., they pass to his assignees, as being in A.'s order & disposition as the apparent owner.—BROCKBANK *v.* DILWORTH (1829), 8 L. J. O. S. Ch. 1, L. C.

6637. —— Pledge of shares belonging to bankrupt's wife before marriage.]—Where bkpt. pledges shares, which belonged to his wife before marriage, notice must be given before the act of bkpcy., or they will be in the reputed ownership.—*Re* MITCHELL, *Ex p.* SPENCER (1836), 3 Mont. & A. 697, Ct. of R.

6638. —— Placed in desk of partner—Labelled as belonging to third party.]—A. & B. were exors. A., without the knowledge of his co-exor., lent the trust funds to a banking firm in which he was a partner, &, as a security, he placed in his desk certain railway & mining shares, wrapped in a paper cover, with an indorsement to the effect that the shares belonged to A. & B. B. had no notice of the transactions, nor had either of the cos. any notice of transfer of the shares, nor was there any deposit-note. On the firm becoming bkpt.:—*Semble:* even if there had been a legal transfer, yet, in the circumstances of the case, the shares would have passed to the assignees, as being within 1849 Act, s. 125.—*Re* STRAHAN, PAUL & Co., *Ex p.* SNOW (1857), 28 L. T. O. S. 52.

6639. —— Delivery of transfers blank as to transferee & date—Name of purchaser from transferee filled in—Bankruptcy between dates of sale—Acknowledgment by company that it held certificate.]—A holder of shares in a co. instructed his broker to sell them, which the broker did, & handed to the purchaser transfers executed by the shareholder, but with blanks for the dates & the name of the transferees. The purchaser on receiving the transfers paid the purchase-money, & subsequently resold some of the shares & filled up the transfers with the names of the sub-purchasers & the dates of the sub-purchases. In the interval the original vendor had been adjudicated bkpt., & the co. on that account declined to register the transfer so filled up. The omission to register had arisen from press of business in the co., & its practice at the time was to give an acknowledgment to a shareholder intending to sell that the co. held the certificates of his shares. The vendor obtained such an acknowledgment on the occasion of the sale & handed it to the purchaser, but neither vendor nor purchaser gave notice to the co. otherwise of the sale:—*Held:* the shares were not in the vendor's reputed owner-

6636 i. *Shares—Assigned by deed—Transfer not completed in company's books.*]—N., an original allottee of five shares in the A. co., assigned them to B. No transfer was executed & no notice of the assignment was given to the co., which subsequently went into liquidation. N. became insolvent:—*Held:* at the time of N.'s insolvency B. was the true owner of the shares, &, as he had omitted to give notice to the co. of the assignment to him, & as he had procured no transfer to be executed in his favour which the co., under their articles of association, were bound to recognise, he had consented that the shares should remain in the order & disposition of N., & the shares & the right to receive any distribution of assets in respect of them vested, upon N.'s insolvency, in the official assignee.—BHAVAN MULJI *v.* KAVASJI JASAWALA (1878), I. L. R. 2 Bom. 542.—**IND.**

ship at his bkpcy.—MORRIS *v.* CANNAN (1862), 4 De G. F. & J. 581 ; 31 L. J. Ch. 425 ; 6 L. T. 521 ; 8 Jur N. S. 653 ; 10 W. R. 589 ; 45 E. R. 1310, L. C.

Annotation :—**Mentd.** Murray *v.* Bush (1873), L. R. 6 H. L. 37.

6640. —— Assignment before allotment—No register of shareholders.]—Under a contract with the promoters of a co., N. was entitled to 2,000 paid-up shares, & by deed assigned for value 1,140 of them to G., his son, of which no notice appeared to have been given to the co. The co. was ordered to be wound up, no allotment taking place, & there being no register of shareholders. N. became bkpt., & his assignees being entitled to 340 of the 1,140 shares :—*Held :* the assignees were not entitled to the other 800 shares as being in the order & disposition of bkpt. at the time of his bkpcy.—*Re* LONDON INDIA RUBBER CO., LTD. (1869), 20 L. T. 355 ; 17 W. R. 512.

6641. —— Deposit of share certificate.]—Debtor, a trader, deposited with a bank the certificate of five shares in a gas co. to secure the balance of his account current. The bank gave no notice to the co. of the deposit so made. Debtor became bkpt. :—*Held :* the bank was the true owner of the shares to the extent of the mtge., & the bank must deliver up the shares to the trustee.—*Re* JACKSON, *Ex p.* UNION BANK OF MANCHESTER (1871), L. R. 12 Eq. 354 ; 40 L. J. Bcy. 57 ; 24 L. T. 951 ; 19 W. R. 872.

Annotations :—**Consd.** Colonial Bank *v.* Whinney (1885), 30 Ch. D. 261, C. A. **Refd.** Harris *v.* Truman (1881), 7 Q. B. D. 340 ; Société Générale de Paris *v.* Tram. Union Co. (1884), 14 Q. B. D. 424, C. A. **Mentd.** *Re* Grimwade *v.* Mutual Soc. (1884), 52 L. T. 409.

6642. —— —— Production of certificate necessary for transfer.]—A deed establishing a gaslight co. declared, "that all property purchased by the directors for the benefit of the co., should, as between the proprietors & their respective real & personal representatives, be considered as personal estate." Bkpt. deposited the certificates of shares with a third party, as a collateral security for a debt, & without any notice to the co. :—*Qu. :* whether the shares would have passed to the assignees, as in the order & disposition of the bkpt., if the deed had required the production of the certificates, previous to any transfer.—*Re* LASHMAR, *Ex p.* VALLANCE (1837), 2 Deac. 354 ; 3 Mont. & A. 224 ; 6 L. J. Bcy. 52 ; 1 Jur. 359, Ct. of R.

6643. Debenture—Assignment by indorsement.]—An assignment by indorsement in blank of a debenture of a joint-stock co., by which the co. undertake to pay a sum of money, with interest, & charge their undertaking & property with the payment thereof, confers a good title on the assignee as against the trustee in bkpcy., of the assignor, notwithstanding the assignee gives no notice to the co. until after the commencement of the bkpcy.—*Re* PRYCE, *Ex p.* RENSBURG (1877), 4 Ch. D. 685 ; 36 L. T. 117 ; 25 W. R. 432.

Annotation :—**Consd.** *Re* Jenkinson, *Ex p.* Nottingham & Nottinghamshire Bank (1885), 15 Q. B. D. 441, D. C.

6644. Reversionary interests & interests in trust funds—Mortgage to trustee.]—If a mtgee. of trust property be himself a trustee to whom notice must be given, the transaction itself is notice enough to prevent reputed ownership.—*Re* HOLT, *Ex p.* SMART (1834), 2 Mont. & A. 60, Ct. of R.

6645. —— Assignment by beneficiary to bankrupt—Deposit of deed by bankrupt as security.]—A. being entitled to a reversionary interest in trust property, assigned it by deed to bkpt. who, without giving notice of the assignment to the trustees, deposited the deed with N. as security for advances. N. gave no notice of the deposit to the trustees :—*Held :* the property did not remain in the order & disposition of bkpt., by reason of the omission to give notice.—*Re* GOREN, *Ex p.* NEWTON (1834), 4 Deac. & Ch. 138 ; 2 Mont. & A. 51 ; 4 L. J. Bcy. 16, Ct. of R.

Annotations :—**Consd.** Bartlett *v.* Bartlett (1857),1 De G. & J. 127, L. JJ. ; *Re* Rawbone's Bequest (1857), 3 K. & J. 300. **Refd.** *Re* Barr's Trust (1858), 4 K. & J. 219.

6646. —— Assignment of dividends in bankruptcy.]—Bkpt. agreed to pay his creditors in full, & gave bills for the amount, & the creditors executed a power of attorney to A. to receive their dividends for bkpt.'s use, & A. gave notice to the assignees. The bills were not paid. A second commission having issued :—*Held :* the dividends were not in the reputed ownership of bkpt.—*Re* GOVEITT & LEIGH, *Ex p.* SMITHER (1836), 3 Mont. & A. 693, Ct. of R.

6647. —— Assignment of reversion—Death of tenant for life after bankruptcy.]—Bkpt. being the assignee of the reversion of a certain sum of stock, in 1846 assigned to A., but no notice was given to the trustee of such assignment. The tenant for life died subsequent to the bkpcy., which took place in Mar., 1853 :—*Held :* the stock was at the time of the bkpcy. in the order & disposition of bkpt. as reputed owner, thereof with the consent of the true owner & passed to his assignees.—*Re* PLIMMER, *Ex p.* PLIMMER (1853), 1 Bankr. & Ins. R. 83.

6648. —— —— Mortgagor & mortgagee both parties to suit for administration.]—After a mtge. of a reversionary interest in a share of personalty bequeathed by will, a suit was instituted for the administration of testator's estate, to which both mtgor. & mtgee. were parties, & after the master by his report had found the fact of the mtge., the mtgor. made a further mtge. to the same mtgee., but the latter did not obtain a stop-order upon the fund in ct. representing the share. The mtgor. became insolvent :—*Held :* although no stop-order had been obtained on the fund, yet, as the mtgor. & mtgee. were both parties to the suit,

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6641 i. —— *Deposit of share certificate.*]—Insolvent deposited with a creditor share certificates, but no notice of any transfer of such shares was given to the co., nor did any legal assignment thereof take place, & insolvent always acted as their proprietor & received dividends, etc. :—*Held :* the creditor was estopped by the doctrine of reputed ownership from claiming the shares.—*Re* HUGHES, *Ex p.* TERRY (1845), Res. & Eq. Jud. 31.—**AUS.**

6641 ii. ——.]—The lodgment of the scrip certificate of shares in a joint-stock co. will not take them out of the order & disposition of the owner, whilst they still remain registered in his name in the books of the co., & in case of his bkpcy. they will pass to his assignees.—*Re* GREHAN (1867), 1 I. L. T. Jo. 66.—**IR.**

6642 i. —— —— *Production of certificate necessary for transfer.*]—An owner of shares deposited the scrip with a bank to secure an advance, without any memorandum in writing or duly executed transfer. The bank, before adjudication, served notice of such assignment on the cos., but with knowledge of an act of bkpcy. committed by the owner :—*Held :* where the certificates contained a proviso that they must be produced on registration of the transfer, such shares were not in the order & disposition of bkpt., but where the certificates contained no such proviso, the shares were in the order & disposition of bkpt., the notice of transfer not having been served upon the cos. by the bank before becoming aware of the act of bkpcy.—*Re* BUTLER, [1900] 2 I. R. 153.—**IR.**

r. *Shares in mutual benefit society —Deposit of book containing reference to.*]—A transfer by W. to D. of a book, containing references to five shares held by W. in a building society, & payments made by W. to the society, together with a memorandum from W. to D. purporting to transfer to D. the shares, in consideration of money lent, gives D. no title whatsoever to the shares, no notice having been given by D. to the society till after W.'s adjudication in bkpcy.—*Re* WHITE, *Ex p.* DOMLE (1896), 30 I. L. T. 122.—**IR.**

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& the fund was in ct., there was notice of the incumbrance, & the fund was not in the order & disposition of insolvent, & nothing passed to the assignee but the equity of redemption.—*Re* GRAINGE, GRAINGE *v.* WARNER (1865), 6 New Rep. 219; 12 L. T. 564; 13 W. R. 833.

Annotation:—**Dbtd.** Stuart *v.* Cockerell (1869), 39 L. J. Ch. 127.

6649. —— One of bankrupt transferors being trustee of fund.]—A mortgaged estate was sold with the concurrence of the mtgees., free from the mtge., & a part of the purchase-money was invested as an indemnity to the purchaser against possible charges, & subject thereto in trust to secure a portion of the debt which had been secured by the mtge. Afterwards the mtgees., who were solrs., borrowed money of a client, giving her a memorandum purporting to charge the mtge. debt, which they described as still secured on the property, with the money thus borrowed. On the solrs. becoming bkpt.:—*Held:* as one of the solrs. was a trustee of the fund, the notice he had of the charge was sufficient to take it out of their order & disposition.—*Re* SELBY, *Ex p.* ROGERS (1856), 8 De G. M. & G. 271; 25 L. J. Bcy. 41; 2 Jur. N. S. 480; 44 E. R. 394, L. JJ.

Annotation:—**Refd.** Lloyd's Bank *v.* Pearson, [1901] 1 Ch. 865.

6650. Debt—Assignment by bankrupt.]—A debt once due to a trader is in his reputed ownership, so long as no notice is given to debtor of any assignment of such debt by the trader, & it will pass to the assignees of such trader on his bkpcy. before any such notice.—*Re* PETO & BRYAN, *Ex p.* PRICE & Co. (1858), 31 L. T. O. S. 74.

6651. —— —— Debt evidenced by certain documents.]—Where a debt is evidenced not merely by verbal contracts & admissions, but by bonds, mtges., policies of assurance, or other documents of a similar nature, & such bonds, mtges., etc., are actually delivered to & held by the creditor claiming payment of such debt, such debt is not in the reputed ownership of bkpt. debtor at the time of his bkpcy.—*Re* HALL, *Ex p.* HALL (1859), 33 L. T. O. S. 96.

6652. —— —— Transfer from former assignee.]—To take an assignment of debts out of the reputed ownership of bkpt., it is necessary that notice should be given to debtor, & the circumstance of the assignment being a transfer merely from a former assignee, who had given due notice to debtor of the assignment to him, will not relieve the last assignee from the necessity of also giving notice of his assignment.—*Re* SELBY, *Ex p.* PROBYN (1857), 28 L. T. O. S. 258.

6653. —— Assignment by deposit of draft by bankrupt on debtor.]—Bkpts., prior to their bkpcy., sold & consigned goods to customers on six months' credit from the date of the invoice, & on the expiration of the first three months, the customers were bound to accept bkpts.' drafts at three months for the price. Bkpts., on making the consignments, obtained advances from bankers upon the terms that they should draw for the price of the goods upon their customers at six months from the date of the invoice, & hand the draft to the bankers, &, when the period of three months from the date of the invoice arrived, they should draw upon the customers for the price of the goods, & hand the bill to the bankers for them to get it accepted by the customers, &, when the bill was met, the unaccepted draft at six months should be handed back to bkpts. Bkpts. drew & handed to the bankers drafts for the prices of goods sold & consigned to customers at six months from the date of the invoice, & at the commencement of the bkpcy. the drafts were in the hands of the bankers unaccepted, & no notice of the transaction between them & bkpts. had been given to the customers:—*Held:* the debts owing by the customers to bkpts. were at the commencement of the bkpcy. in the order & disposition of bkpts., in their trade, by the consent & permission of the true owners in such circumstances that bkpts. were the reputed owners thereof.—*Re* GOETZ, JONAS & Co., *Ex p.* THE TRUSTEE, [1898] 1 Q. B. 787; 67 L. J. Q. B. 577; 78 L. T. 399; 46 W. R. 469; 14 T. L. R. 327; *sub nom. Re* GOETZ, JONAS & Co., *Ex p.* ARMSTRONG & Co., 5 Mans. 76, C. A.

6654. —— Agreement by bankrupt to pay proportion to retired partner.]—C. & S. traded in partnership, & in the course of business lent money to R. In 1894 the partnership was dissolved by deed, whereby the assets of the partnership were assigned to C., who agreed to pay over to S. one-fifth part of any money which he might receive from R. in respect of R.'s debt to the firm. In 1898 C. became bkpt. S. gave no notice to R. of his interest in the debt due from R. to the firm under his agreement with C. In 1900 the trustee in C.'s bkpcy. received from R. £150 in settlement of R.'s debt:—*Held:* the share assigned to S. was in the order & disposition of bkpt. within 1883 Act, s. 44. S. could not recover from the trustee. —*Re* CROUCH, *Ex p.* SMITH (1901), 83 L. T. 746.

6655. Bond debt—Assigned by bankrupt.]—A bond debt was assigned by the obligee, & the bond delivered to the assignee, but notice of the assignment was not given to the obligor previous to the bkpcy. of the obligee:—*Held:* the debt remained in the order & disposition of bkpt.—*Re* FRAZER, *Ex p.* MONRO (1819), Buck, 300.

Annotations:—**Distd.** Leisle *v.* Guthrie (1835), 1 Hodg. 83. **Consd.** *Re* Gibbs, *Ex p.* Price (1844), 3 Mont. D. & De G. 586, Ct. of R. **Refd.** Cooke *v.* Hemming (1868), L. R. 3 C. P. 334.

6656. —— Obligee trustee for others—Having also interest in bond.]—Where the obligee of a bond is a trustee for others, has himself an interest in the bond, & deposits it as security, notice must be given to the obligor, to prevent the reputed ownership of the obligee.—*Re* NORTH, *Ex p.* M'TURK (1836), 2 Deac. 58; 3 Mont. & A. 1, Ct. of R.

6657. Book debts—Inference from lack of notice —How rebutted.]—In the absence of notice given by the assignee of book debts of bkpt. to debtors, consent on his part to the debts remaining in his order & disposition is *primâ facie* to be inferred; but the inference will be rebutted, if the true owner takes every possible step to obtain possession of the debt, or if his failure is not attributable to his own fault.—RUTTER *v.* EVERETT, [1895] 2 Ch. 872; 64 L. J. Ch. 845; 73 L. T. 82; 44 W. R. 104; 39 Sol. Jo. 689; 2 Mans. 371; 13 R. 719.

6650 i. *Debt.*]—Where debtor has assigned a debt, notice by the assignee to the person owing the debt will take it out of the order or disposition of debtor.—PUNINTHAVELU MUDALIAR *v.* BHASHYAM AYYANGAR (1901), I. L. R. 25 Mad. 406.—**IND.**

6653 i. —— *Negotiation of promissory note.*]—*Held:* though in the circumstances negotiation of promissory notes might be in fraud of the makers, notice to debtor was not necessary to take them out of the order & disposition of bkpt.—*Re* ISRAEL, *Ex p.* OFFICIAL ASSIGNEE (1895), 16 N. S. W. B. 93.—**AUS.**

6657 i. *Book debts.*]—A bill of sale purported to operate as an assignment of all book & other debts connected with a business, but no notice of the

Annotations :—**Consd.** *Re* Crouch, *Ex p.* Smith (1902), 83 L. T. 746 ; *Re* Neal, *Ex p.* Trustee, [1914] 2 K. B. 910.

6658. —— Where receiver appointed.]—By an order dated May 14, 1887, by which pltf. obtained final judgment in an action, a receiver was appointed to carry on the business of deft., & to collect & get in outstanding debts. By a further order dated Dec. 20, the order of May 14 was rescinded except as regarded the book debts mentioned in the four parts of the first schedule, as to which the receiver was to continue to act for pltf. with power to issue to any of such book debtors a circular in prescribed form ; & it was further ordered that the whole of the book debts mentioned in the four parts of the first schedule should be allocated to & accepted by pltf. in satisfaction of his judgment debt interest & costs, & after giving deft. power to redeem any of the book debts in the schedule by payment thereof, it was further ordered that in case any of the book debts mentioned in the first part of the first schedule should not have been paid by the respective debtors or redeemed by deft. on or before Mar. 31, 1888, pltf. should be at liberty to give notice of the order of May 14, & of that order in the form prescribed in the second schedule, to each of the debtors mentioned in the first part & to collect & recover such debts in his own name. On Feb. 13, 1888, the receiver sent to the debtors mentioned in the first schedule of the order of Dec. 20, a notice requiring payment, & stating that deft.'s firm were "closing up accounts with a former member," & that it was "necessary to collect all outstanding debts." On Feb. 23, 1888, deft. in the action committed an act of bkpty. upon which a petition was presented against him. On Apr. 4, pltf., without knowledge of the act of bkpcy. or of the petition, sent to the debtors whose names were mentioned in the first part of the first schedule, a notice as prescribed of the appointment of the receiver & the assignment. In May debtor was adjudicated bkpt. & the trustee claimed the scheduled debts :—*Held :* the order of Dec. 20, transferred the book debts to pltf., but left them in the order & disposition of bkpt. without notice, & although the debts in the first part of the schedule were taken out of the order & disposition clause by the notice of Apr. 4, 1888, those contained in the other three parts of the schedule were in the order & disposition of the bkpt. at the time of the bkpcy., the notice sent out by the receiver on Feb. 13, 1888, being sufficient.—*Re* TILLETT, *Ex p.* KINGSCOTE (1889), 60 L. T. 575 ; 5 T. L. R. 269 ; 6 Morr. 70.

Annotations :—**Consd.** *Re* Neal, *Ex p.* Trustee, [1914] 2 K. B. 910. **Mentd.** *Re* Potts, *Ex p.* Taylor, [1893] 1 Q. B. 648.

6659. —— Failure to give notice before knowledge of act of bankruptcy.]—On Nov. 29, 1913, mtgees. of the book debts of a business appointed a receiver. Negotiations at once ensued between the mtgor. & the mtgees., the mtgor. desiring that the receiver should not give notice to the book debtors, & the mtgees. insisting on their appointment of the receiver. On Dec. 15 the negotiations fell through, & on Dec. 16 the receiver arranged with the mtgor. to take possession of the business the next day & instructed the mtgor.'s clerk to give notice to the book debtors, which he did not do. On Dec. 17 the receiver had notice of an act of bkpcy. committed that day by the mtgor., & on Dec. 29 the mtgor. was adjudged bkpt. on his own petition. Between Dec. 22 & 29 the receiver gave notice to the book debtors :—*Held :* the book debts were at the commencement of the bkpcy. (Dec. 17) in the order & disposition of bkpt. with the consent of the true owners, for the receiver could have given notice between Nov. 29 & Dec. 17 to the book debtors.—*Re* NEAL, *Ex p.* TRUSTEE, [1914] 2 K. B. 910 ; 83 L. J. K. B. 1118 ; 110 L. T. 988 ; 58 Sol. Jo. 536 ; 21 Mans. 164.

6660. Assignment of costs by bankrupt solicitor —Notice of assignment given—Further funds for payment of costs becoming available—Failure to obtain stop order.]—T., the solr. of pltfs. in an administration suit, assigned his costs as security for a debt. Notice of the assignment was given to pltfs. & to the exors. of testator. Subsequently an order was made on further directions for payment to T. of pltfs.' costs out of the funds to be brought into ct., after satisfying prior demands. T. became bkpt. The fund in ct., at the times of the order on further directions & of the bkpcy., was insufficient to pay the charges prior to T.'s costs, but later a fund was brought in by the exors. applicable to payment of the costs. No stop order was ever obtained by the assignee of the costs :—*Held :* the fund did not pass to the assignees in bkpcy. as having been within the order & disposition of bkpt. with the consent of the true owner, but belonged to the assignee of the costs.—DAY *v.* DAY (1857), 1 De G. & J. 144 ; 26 L. J. Ch. 585 ; 29 L. T. O. S. 206 ; 3 Jur. N. S. 782 ; 5 W. R. 701 ; 44 E. R. 678, L. JJ.

Annotation :—**Consd.** Thompson *v.* Tomkins (1862), 2 Drew. & Sm. 8.

6661. —— —— No stop order obtained.]—The solr. to a party in a suit assigned the costs due & to become due to him in the suit, & subsequently became insolvent. An order was afterwards made for the payment of the costs out of a fund in ct., & the assignee of the solr. claimed the costs as against the person to whom they had been assigned, as being under the order & disposition clause, on the ground that, though notice had been given to the solr. for pltf. in the suit, no stop-order had been obtained on the fund in ct. :—*Held :* it was not necessary to get a stop-order on the fund in ct. ; & the person taking under the assignment was entitled to the costs.—LORD *v.* COLVIN (1862), 2 Drew. & Sm. 82 ; 6 L. T. 211 ; 10 W. R. 420 ; 62 E. R. 553.

6662. Receipts signed by depositor—Handed to bankers as security.]—Goods were deposited in bond in the warehouse of L. to await the order of the depositor, who signed receipts for same & delivered the receipts to his bankers to secure advances. No notice of such delivery of the receipts was given to L. The depositor subsequently became bkpt. :—*Held :* the goods remained in the order & disposition of bkpt., & passed to his assignees.—*Re* WILSON, *Ex p.* THE ASSIGNEES (1866), 14 L. T. 369.

6663. Hire-purchase agreement—Assignment of rights under.]—Debtors deposited with a creditor as security for his debt hire-purchase agreements of furniture, & subsequently executed an assignment, by which they assigned all their rights under the agreements to the creditor. Due notice

assignment was given :—*Held :* the debts remained in the reputed ownership of insolvents.—*Re* COLLINS BROTHERS, *Ex p.* WHITE, [1903] S. R. Q. 47.—**AUS.**

s. *Goods in transit—Pledged for advances.*]—A bank advanced money to T., upon the faith that they would be repaid out of the proceeds of goods shipped by T. to foreign consignees, whom T. had instructed to remit the proceeds to the bank, but the goods were, with the bank's consent, in T.'s order & disposition at the date of his subsequent bkpcy. The bank did not give the consignees any notice of the transactions :—*Held :* the property was not taken out of T.'s order & disposition, & the proceeds vested in the assignees of the shipper.—*Re* THORNTON (1866), 18 Ir. Jur. 62.—**IR.**

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of the assignment was given to the hirers. Debtors became bkpt. :—*Held :* the furniture was not in bkpts.' order & disposition.—*Re* DAVIS, *Ex p.* RAWLINGS *v.* PIPE (1888), 60 L. T. 157 ; 37 W. R. 142 ; *affd.* on appeal on another point, 22 Q. B. D. 193, C. A.

Annotation :—**Refd.** Wilmot *v.* Alton, [1897] 1 Q. B. 17, C. A.

6664. Goods in hands of third parties to have work done thereon.]—*Re* HAMILTON, YOUNG & Co., *Ex p.* CARTER, No. 6614, *ante.*

6665. Assignment of ship—No notice to partners holding lien.]—A ship purchased by a firm consisting of A., B., & C., & subject to a lien in favour of D. & E., was registered in the names of B., C., D., & E., & an agreement was subsequently entered into by the firm to assign the ship to other persons as security, of which no notice was given to D. & E. The firm having subsequently become bkpt. :—*Held :* if the agreement had not been void under Merchant Shipping Act, 1854 (c. 120), the interest of the mtgees. would not have passed to the assignee under 1849 Act, s. 125.—LIVERPOOL BOROUGH BANK *v.* TURNER (1860), 1 John. & H. 159 ; 29 L. J. Ch. 827 ; 3 L. T. 84 ; 6 Jur. N. S. 935 ; 8 W. R. 730 ; 70 E. R. 703 ; *affd.* without touching this point, 2 De G. F. & J. 502 ; L. C.

Annotations :—**Consd.** Black *v.* Williams, [1895] 1 Ch. 408. **Refd.** Stapleton *v.* Haymen (1864), 2 H. & C. 918 ; Chasteauneuf *v.* Capeyron (1882), 7 App. Cas. 127, P. C. **Mentd.** M'Larty *v.* Middleton (1861), 4 L. T. 852 ; Lacon *v.* Liffen (1862), 4 Giff. 75 ; Ward *v.* Beck (1866), 13 C. B. N. S. 668 ; *Re* General Provident Assce. (1869), 38 L. J. Ch. 320 ; *Re* Pearcey, *Ex p.* Sturt (1871), 41 L. J. Bcy. 12 ; Keith *v.* Burrows (1876), 1 C. P. D. 722 ; Caldow *v.* Pixell (1877), 2 C. P. D. 562 ; Howard *v.* Bodington (1877), 2 P. D. 203 ; Batthyany *v.* Bouch (1881), 50 L. J. Q. B. 421 ; Hughes *v.* Sutherland (1881), 7 Q. B. D. 160 ; *Re* Great Eastern S.S. Co., Williams' Claim (1885), 53 L. T. 594.

See, further, SHIPPING & NAVIGATION.

6666. Deposit of second mortgage deeds—No notice given to first mortgagee.]—An assign of a second mtge. of freeholds deposited his mtge. deeds by way of equitable mtge., but no notice of the deposit was given to the first mtgee. The first mtgee., having notice of the second mtge. & the assignment, contracted to sell under a power ; before completion, the depositor became bkpt. :—*Held :* the assignees in bkpcy. were entitled to the balance of the purchase-money due in respect of the second mtge. as against the depositee, under 1849 Act, s. 125.—BARNES *v.* PINKNEY (1867), 36 L. J. Ch. 815.

ii. *Sufficiency and Proof of Notice.*

6667. Policy of insurance—Letter from depositary—Stating himself to be holder—Asking surrender value.]—A letter from the depositary of a policy of insurance, stating, "I am the holder of the undermentioned policies," & inquiring what the office would give for them if delivered up to be cancelled with the consent of the parties :—*Held :* a sufficient notice to take it out of the order & disposition of bkpt.—*Re* EYLES, *Ex p.* STRIGHT (1832), 2 Deac. & Ch. 314 ; Mont. 502 ; 2 L. J. Bcy. 12, Ct. of R.

Annotations :—**Distd.** *Re* Barr's Trusts (1858), 4 K. & J. 219. **Mentd.** *Re* Bennett, *Ex p.* Burnall (1833), 2 L. J. Bcy., 65, Ct. of R.

6668. —— Verbal statement by agent of depositary—That policies deposited with principal—Asking whether bankrupt had paid premiums.]—Defts., with whom bkpt. had deposited a policy of assurance as security for an advance of money, sent an agent to the office for the purpose of ascertaining whether bkpt. had paid the premium, with directions to him to pay it, if bkpt. had omitted to do so. The agent told a clerk in the office that the policy had been so deposited with defts :—*Semble :* this was not such a notice to the office as to take the policy out of the order & disposition of bkpt., the practice of the office requiring the notice to be in writing, but it was a circumstance, amongst others, upon which the jury were to exercise their judgment.—EDWARDS *v.* SCOTT (1840), 1 Man. & G. 962 ; Drinkwater 6 ; 2 Scott, N. R. 266 ; 10 L. J. C. P. 11 ; 4 Jur. 1062 ; 133 E. R. 621.

Annotations :—**Consd.** *Re* Baldwin, *Ex p.* Foss (1858), 30 L. T. O. S. 354. **Refd.** West *v.* Reid (1843), 2 Hare, 249 ; Gale *v.* Lewis (1846), 11 Jur. 730 ; Alletson *v.* Chichester (1875), L. R. 10 C. P. 319.

6669. —— Premiums paid by creditor before & after bankruptcy—Note on company's books to send notices to creditor's solicitors—Company unaware that solicitors acted for creditor.]—To take a policy of insurance out of the order & disposition of bkpt., direct notice of the assignment must be given to the insurance co., *viz.*, such notice as would clearly indicate a change of interest, & make the co. liable to pay the amount a second time, if paid to other persons than the assignee.

A., by deed, assigned to B. a policy on his life, to secure a debt, & handed over the policy to B. The premiums were paid by B., but the receipts were given by the co. as to A. A. became bkpt., & B., after some treaty with the assignees in bkpcy., continued to pay the premiums till A.'s death. After A.'s death, his assignees claimed the money due upon the policy, as in the order & disposition of bkpt. The only evidence of notice to the co. was a note in the margin of their books, opposite the declaration made by A. on the occasion of effecting the policy, "Letters to be sent to C. & W., by order of C." C. & W. were the solrs. of B., but it did not appear that that was known to the co. :—*Held :* this was not sufficient notice to take the amount due on the policy out of the order & disposition of bkpt., & B. was entitled only to a lien thereon, for the amount of the premiums paid by him, with interest.—WEST *v.* REID (1843), 2 Hare, 249 ; 12 L. J. Ch. 245 ; 7 Jur. 147 ; 67 E. R. 104.

Annotations :—**Distd.** Drysdale *v.* Piggott (1856), 22 Beav. 238. **Consd.** Saunders *v.* Dunman (1878), 7 Ch. D. 825 ; Falcke *v.* Scottish Imperial Insce. (1886), 34 Ch. D. 234, C. A. **Refd.** *Re* Plummer, *Ex p.* Plummer (1853), 1 Bankr. & Ins. R. 83 ; *Re* Leslie, Leslie *v.* French (1883), 23 Ch. D. 552. **Mentd.** Lloyd's Banking Co. *v.* Jones (1885), 29 Ch. D. 221.

6670. —— Instructions to agent of company to have policy assigned—Agent with authority to receive notices of assignment—Agent attorney for creditor—No notice given by agent to head office.]—A. employed the local agent of an insurance office as his attorney, to effect a policy on the life of B. in such office, & to get it assigned by B. to A. as security for a debt. B. having become bkpt. :—*Held :* the circumstance of the co.'s authorising their agent to receive notices of assignment for them, though no notice was, in fact, given to the head office of the co., operated to prevent the

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PART XX. SECT. 9, SUB-SECT. 3.—B. (b) ii.

6670*1*. *Policy of insurance—Bankrupt being manager of branch office—Verbal notice.*]—A policy of assurance on the life of bkpt., then manager of the Dublin branch of the insurance co., with whom the policy had been effected, was subject to a condition that all notices of assignment or charge upon the policy should be given "in writing at the principal place of business" of the co. Bkpt., while manager, assigned the policy. No notice of the assignment was given at the head office of the co., which was in London : —*Held :* the policy was in the order & disposition of bkpt. with the consent of the true owner. *Semble :* verbal notice of assignment would not have pro-

policy from being within the order & disposition of bkpt.; & the case was not altered by the notice being received by the agent in his character of attorney for A.—GALE *v.* LEWIS (1846), 9 Q. B. 730; 16 L. J. Q. B. 119; 8 L. T. O. S. 158; 11 Jur. 730; 115 E. R. 1455.

Annotations :—**Expld. & Fclld.** Alletson *v.* Chichester (1875), L. R. 10 C. P. 319. **Distd.** *Re* Hampshire Land Co., [1896] 2 Ch. 743.

6671. —— Notice given by mortgagee from assignee of policy.]—A., a retiring partner, agreed to assign a policy, part of the partnership assets, to B., the continuing partner, on certain terms. B. mortgaged it to C., who gave notice to the office. B. afterwards became bkpt. :—*Held :* the policy was not within the order & disposition of B. either as against A. or C.—*Re* LANGMEAD'S TRUSTS (1855), 20 Beav. 20; 24 L. J. Ch 237; 24 L. T. O. S. 330; 1 Jur. N. S. 198; 3 W. R. 260; 52 E. R. 509; *affd.*, 7 De G. M. & G. 353, L. JJ.

Annotations :—**Consd.** *Re* Bourne, Bourne *v.* Bourne, [1906] 1 Ch. 113. **Mentd.** Power *v.* Banks, [1901] 2 Ch. 487.

6672. —— Statement to secretary by bankrupt when taking up dishonoured cheque for premium.]—Debtor deposited an insurance policy with bankers as security. No notice in writing was given to the office. Subsequently debtor calling at the insurance office to take up a dishonoured cheque given in payment of the premium, told the secretary that the policy was held by his bankers. Debtor became bkpt., & died :—*Held :* the statement was not sufficient notice, & the policy was in bkpt.'s order & disposition, & the proceeds passed to his assignees, less the premiums paid by the bankers.—EDWARDS *v.* MARTIN (1865), L. R. 1 Eq. 121; 35 L. J. Ch. 186; 13 L. T. 236; 14 W. R. 25.

Annotations :—**Refd.** Webb's Policy (1867), 36 L. J. Ch. 341; *Re* Worcester, *Ex p.* Agra Bank (1868), 3 Ch. App. 555, L. JJ.; Alletson *v.* Chichester (1875), L. R. 10 C. P. 319. **Mentd.** *Re* Kerr's Policy (1869), L. R. 8 Eq. 331.

6673. —— Letter from creditor's solicitor—Reference to necessity for calling to pay premium on policy assigned.]—A policy of insurance on the life of A. was assigned to B. before the law required notice to the insurance co. of assignment to be in writing. B.'s attorney wrote to N., the secretary or actuary of the insurance co. liable under the policy, that as he would have to call on him on a day then named to pay the premium on the policy, the number of which he gave, he would take that opportunity of conferring with him on the subject of a loan from the co. to a local board of health, in which he was interested. He called on that day, & paid the premium, when, during his interview with N., he informed him of the policy having been assigned to B. A. became bkpt. N. had no recollection of having been so informed :—*Held :* there was sufficient notice to the insurance office of the assignment of the policy to take the policy out of the order & disposition of bkpt.—ALLETSON *v.* CHICHESTER (1875), L. R. 10 C. P. 319; 44 L. J. C. P. 153; 32 L. T. 151; 23 W. R. 393.

6674. Shares—Assignment to company itself—By officer of company.]—The directors of a co. assigned their salaries & shares to the co. to secure debts due from them on their private accounts, & empowered the co. to direct the treasurer to retain their salaries & dividends, & sell their shares, for payment of their debts. One of the directors became bkpt., but the power given to the co. had not been exercised, & his shares still remained in his name :—*Held :* they passed to his assignees as being in his order & disposition.—NELSON *v.* LONDON ASSURANCE CO. (1825), 2 Sim. & St. 292; 57 E. R. 358.

Annotation :—**Distd.** *Re* Pearse, *Ex p.* Littledale (1855), 6 De G. M. & G. 714, L. C. & L. JJ.

6675. —— Contract to assign to company itself—By shareholder.]—A shareholder in a banking co. contracted to assign a number of his shares to the co. as a security for advances. He afterwards became bkpt. :—*Semble :* the shares were not in his order & disposition.—MURRAY *v.* PINKETT (1846), 12 Cl. & Fin. 764; 8 E. R. 1612, H. L.

Annotations :—**Refd.** Société Générale de Paris *v.* Tram. Union Co. (1884), 14 Q. B. D. 424, C. A. **Mentd.** Pennell *v.* Deffell (1853), 1 Eq. Rep. 579; Clack *v.* Holland (1854), 19 Beav. 262; Ashwin *v.* Burton (1862), 32 L. J. Ch. 196; Aberaman Ironworks *v.* Wickens (1868), L. R. 5 Eq. 485; Brown *v.* Adams (1869), 21 L. T. 71, L. J.; *Re* Birchell, Wilson *v.* Birchall (1881), 44 L. T. 243; *Re* Leslie, Leslie *v.* French (1883), 23 Ch. D. 552; *Re* Bell, *Ex p.* Hodgson (1891), 65 L. T. 245.

6676. —— Knowledge of directors & actuary that shares were not bankrupt's.]—The fact that one of the directors & an actuary knew that shares of the co. standing in bkpt.'s name did not belong to bkpt., is not sufficient to prevent reputed ownership.—*Re* KIDDER, *Ex p.* BURBRIDGE (1835), 1 Deac. 131; 2 Mont. & A. 348; 5 L. J. Bcy. 56, L. C.

Annotations :—**Consd.** *Re* Ord, *Ex p.* Ord (1835), 1 Deac. 166, Ct. of R.; *Re* Theobold, *Ex p.* Bignold (1838), 3 Mont. & A. 477, Ct. of R.; *Re* Barr's Trust (1858), 4 K. & J. 219; G. E. Ry. Co. *v.* Turner (1872), 8 Ch. App. 150, n. **Refd.** *Re* Stokes, *Ex p.* Pemberton, *Ex p.* Hancox (1835), 1 Deac. 421, Ct. of R.; *Re* Borron, *Ex p.* Parratt (1836), 1 Deac. 696; Tibbits *v.* George (1836), 5 Ad. & El. 107; *Re* Medley, *Ex p.* Harrison (1838), 7 L. J. Bcy. 48; Thompson *v.* Speirs (1845), 14 L. J. Ch. 453; *Re* Strahan, Paul, *Ex p.* Snow (1857), 28 L. T. O. S. 52. **Mentd.** *Re* Warwick, *Ex p.* Brown (1838), 3 Mont. & A. 471, Ct. of R.; *Re* Higginson & Deane, *Ex p.* Hinds (1849), 14 L. T. O. S. 449.

6677. —— Notice of mortgage sufficient—Though mortgage itself defective.]—If the owner

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tected the policy.—*Re* YOUNG (1890), 25 L. R. Ir. 372.—**IR.**

6670 ii. —— *Notice to bankrupt being agent of company.*]—H., a trader, & local agent of an insurance co., of which the head office was in Dublin, effected with it, upon his own life, two policies, which he assigned to a banking firm. A formal notice thereof was given him, as agent of the co. H., becoming bkpt., died :—*Held :* when the assignor of a policy was agent to the co. with which it had been effected, notice to him of the assignment was insufficient.—*Re* HENNESSY (1842), 2 Dr. & War. 555; 1 Con. & L. 559; 5 I. Eq. R. 259.—**IR.**

6671 i. —— *Notice given by mortgageee —No notice of subsequent deposit.*]—A. assigned a policy of assurance for £500 to B., who gave notice of the assignment to the co., &, subsequently, at the request of A., deposited the policy with C. to secure a debt due by A. to C. No notice of the deposit was given to the co. A. became insolvent, & assigned the policy to C., to which assignment B. was a party. Notice of that assignment was given to the co. by C. At the time of taking the assignment C. had express notice of the insolvency : —*Held :* the notice served by B. of the assignment to himself took the policy out of the order & disposition of insolvent.—FENELON *v.* BAKER (1855), 8 Ir. Jur. 1.—**IR.**

t. —— *Memorandum by company that policy vested in bankrupt & mortgagees jointly.*]—M. executed a mtge. of his shop & premises, etc., to the dischargeants, & took out a policy of fire insurance covering his stock-in-trade & household furniture, & sent same to the mtgees.' agent. Some time afterwards, apparently at the request of the mtgees., the insurance co. indorsed on the policy a memo. that the benefit of the policy was vested jointly in M. & the mtgees. :—*Held :* as against M.'s assignees in bkpcy., there was no clear strict proof as required that the interest in the policy was assigned to dischargeants.—*Re* MAGEE (1905), 39 I. L. T. 167.—**IR.**

6674 i. *Shares—Mortgage to company itself—By shareholder.*]—D. was proprietor of shares in a bank, the deed of settlement of which provided that the co. should have a lien on the shares of any shareholder for any debt due by him to the bank. D., by letter, authorised the bank to hold his shares therein as collateral security for the balance of his account current with the bank. No transfer of the shares in accordance with the terms of the letter was ever executed. Subsequently D. became bkpt., being indebted to the bank on his current account :—*Held :* the equitable mtge. security of the bank was valid against the assignees, the transaction itself importing notice to the bank.—DUNNE (ASSIGNEES OF) *v.* HIBERNIAN JOINT STOCK CO. (1868), I. R. 2 Eq. 82; 2 I. L. T. Jo. 5.—**IR.**

Sect. 9.—Property in reputed ownership of bankrupt: Sub-sect. 3, B. (b), ii.]

of shares in an insurance co. assign them by way of mtge., & give notice to the co., but owing to an informality in the assignment the co. do not recognise the mtgee.'s title, & the shares still stand in bkpt.'s name, the shares are not in his reputed ownership.—*Re* LITT, *Ex p.* MASTERMAN (1835), 2 Mont. & A. 209; 4 Deac. & Ch. 751, Ct. of R.

Annotation:—**Consd.** *Re* Pearse, *Ex p.* Littledale (1855), 6 De G. M. & G. 714, L. C. & L. JJ.

6678. —— Agreement with managing director—On his accepting accommodation bill for bankrupt—Shares deposited with party discounting bill.]—Bkpt. agreed with A., the managing director of a railway co., that certain shares belonging to bkpt. should be a security for payment of a bill accepted by A. for the accommodation of bkpt., which bkpt. discounted with B., with whom the certificates of the shares were deposited, but no formal notice to the co. was given of the transaction until four days before the fiat issued, nor was any transfer made of the shares in the books of the co., which were still standing in bkpt.'s name at the time of his bkpcy. By the rules of the co., no shares could be transferred without the consent of the directors, & A., as managing director, received all applications for the transfer of shares:—*Held:* the shares were not in the order & disposition or reputed ownership of bkpt.—*Re* MEDLEY, *Ex p.* HARRISON (1838), 3 Deac. 185; 3 Mont. & A. 506; 7 L. J. Bcy. 48, Ct. of R.

Annotation:—**Consd.** *Re* Worcester, *Ex p.* Cooper (1868), 18 L. T. 154.

6679. —— Same person secretary of two companies—Whether knowledge is notice.]—If the same person is secretary to two insurance societies:—*Qu.:* whether knowledge by him as secretary to one society is notice to the other society of a deposit of shares. *Qu.:* whether knowledge is notice in questions of reputed ownership.—*Re* THEOBOLD, *Ex p.* BIGNOLD (1838), 3 Deac. 151; 3 Mont. & A. 477; 7 L. J. Bcy. 35, Ct. of R.

Annotation:—**Mentd.** Seaton *v.* Twyford (1870), 40 L. J. Ch. 122.

6680. —— Statement by bankrupt to director—Board informed by director before bankruptcy—Shares deposited with creditor.]—Bkpt. on borrowing money from his sister, petitioner, deposited with her some certificates of shares in a mining co., undertaking to complete the transfer when required. Some time before his bkpcy. he told one of the directors of the co. that he had so deposited the shares, & the director told the board the circumstance, on the morning of the day on the evening of which the act of bkpcy. was committed:—*Held:* the shares were not in the reputed ownership of bkpt.—*Re* RICHARDSON, *Ex p.* RICHARDSON (1839), 3 Deac. 496; Mont. & Ch. 43; 8 L. J. Bcy. 27, Ct. of R.

Annotations:—**Consd.** *Re* Worcester, *Ex p.* Agra Bank (1868), 3 Ch. App. 555, L. JJ.; *Re* Worcester, *Ex p.* Cooper (1868), 18 L. T. 154; Colonial Bank *v.* Whinney (1885), 30 Ch. D. 261, C. A. **Refd.** Colonial Bank *v.* Whinney (1886), 11 App. Cas. 426, H. L.

6681. —— Statements of bankrupt to board of directors.]—A shareholder in a joint stock co. made an assignment of certain paid-up shares by way of mtge. The assignee gave no notice to the co. The assignor had also unpaid shares in the same co., & in the course of discussions at the board of directors respecting the unpaid shares the assignor verbally informed the directors of the assignment of his paid-up shares, but no entry was made on the minutes of such notice. The assignor afterwards became bkpt.:—*Held:* as the directors received the information in the course of the transaction of the business of the co., the notice was sufficient to make the assignment complete in equity, & the shares did not remain in the order & disposition of bkpt.—*Re* WORCESTER, *Ex p.* AGRA BANK (1868), 3 Ch. App. 555; 37 L. J. Bcy. 23; 18 L. T. 866; 16 W. R. 879, L. JJ.

Annotations:—**Distd.** Société Générale de Paris *v.* Tram. Union Co. (1884), 14 Q. B. D. 424, C. A. **Refd.** Alletson *v.* Chichester (1875), 44 L. J. C. P. 153; Colonial Bank *v.* Whinney (1885), 30 Ch. D. 261, C. A. **Mentd.** Bradford Banking Co. *v.* Briggs (1886), 12 App. Cas. 29, H. L.

6682. Reversionary interests—Verbal statement—To one of several trustees.]—A. made advances to B., a trader, & afterwards took from him as a security an assignment of an equitable life interest in stock & other property, standing in the names of, & vested in, three trustees under a marriage settlement. There being rumours about the solvency of B., A., in the course of conversation, subsequently to the assignment, & not with a view of giving validity to his security, mentioned to one of the trustees, who was not the acting trustee, that he was secured by the assignment. B. having become bkpt.:—*Held:* the communication was a sufficient notice to prevent the interest of B. passing to his assignees as property in the order & disposition of bkpt.—SMITH *v.* SMITH (1833), 2 Cr. & M. 231; 4 Tyr. 52; 149 E. R. 745; *sub nom.* SMITH *v.* MASTERMAN, 3 L. J. Ex. 42.

Annotations:—**Consd.** Meux *v.* Bell (1841), 1 Hare, 73; Willes *v.* Greenhill (1861), 31 L. J. Ch. 1, L. C.; *Re* Wyatt, White *v.* Ellis, [1892] 1 Ch. 188, C. A.; Ward *v.* Duncombe, [1893] A. C. 369, H. L. **Refd.** Tibbits *v.* George (1836), 5 Ad. & El. 107; Timson *v.* Ramsbottom (1837), 2 Keen, 35; Hutchinson *v.* Heyworth (1838), 9 Ad. & El. 375; *Re* Barr's Trust (1858), 4 K. & J. 219. **Mentd.** *Re* Holt, *Ex p.* Smart (1834), 2 Mont. & A. 60, Ct. of R.; *Re* Severn, *Ex p.* King (1835), 2 Mont. & A. 410, L. C.; Kekewich *v.* Manning (1851), 1 De G. M. & G. 176, L. JJ.

6683. —— Parol notice—Not statement in casual conversation.]—Parol notice given to a trustee of an incumbrance on a trust fund is sufficient to take the fund out of the order & disposition of the mtgor. on his bkpcy., but a statement to a trustee in a casual conversation, is insufficient.—*Re* TICHENER (1865), 35 Beav. 317; 55 E. R. 918.

Annotation:—**Mentd.** Semphill *v.* Queensland Sheep Investment Co. (1873), 29 L. T. 737.

6684. —— Knowledge of solicitor to commission—Verbal agreement for repayment of bankrupt's debt—Out of dividends from other bankrupt's estate.]—Money was lent on a verbal agreement that it should be repaid out of dividends due from a bkpt.'s estate. The solr. to the commission was privy to the bargain. It did not appear that the solr. acted for the assignees in the transaction, or communicated it to them. The borrower became bkpt.:—*Held:* the debt was not in the order & disposition of bkpt., no formal notice being necessary, the knowledge of the solr. being the knowledge of the assignees.—TIBBITS *v.* GEORGE (1836), 5 Ad. & El. 107; 2 Har. & W. 154; 6 Nev. & M. K. B. 804; 6 L. J. K. B. 255; 111 E. R. 1107.

Annotations:—**Distd.** *Re* Gibbs, *Ex p.* Price (1844), 13 L. J. Bcy. 15. **Refd.** West *v.* Reid (1843), 2 Hare 249;

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v. *Damages in pending action—Notice to solicitor of defendant communicated to client.*]—Debtor, as pltf. in an action then pending, by letter authorised his solr. to pay over to the solr. of the creditor whatever damages he might recover in the action, less his solr.'s costs & also undertook to prosecute the action. Debtor's solr. wrote to the creditor's solr. communicating the contents of that letter, & undertaking to hold over for the benefit of the creditor any sum to be recovered in the action, & notice of such undertaking was also given to the solr. of deft. in the action, who communicated same to his clients:—*Held:* there was a valid agreement to assign, which prevented the amount recovered in the action from being in the order & disposition of bkpt.—*Re* KNOWLES (1878), 1 L. R. Ir. 251.—IR.

Belcher *v.* Campbell (1845), 15 L. J. Q. B. 11. **Mentd.** Hutchinson *v.* Heyworth (1838), 9 Ad. & El. 375; Bell *v.* L. & N. W. Ry. Co. (1852), 15 Beav. 548; Parish *v.* Poole (1884), 53 L. T. 35.

6685. —— Knowledge of insolvency by trustee's solicitor.]—The mere fact of the solrs. of the trustees of a fund in which insolvent is interested knowing of the insolvency :—*Held :* not sufficient notice to the trustees to take the fund out of the disposition of insolvent.—*Re* BROWN'S TRUSTS (1867), L. R. 5 Eq. 88; 37 L. J. Ch. 171; 17 L. T. 241; 16 W. R. 106.

Annotations :—**Mentd.** Stuart *v.* Cockerell (1869), L. R. 8 Eq. 607; Semphill *v.* Queensland Sheep Investment Co. (1873), 29 L. T. 737.

6686. —— Assignment by bankrupt solicitor to client—Interest in bequeathed annuity.]—A legatee, to whom an annuity was bequeathed for her life, granted an annuity for her life to A., to issue out of the bequeathed annuity, & afterwards granted another annuity for her life to B., also to issue out of the bequeathed annuity, which was insufficient to answer both the granted annuities. By a compromise of a suit respecting the priority of the charges, it was agreed that B.'s annuity should have precedence, & that the residue of the bequeathed annuity should be paid to A. A. then assigned his interest to a purchaser, describing it as the residue of the bequeathed annuity, after payment of B.'s annuity, & became bkpt. A. was the solr. of the purchaser, & was trusted by her to do all that was proper for perfecting the purchase & assignment. He had not informed her that he was himself the vendor :—*Held :* although the proper notice of the assignment was not given, the annuity was not in the order & disposition of bkpt., with the consent of the true owner.—*Re* BROMLEY, *Ex p.* SMYTH (1844), 3 Mont. D. & De G. 687, Ct. of R.

Annotations :—**Consd.** *Re* Rawbone's Trust (1857), 3 K. & J. 476. **Expld. & Distd.** *Re* Sketchley, *Ex p.* Boulton (1857), 26 L. J. Bcy. 45, L. JJ. **Refd.** Bartlett *v.* Bartlett (1857), 1 De G. & J. 127, L. JJ.

6687. —— —— Fund in court—Failure to obtain stop order.]—A solr. mortgaged his reversionary interest in a fund in ct. to a client. He acted for the client in the transaction, & neglected to obtain a stop order. The solr. became bkpt. :—*Held :* the operation of 1849 Act, s. 125, was not prevented by the fact that the client had relied on bkpt. as his solr. to do whatever was necessary to make the security perfect.—BARTLETT *v.* BARTLETT (1857), 1 De G. & J. 127; 26 L. J. Ch. 577; 29 L. T. O. S. 135; 3 Jur. N. S. 705; 5 W. R. 541; 44 E. R. 671, L. JJ.

Annotations :—**Distd.** Day *v.* Day (1857), 1 De G. & J. 144, L. JJ. **Consd.** *Re* Rawbone's Trust (1857), 3 K. & J. 476; *Re* Buller, *Ex p.* Wornald (1860), 2 L. T. 544; Grainge *v.* Warner, *Re* Grainge (1865), 6 New Rep. 219; Cooke *v.* Hemming (1868), L. R. 3 C. P. 334; Rutter *v.* Everett, [1895] 2 Ch. 872. **Refd.** *Re* Vickress's Trusts (1859), 7 W. R. 542; Webb's Policy (1867), 36 L. J. Ch. 341; Stuart *v.* Cockerell (1869), L. R. 8 Eq. 607; Semphill *v.* Queensland Sheep Investment Co. (1873), 29 L. T. 737. **Mentd.** *Re* Barr's Trusts (1858), 4 K. & J. 219.

6688. Possession of land purchased by bankrupt given before payment of price—Request by bankrupt asking vendor to resell—Notice to caretaker to hold for vendor.]—Bkpt. contracted to purchase a factory with steam engines, & obtained possession on payment of part of the purchase-money. He did not occupy it, but employed the vendor's caretaker to take charge of it. Shortly before he committed an act of bkpcy., he requested the vendor to resell it & pay himself what was due. The vendor gave the caretaker notice to take charge for him :—*Held :* the possession was effectually changed, & bkpt. was not the reputed owner.—*Re* REINAGLE, *Ex p.* WATKINS (1835), 1 Deac. 296, Ct. of R.

Annotation :—**Mentd.** *Re* Sinclair, *Ex p.* Chaplin (1884), 51 L. T. 345, C. A.

6689. Deposit of warrant of attorney—Knowledge of solicitor of grantor obtained as agent for grantee—No notice to grantor.]—C. gave a warrant of attorney to A. to secure payment of a debt due from C. to A. D., who was the solr. of C., as the agent of A. deposited the warrant of attorney with B., to secure a debt due from A. to B. No express notice of the deposit was given to C. A. afterwards became bkpt. :—*Held :* the circumstance of D. being the solr. of C., did not amount to notice to C. of the deposit, & the warrant of attorney was in the order & disposition of A. at the time of his bkpcy.—*Re* GIBBS, *Ex p.* PRICE (1844), 3 Mont. D. & De G. 586; 13 L. J. Bcy. 15; 2 L. T. O. S. 426, 477; 8 Jur. 545, Ct. of R.

Annotations :—**Refd.** *Re* Goetz, Jonas, *Ex p.* Trustee (1898), 78 L. T. 399, C. A. **Mentd.** Thompson *v.* Speirs (1845), 9 Jur. 933.

6690. Assignment of bills of exchange—Letter asking acceptors to send bills to creditor when accepted.]—D. sold a cargo of coal to a co. at Athens. He shipped the coal to the purchasers & forwarded bills of exchange for the price, to be accepted by them & returned. Being in want of funds D. arranged with the N. E. Bank on Feb. 3 for payment of cheques, & agreed in writing that the payments should be against the bills to be accepted, & he "undertook to hand to the bank the above bills immediately on receipt." On Mar. 3, the bills not having arrived, D. gave the bank a letter addressed to the co. requesting them to "hand the bills on demand to the N. E. Bank." That letter the bank on Mar. 3 forwarded to the co., enclosed in one from themselves, to the following effect: "We shall be glad if you will post direct to us the four bills in accordance with the enclosed instructions." D. committed an act of bkpcy. on Mar. 3, before giving the letter to the bank, but the bank had no notice of an act of bkpcy. till Mar. 6. D.'s trustee having moved for a declaration that he was entitled to the proceeds of the bills as being property in the order & disposition of bkpt. :—*Held :* the letters of Mar. 3 constituted a sufficient notice of the assignment to prevent the operation of 1883 Act, s. 44.—*Re* DIXON, *Ex p.* THE TRUSTEE (1900), 83 L. T. 433.

6691. When given—After act of bankruptcy—Occurring seven years after assignment.]—Bkpt., the owner of two policies of assurance in a mutual assurance office, assigned them to a creditor to secure a debt, but no notice of the assignment & transfer was given to the co., until after the act of bkpcy., which occurred seven years after the assignment :—*Held :* bkpt. was not the reputed owner of them, after so long a period as seven years, & they could not be considered to be in his order & disposition from the want of notice only.—*Re* STYAN, *Ex p.* SMITH (1842), 2 Mont. D. & De G. 219; 1 Ph. 105; 11 L. J. Ch. 127; 6 Jur. 158; 41 E. R. 571 L. C.

Annotations :—**Folld.** Young *v.* Hope (1848), 2 Exch. 105. **Consd.** *Re* Atkinson (1851), Fonbl. 271; *Re* Pritchard, *Ex p.* Knowlys (1852), Fonbl. 238. **Refd.** *Re* Young, *Ex p.* Cooper (1842), 11 L. J. Bcy. 29; Pariente *v.* Pennell (1843), 2 Mood. & R. 517; West *v.* Reid (1843), 2 Hare, 249; Graham *v.* Furber (1853), 14 C. B. 134; Krehl *v.* Great Central Gas Consumers Co. & Guarantee Soc. (1870), 39 L. J. Ex. 197. **Mentd.** Fawcett *v.* Fearne (1844), 6 Q. B. 20; *Re* Jenvey (1854), 24 L. T. O. S. 192; Rutter *v.* Everett, [1895] 2 Ch. 872.

6693i. *When given—After act of bankruptcy—Before notice thereof.*]—The mtgee. of shares in a co., holding the share certificates & an unregistered transfer, did not complete his title by causing the transfer to be registered until after the commission by the mtgor. of an act of bkpcy., of which the mtgee. had no knowledge. *Semble :* the shares were not in the order & disposition of bkpt.—*Re* FENTON, COURTNEY'S CASE (1886), 5 N. Z. L. R. 189.—**N.Z.**

Sect. 9.—Property in reputed ownership of bankrupt: Sub-sect. 3, B. (b), ii.]

6692. —— —— Before fiat issued—Assignee unaware of act of bankruptcy.]—A deposit of a policy of assurance by way of security for a debt, made previous to the commission of an act of bkpcy. by the depositor, & notified to the insurance co., by the party with whom the deposit was made, previous to the issuing of the fiat, though subsequent to the act of bkpcy. :—*Held :* valid as against the assignees, it not appearing that, at the time the notice was given to the co., the party giving it was aware of an act of bkpcy. having been committed.—*Re* STYAN, *Ex p.* SMITH (1842), 2 Mont. D. & De G. 219 ; 1 Ph. 105 ; 11 L. J. Ch. 127 ; 6 Jur. 158 ; 41 E. R. 571, L. C.

Annotations :—**Apld.** Young *v.* Hope (1848), 2 Exch. 105. **Consd.** *Re* Atkinson (1851), Fonbl. 271 ; *Re* Pritchard, *Ex p.* Knowlys (1852), Fonbl. 238. **Refd.** *Re* Young, *Ex p.* Cooper (1842), 11 L. J. Bcy. 29 ; Pariente *v.* Pennell (1843), 2 Mood. & R. 517 ; West *v.* Reid (1843), 2 Hare, 249 ; Graham *v.* Furber (1853), 14 C. B. 134 ; *Re* Jenvey (1854), 24 L. T. O. S. 192 ; Krehl *v.* Great Central Gas Consumers Co. & Guarantee Soc. (1870), 39 L. J. Ex. 197. **Mentd.** Fawcett *v.* Fearne (1844), 6 Q. B. 20 ; Rutter *v.* Everett, [1895] 2 Ch. 872.

6693. —— —— Before notice thereof.]—T. advanced £222 to B. on his note of hand & the deposit of a life policy for £600. After an act of bkpcy. by B., but without notice of it, T. gave notice to the assurance office. On B.'s bkpcy. :—*Held :* as T. at the time of giving notice to the co. had no notice of an act of bkpcy. having been committed, his notice to the co. was a good one.—*Re* BROCK, *Ex p.* TANNER (1853), 1 Bankr. & Ins. R. 156.

6694. —— After stoppage of payment—Before bankruptcy—Assignment of share in partnership.]—On May 9, 1831, M., being a partner with R. in a linen manufactory, sold & assigned his share in the partnership to L., but M. being apprehensive that the transaction, if made public, would cause a run on certain banks in which he was engaged, & might prevent his being re-elected for the borough of A., which he then represented, the dissolution of the partnership between him & R., & the formation of the new partnership between R. & L. was, at his request, not announced in the *Gazette* or otherwise made public until Jan. 3, 1832. On Jan. 2 M. stopped payment, &, on the 26th, a fiat issued, on a debt incurred in 1830, under which he was found a bkpt. :—*Held :* M.'s share in the linen business was not in his order & disposition up to Jan. 3, 1832.—BANNATYNE *v.* LEADER (1841), 10 Sim. 350 ; 10 L. J. Ch. 385 ; 5 Jur. 573 ; 59 E. R. 649.

Annotations :—**Refd.** Stanger *v.* Wilkins (1855), 19 Beav. 626. **Mentd.** Combe *v.* London Corpn. (1845), 15 L. J. Ch. 80, L. C., Peile *v.* Stoddart (1849), 13 Jur. 225.

6695. —— After knowledge of act of bankruptcy.]—A., having a contract with the Admlty. to deliver coals at certain foreign ports at stipulated prices, shipped coals, in performance of the contract, &, in pursuance of the terms of the contract, deposited three parts of the bills of lading with the Admlty., retaining a fourth part himself, which he deposited, together with the policies on the ships, with B., to secure an advance. The deposit was accompanied by a letter, stating that it was made to secure the amount of the advance, & undertaking, in case of default in repayment at maturity or on demand, to enable B. to receive the value of the cargoes. B. having given no notice to the Admlty. until after he was aware of an act of bkpcy. by A., on which an adjudication was afterwards founded :—*Held :* the money which became due from the Admlty. passed to the assignees under 1849 Act, s. 125.—NORTH *v.* GURNEY (1861), 1 John. & H. 509 ; 5 L. T. 18 ; 9 W. R. 678 ; 70 E. R. 847.

Annotation :—**Apprvd.** Cooke *v.* Hemming (1868), L. R. 3 C. P. 334.

6696. —— ——.]—Defts. assigned machinery by bill of sale to secure a sum of money advanced by pltf., & in pursuance of a covenant to insure, they insured such machinery, which was afterwards burnt. After the fire defts. executed an assignment of property to their creditors, but the deed was destroyed before any of the creditors had signed it. Pltf., with the knowledge of that deed, gave the insurance office notice of his claim to the policy :—*Held :* the policy being in the order & disposition of defts. at the time of the notice to the insurance office, pltf. had no claim to the proceeds of the policy as against deft.'s assignees.—LEES *v.* WHITELEY (1866), L. R. 2 Eq. 143 ; 35 L. J. Ch. 412 ; 14 L. T. 472 ; 14 W. R. 534.

Annotations :—**Refd.** Sinnott *v.* Bowden, [1912] 2 Ch. 414. **Mentd.** Rayner *v.* Preston (1881), 18 Ch. D. 1, C. A.

6697. —— After bankruptcy—Warrants delivered before.]—Where A. received dock warrants for wine from B. not indorsed by B., & A. delivered & indorsed them to C., who afterwards procured B.'s indorsement, & A. became bkpt. :—*Held :* the wines passed to C., though notice of transfer to the dock co. & the indorsement by B. were subsequent to the bkpcy.—*Re* LEECH, *Ex p.* DAVENPORT (1832), 1 Deac. & Ch. 397 ; Mont. & B. 165 ; 1 L. J. Bcy. 101, Ct. of R.

6698. —— —— Before notice given by trustee in bankruptcy.]—A mtgee. of a trust fund gave no notice to the trustee until after the mtgor.'s bkpcy., but he gave notice before the assignees had given notice to the trustee of their right :—*Held :* the trust fund was in the order & disposition of bkpt.—*Re* TICHENER (1865), 35 Beav. 317 ; 55 E. R. 918.

Annotation :—**Refd.** Semphill *v.* Queensland Sheep Investment Co. (1873), 29 L. T. 737.

6699. —— —— ——.]—Previous to his marriage C. insured his life in two offices for two sums of £500 each, & by his marriage settlement covenanted to insure his life for not less than £2,000. On Oct. 29 C. handed over one of the policies to the solr. for the trustees of the settlement, & on Dec. 9 signed a memorandum stating that he handed over the two policies to the trustee in pursuance of the covenant contained in the settlement. C. was adjudicated bkpt. on Dec. 13. The other policy was handed over to the solr. for the trustees on Jan. 10 in the following year. Notice of the claim of the trustees to the policies was given to the offices after the bkpcy., but before any notice had been given by the assignee :—*Held :* the policies were in the order & disposition of bkpt. at the commencement of the bkpcy.—*Re* CURRIE, *Ex p.* CALDWELL (1871), L. R. 13 Eq. 188 ; 41 L. J. Bcy. 55 ; 20 W. R. 363.

6700. —— —— Trustees declining trust.]—M., by a voluntary deed, assigned a reversionary interest to trustees upon trusts for his wife & children. The trustees never executed the settle-

6695 i. —— *After knowledge of act of bankruptcy.*]—The certificates of shares in a co. were deposited by the registered owner with a bank by way of security. The Act of Parliament constituting the co. incorporated Cos. Clauses Consolidation Act, 1845, s. 12. The owner of the shares was adjudicated a bkpt. The bank had notice of the act of bkpcy. The bank did not give notice to the co. of the deposit of the certificates until nearly four months after the commission of the act of bkpcy., & the name of bkpt. remained in the books of the co. as registered proprietor of the shares :—*Held :* the shares were in the order & disposition of bkpt.—*Re* STEVENSON (1890), 27 L. R. Ir. 309.—IR.

ment. After the reversion fell in, M. was adjudicated a bkpt. No notice of the settlement was given to the trustees until after the bkpcy., when they declined the trusts :—*Held :* the reversionary interest was within M.'s order & disposition.—HENSLEY *v.* WILLS (1867), 16 L. T. 582.

Annotation :—**Distd.** *Re* Mills' Trusts (1895), 73 L. T. 229, C. A.

6701. —— —— Stop order.]—The tenant for life of a fund in ct. mortgaged his interest, & afterwards became bkpt. After the bkpcy., the mtgee. obtained a stop order on the dividends. The assignee in bkpcy. did not obtain a stop order : —*Held :* the mtgee. was entitled to priority over the assignee in bkpcy.

If the assignee of a chose in action omits to give notice of the assignment to the debtor or trustee, or, in the case of a fund in ct., to obtain a stop order, & the assignor becomes bkpt., the chose in action remains in the order & disposition of bkpt. with the consent of the assignee, & passes to the assignee in bkpcy. Assignees in bkpcy. are in no better position than assignees for value, & it is incumbent on them to perfect their title by giving notice (MALINS, V.-C.).—STUART *v.* COCKERELL (1869), L. R. 8 Eq. 607 ; 39 L. J. Ch. 127.

Annotations :—**Folld.** *Re* Russell's Policy Trusts (1872), L. R. 15 Eq. 26. **Consd.** *Re* Mills' Trusts (1895), 73 L. T. 229, C. A.

6702. —— —— After death of bankrupt.]—No act of an assignee for value after bkpcy. of the assignor can give validity to the assignment, as against the assignees in bkpcy.

A person having mortgaged a policy of insurance on his own life, afterwards became bkpt., & died four years after the bkpcy. The mtgee. thereupon gave notice to the insurance office & claimed the proceeds of the policy. No previous notice had been given of the mtge. or of the bkpcy. :—*Held :* the policy remained in the order & disposition of bkpt.—*Re* WEBB'S POLICY (1867), 36 L. J. Ch. 341 ; 16 L. T. 89 ; 15 W. R. 529.

Annotations :—**Consd.** Semphill *v.* Queensland Sheep Investment Co. (1873), 29 L. T. 737. **Refd.** Cooke *v.* Hemming (1868), L. R. 3 C. P. 334 ; *Re* Russell's Policy Trusts (1872), L. R. 15 Eq. 26.

6703. —— After death of assured.]—A policy effected by A. on his life was mortgaged in 1860 without notice to the office. A. became bkpt. in 1862, & in 1868 joined in a transfer of the mtge. to B., who had no notice of the bkpcy. After the death of A., B.'s solr. gave notice to the office that the policy was mortgaged, & that he acted for the mtgees., not naming them :—*Held :* the notice, to be valid, need not be made during the lifetime of the assured, the principle being, that notice was sufficient if given to the party having the fund whilst it remained in his possession.—*Re* RUSSELL'S POLICY TRUSTS (1872), L. R. 15 Eq. 26 ; 27 L. T. 706 ; 21 W. R. 97.

Annotations :—**Expld.** *Re* Pooley, *Ex p.* Rabbinge (1878), 38 L. T. 663, C. A. **Consd.** *Re* Mills' Trusts (1895), 73 L. T. 229, C. A. **Refd.** Semphill *v.* Queensland Sheep Investment Co. (1873), 29 L. T. 737.

6704. —— Notice to party abroad—Arriving after goods despatched to bankrupt.]—A. accepted bills to enable B. to make shipments to Sydney, on an agreement, known at Sydney, to apply the return proceeds in payment of the bills. On the last shipment, B. sent notice to Sydney to send the proceeds direct to A., & gave the same notice to a partner of the Sydney house, who happened to be in London. Before the notice arrived at Sydney the return proceeds were sent off to B., who became bkpt., & his assignees received them : —*Held :* not in his reputed ownership, & A. entitled thereto.—*Re* CORNIE, *Ex p.* FLOWER (1835), 2 Mont. & A. 224 ; *sub nom. Re* CORMIE, *Ex p.* FLOWER, 4 Deac. & Ch. 449, Ct. of R.

Annotation :—**Distd.** Bligh *v.* Davies (1860), 28 Beav. 211.

6705. —— —— Sent by direct but not by quickest mail—Bankruptcy before arrival.]—London sub-mtgees. of shipments abroad sent to the parties in possession there notices of their security by the next direct mail, there being another & earlier mail, by which the notices might possibly have reached their destination sooner. Before that could have taken place by either mode of transmission, the sub-mtgors. became bkpt. :—*Held :* the notice was sufficient to take the goods out of their reputed ownership.—*Re* BEATTIE, *Ex p.* KELSALL (1846), De G. 352, Ct. of R.

6706. —— —— Bankruptcy before arrival.]—H., residing in Australia, was indebted to A., who *bonâ fide*, & for a valuable consideration, assigned the debt to W., & joined W. in a letter notifying to H. the assignment, & requiring him to pay the debt to W. The letter, even if it had been posted on the day of the assignment, could not have reached Australia before the day on which a fiat in bkpcy. issued against A. H. remitted, by letter, £50 which was received after the fiat & delivered over to W. The assignees of A. having sued W. for the amount :—*Held :* W. having taken every possible step to obtain possession of the debt, it could not be said to remain in the order & disposition of bkpt., with the consent of the true owner.—BELCHER *v.* BELLAMY (1848), 2 Exch. 303 ; 17 L. J. Ex. 219 ; 154 E. R. 508.

Annotations :—**Consd.** *Re* Long, *Ex p.* Long's Assignees (1857), 31 L. T. O. S. 270 ; Rutter *v.* Everett, [1895] 2 Ch. 872. **Refd.** *Re* Selby, *Ex p.* Probyn (1857), 28 L. T. O. S. 258 ; *Re* Goetz, Jonas, *Ex p.* Trustee (1898), 78 L. T. 399, C. A. **Mentd.** *Re* Love, *Ex p.* Watson (1877), 5 Ch. D. 35, C. A. ; *Re* Watson, *Ex p.* Atkin, [1904] 2 K. B. 753, C. A.

6707. —— —— Not received by party to whom sent—Service of copy immediately on arrival in England.]—G., by deed, dated Nov. 11, 1857, assigned the cargo with which a ship was then laden, & which thereafter should be placed on board, to deft. for securing the balance of a banking account. On Jan. 23, 1858, notice of the deed was sent, directed to the captain of the ship, "west coast of Africa," but it never reached him. At the date of the deed deft. had reason to expect that the ship would soon sail on her homeward voyage. In fact, she was then on the west coast of Africa taking in & seeking cargo. On Jan. 18, 1858, she was still taking in & seeking cargo, & on Feb. 1 to the 11th received part of the cargo of another ship belonging to bkpt. On Feb. 12 she sailed on her homeward voyage. On Mar. 1 G. was adjudicated a bkpt. On the arrival of the ship, on Apr. 14, the master was served with a copy of the notice. In an action by the assignees of G. to recover the proceeds of the cargo :—*Held :* (1) the deed operated as an equitable assignment of the cargo, & there was no distinction between the part of the cargo put on board before the assignment & the part put on board after ; (2) there was no default in deft. in not giving notice of the deed, & the goods were not in the order & disposition of bkpt. with the consent of the owner.—ACRAMAN

w. —— *Notice sent by post on day of adjudication.*]—In Apr., 1914, M. deposited two policies of insurance with a bank, & on Aug. 15 he executed a legal mtge. of them to the bank. On Aug. 21 M. was adjudicated bkpt., & on the same day notice of the mtge. was sent by the bank to the insurance co. :—*Held :* the policies were, by the consent of the true owner, in the order & disposition of bkpt. at the time he had become bkpt.—*Re* MACKAY, [1915] 2 I. R. 347.—IR.

Sect. 9.—Property in reputed ownership of bankrupt: Sub-sect. 3, B. (b), ii., & (c).]

v. BATES (1860), 2 E. & E. 456; 29 L. J. Q. B. 78; 1 L. T. 322; 6 Jur. N. S. 294; 121 E. R. 172.

6708. —— Before fund in existence—Proceeds of army commission—Notice to army agents.]—An officer in the army covenanted to assign to trustees for his creditors the proceeds of the future sale of his commission. Before the sale the trustees gave notice of the assignment to the army agents of the officer. Afterwards the officer was adjudicated a bkpt., & subsequently to his bkpcy. his commission was sold, & the proceeds thereof were received by his agents, & handed over by them to his assignee in bkpcy.:—*Held:* the trustees for the creditors having done all they could do to perfect the assignment to them, were entitled to the proceeds of the commission in priority to the assignee in bkpcy.—GLOVER *v.* MOORE (1869), 39 L. J. Ch. 98; 21 L. T. 815.

6709. To whom given—To insurance office—Not to original mortgagor—Deposit of mortgage on life policy.]—A mtgee. of a policy of assurance deposited it by way of sub-mtge. & gave notice of the sub-mtge. to the insurance office but not to the original mtgor.:—*Held:* sufficient to take the policy out of the reputed ownership of the mtgee.—*Re* REAY, *Ex p.* BARNETT (1845), De G. 194, Ct. of R.

Annotations:—**Consd.** *Re* Buller, *Ex p.* Wornald (1860), 2 L. T. 544. **Refd.** *Re* Richards, Humber *v.* Richards (1890), 45 Ch. D. 589; *Re* Goetz, Jonas, *Ex p.* Trustee (1898), 78 L. T. 399, C. A.

6710. —— Solicitor of trustees—Reversionary interest.]—Notice of the assignment of a reversionary interest given to the solr. of the trustees:—*Held:* notice to the trustees, so as to take it out of the order & disposition of the assignor on his insolvency.—RICKARDS *v.* GLEDSTANES (1861), 3 Giff. 298; 5 L. T. 416; 66 E. R. 423; *affd.* 31 L. J. Ch. 142, L. C.

6711. —— Executor—Part of estate being fund paid into court—Stop order unnecessary.]—All the interest of a residuary legatee, under a certain will, was mortgaged, part of testator's estate consisting of a fund paid into ct., in a suit for the administration of testator's estate, & another part having been paid into ct., not in that suit but under Trustee Relief Act. The mtgee. gave notice to the exor. under the will, but did not obtain a stop order on the funds in ct., & the mtgor. became bkpt.:—*Held:* the notice to the exor. was sufficient, & affected every portion of testator's estate, & it was not necessary for the mtgee. to obtain a stop order on the funds in ct., in order to take those funds out of the order & disposition of bkpt.—THOMPSON *v.* TOMKINS (1862), 2 Drew. & Sm. 8; 31 L. J. Ch. 633; 6 L. T. 305; 8 Jur. N. S. 185; 10 W. R. 310; 62 E. R. 524.

Annotations:—**Consd.** Mutual Life Assce. Soc. *v.* Langley (1884), 26 Ch. D. 686. **Distd.** Mutual Life Assce. Soc. *v.* Langley (1886), 32 Ch. D. 460, C. A. **Mentd.** *Re* Nettlefold's Trusts (1888), 59 L. T. 315.

6712. —— Party by whom money payable—Charterparty entered into by agent of bankrupt owner—Assignment of freight by owner.]—A., on behalf of the owner of a ship, entered into a charterparty with B., by which B. agreed to pay to A., on the owner's behalf, a certain sum for freight. The owner afterwards assigned all the freight accruing under the charterparty to C., as a security for a debt, & C. gave notice of the assignment to A. but not to B. The owner having subsequently become bkpt.:—*Held:* the arrears of freight were not in his order & disposition at the time of his bkpcy.

Where a trader assigns a debt, the only person to whom notice of the assignment need be given, in order to vest a good equitable title in the assignee, is the party from whom the trader was to have received payment of the money, in other words, the party holding the property at the order & disposition of the trader.—GARDNER *v.* LACHLAN (1838), 4 My. & Cr. 129; 8 L. J. Ch. 82; 2 Jur. 1056; 41 E. R. 51, L. C.

Annotation:—**Refd.** Cooke *v.* Hemming (1868), L. R. 3 C. P. 334.

6713. —— Not to original mortgagor—Sub-mortgage.]—A person, to whom estates were mortgaged to secure the balance due from time to time on an account current, mortgaged his interest under the mtge., & became bkpt.:—*Held:* it was not necessary to give notice of the sub-mtge. to the original mtgor., to take the mtge. debt out of the order & disposition of the original mtgee.—*Re* WRIGHT, *Ex p.* MACKAY (1841), 1 Mont. D. & De G. 550, Ct. of R.

Annotations:—**Refd.** *Re* Buller, *Ex p.* Wornald (1860), 2 L. T. 544; *Re* Richards, Humber *v.* Richards (1890), 45 Ch. D. 589.

6714. —— London agents of bankrupt solicitor—Assignment of claim for costs.]—A solr. assigned his claim for costs to W. & became bkpt. W. gave notice of his claim to the London agents of the solr. The assignees in bkpcy. petitioned for payment to them, subject to the London agents' claim:—*Held:* (1) the notice to the London agents, as far as costs became payable to them, took those costs out of the order & disposition of bkpt.; (2) the costs being ordered out of a fund in ct., the petition must be refused.—SHARPLES *v.* MARSH (1854), 2 W. R. 400.

6710 i. *To whom given—Person supposed to be solicitor to trustees—Reversionary interest.]*—Leaseholds were bequeathed to trustees in trust, to sell & out of the proceeds to invest £3,000 in stock, & pay the dividends to F., the wife of E., for life, for her separate use, without powers of anticipation, & subject thereto, to pay the principal to the children of E. & F., in such shares as she should appoint, with gifts over, in default of appointment, to the children of E. & F. living at testator's death, & powers were given to the trustees to sell the stock & invest the proceeds on private security or in the purchase of land, to be held upon the same trusts as were declared of the stock. At testator's death, in 1839, there were three children of E. & F. The trustees sold, & left the £3,000 outstanding on a mtge. of the property, which was then held for a term of sixty-two years, executed by the purchaser to them in 1840. In 1843 F. appointed the £3,000 in unequal shares to her three children, subject to her own life interest, & in 1858 the appointees, by a deed which was imperfectly registered, mortgaged to D. the sums appointed to them together with their respective estates, & interests therein, to secure money advanced to their father. D. gave no notice of the assignment to W., the surviving trustee, but only to M., whose firm, he was informed by one of the assignors, had acted as solrs. for the trustees. Two of the assignors were adjudicated bkpts. in England in 1866, & in 1873 F. died, having had no other children. In 1874 D. instituted a suit to raise the amount due to him, & the creditors' assignees proved that W. had received no actual notice of the assignment till the filing of the bill, & that M. had never acted as his solr. They also gave in evidence orders made by the English Bkpcy. Ct. for the sale of "all & every the right, title, interest, claim, & demand" of bkpts. in the £3,000 trust fund. The Master of the Rolls decided that the reversionary shares of F.'s children were choses in action, & that, no previous notice of their assignment having been given to W., the share of bkpts. were in their "order or disposition" by the "consent & permission" of D. at the time of the bkpcies. & passed to their creditor's assignees:—*Held:* although the interests of F.'s children were choses in action, & bkpts.' shares were in their "order or disposition" by the "consent & permission of the true owner," the language of the orders for sale was such as only to vest bkpts.' equity of redemption in the creditor's assignees, & D. was entitled to the relief sought by his bill.—DANIEL *v.* FREEMAN (1877), I. R. 11 Eq. 638.—IR.

6715. How proved—Statement that partner had given notice.]—B. granted an annuity to F., assigning the share he was entitled to under his father's will as a security. B. afterwards became bkpt., & F. stated that he had no doubt his partner, who managed the business for him, had given notice of the assignment, previous to the bkpcy., to the exors. of B.'s father:—*Held:* this was not sufficient proof that the exors. had notice of the assignment, & B.'s share remained in his order & disposition.—FOSTER *v.* BONNER (1863), 2 New Rep. 226; 8 L. T. 530; 11 W. R. 742.

(c) *By Registration of Bill of Sale.*

See, now, Bills of Sale Acts, 1878 (c. 31) & 1882 (c. 43).

6716. Goods left in possession of bankrupt—Bills of Sale Act, 1854 (c. 36).]—Goods assigned by a bill of sale registered under Bills of Sale Act, 1854, if in the possession of bkpt., will be deemed to be in his order & disposition.—*Re* DANIEL, *Ex p.* ASHBY (1855), 25 L. T. O. S. 188.

Annotation:—**Refd.** Badger *v.* Shaw (1860), 1 L. T. 323.

6717. ——— ———.]—On Apr. 19, 1856, A., a trader, executed a bill of sale, assigning all his furniture & effects on the premises where he was carrying on business to B. for securing a sum of money & interest. On May 15, June 5, June 24, July 15, & Aug. 5 respectively similar bills of sale were made by A. to B., but the last of such bills of sale was the only one of them which was registered under Bills of Sale Act, 1854. Such registration took place on Aug. 23, 1856. In July, 1856, A. had committed one or more acts of bkpcy., & the goods comprised in the bills of sale continued in his possession during the first ten days of Aug., 1856. In Dec., 1856, A. was adjudicated bkpt.:—*Held:* notwithstanding the subsequent registration, the goods comprised in the bills of sale were in the order & disposition of bkpt. during the first ten days of Aug.—STANSFELD *v.* CUBITT (1858), 2 De G. & J. 222; 27 L. J. Ch. 266; 31 L. T. O. S. 3; 4 Jur. N. S. 395; 6 W. R. 320; 44 E. R. 973, L. JJ.

Annotations:—**Consd.** Badger *v.* Shaw (1860), 2 E. & E. 472; Ashton *v.* Blackshaw (1870), L. R. 9 Eq. 510; Ramsden *v.* Lupton (1873), L. R. 9 Q. B. 17, Ex. Ch. **Distd.** Crawcour *v.* Salter (1881), 18 Ch. D. 30. **Consd.** Hollinshead *v.* Egan, [1913] A. C. 564, H. L. **Mentd.** Richards *v.* James, Sharpe *v.* James (1867), 8 B. & S. 302; *Re* Stevens, *Ex p.* Stevens (1875), L. R. 20 Eq. 786; *Re* Hewer, *Ex p.* Kahen (1882), 21 Ch. D. 871; *Re* Ginger, *Ex p.* London & Universal Bank (1897), 76 L. T. 808, D. C.

6718. ——— ———.]—If goods assigned by a bill of sale are allowed by the person to whom the bill of sale is given to remain in the possession of the person who gives it, & the latter, while still in possession of the goods, becomes bkpt., the mere fact that the bill of sale was, before the bkpcy. happened, duly registered under Bills of Sale Act, 1854, s. 1, will not prevent the goods comprised therein from passing to the creditors under the bkpcy., by 1849 Act, s. 125, as goods in the possession, order, or disposition of bkpt., at the time he became bkpt., with the consent of the true owner.—BADGER *v.* SHAW (1860), 2 E. & E. 472; 29 L. J. Q. B. 73; 1 L. T. 323; 6 Jur. N. S. 377; 8 W. R. 210; 121 E. R. 178.

Annotations:—**Refd.** Hollinshead *v.* Egan, [1913] A. C. 564, H. L. **Mentd.** *Re* Hewer, *Ex p.* Kahen 1882), 21 Ch. D. 871.

6719. ——— ——— **Agreement that goods to remain until default—No default till bankruptcy.**]—Where, in a mtge. of furniture, it is provided that the mtgor. shall remain in possession until default, & no default is committed until the bkpcy., when no description of the brands of the stock would not take the stock out of the reputed ownership of the mtgor. in case of the bkpcy.—WILSON *v.* CAMERON (1883), 2 N. Z. L. R. 274.—**N.Z.**

6716 v. ———.]—L., a trader in Ceylon pledged household property to C. & A. by hypothecatory bonds, mortgaging his goods present & future. L. was afterwards adjudicated an insolvent:—*Held:* a mtge. of movables, by writing before a notary, though unattended by possession, was valid, not only against debtor himself, but against his general creditors, & the goods were not in the order & disposition of L. at the time of his insolvency, so as to defeat the priority of C. & A.'s claim.—TATHAM *v.* ANDREE (1863), 1 Moo. P. C. C. N. S. 386; 9 L. T. 2; 9 Jur. N. S. 1019; 12 W. R. 22; 2 New Rep. 554; 15 E. R. 386.—**CEYLON.**

6719 i. ——— *Under agreement that goods to remain until default—No default till bankruptcy.*]—A., on June 16, 1885, assigned chattels to B., by a deed, which contained a proviso that the debt was to be paid by instalments, the first to become due upon July 8. The deed was in the form prescribed by 46 Vict. c. 7, & was duly registered as a bill of sale. A. was adjudicated bkpt. on July 1:—*Held:* the possession of the chattels by bkpt. being consistent with the terms of the deed, they were not in his possession with the consent of the "true owner," & did not pass to the assignees under the order & disposition clause.—*Re* STANLEY (1885), 17 L. R. Ir. 487.—**IR.**

6719 ii. ——— ———.]—A. assigned articles by a bill of sale, which provided that A. was to pay £160, with interest, by instalments, & that, if he paid the £160, with interest, the bill of sale should be void, & that A. should have the use of the furniture so long as he continued to pay the instalments

6715 i. *How proved—Deposition of solicitor that he believed notice was given.*]—B. assigned a policy of insurance, effected on his own life, to two trustees, by a deed of settlement, & was afterwards adjudged bkpt. Upon his death the sum assured was claimed by B., as alleged surviving trustee of the settlement, & by the assignees in bkpcy. At the trial, the attorney, who had prepared the settlement, deposed that he believed he had given notice of it to the insurance co., but there was no other evidence that notice had been given before the bkpcy. After the bkpcy. notice was given:—*Held:* there was no evidence to go to the jury of notice to the co., so as to take the policy out of the operation of the order & disposition clause.—BRADLEY *v.* JAMES (1876), 10 I. L. T. 180.—**IR.**

6715 ii. ——— *Proof of posting letter sufficient.*]—On June 28, 1873, M. by deed agreed to assign for value a policy, effected on his own life, to his father W., who, on the same day, by a separate deed assigned it to D. by way of equitable mtge. The parties were all resident in Ireland, & a memorandum at foot of the policy, which had been issued from the Dublin branch office, directed that notice of assignments should be given at the head office in London. Immediately upon the execution of the deeds of June 28, D. prepared a formal notice of the assignment to W., in whose name & at whose request it was signed for him & addressed, & posted in Dublin, to B., the society's secretary, at the London office. M. was adjudicated a bkpt. in Jan., 1874, & died in the following Aug., when his assignees in bkpcy. gave notice to the London office, & claimed the proceeds of the policy as having been in his "order or disposition" at the time of his adjudication, B. deposing that D.'s notice had never reached the London office:—*Held:* the notice, having been duly posted, must be presumed to have reached its destination, & irrespective of the question whether the notice was actually received at the office, the mere posting of it was effectual to prevent the policy from being in the "order or disposition" of M. at the date of his bkpcy. "by the consent & permission of the true owner."—*Re* HICKEY (1875), I. R. 10 Eq. 117; 10 I. L. T. 123.—**IR.**

PART XX. SECT. 9, SUB-SECT. 3.—B. (c).

6716 i. *Goods left in possession of bankrupt.*]—When insolvent executes a bill of sale of all his chattels, which remain in his order & disposition, the ct. will direct that they shall be sold for the benefit of the creditors.—*Re* RONAYNE (1868), 2 I. L. T. Jo. 151.—**IR.**

6716 ii. ———.]—Bkpt. gave a bill of sale of the furniture in his hotel to B., for valuable consideration, but continued to retain the furniture, & use it in the hotel. B. did not interfere with the furniture, or with the management of the hotel:—*Held:* the furniture came within the reputed ownership clause, & should be ordered to be sold for the benefit of the general creditors, & the mere fact that the dealings between bkpt. & B. with regard to the bill of sale were beneficial to the general estate, & assented to by several of the parties interested, did not raise an equity to bar the operation of the statute.—*Re* HAMS (1859), 10 I. Ch. R. 100; 12 Ir. Jur. 59.—**IR.**

6716 iii. ———.]—*Held:* registration of a mtge. of stock was not compulsory, but unless the mtge. were registered the stock was not exempt from the operation of the doctrine of reputed ownership.—WILDIE *v.* GREEN (1882), 1 N. Z. L. R. 265.—**N.Z.**

6716 iv. ———.]—*Semble:* a mtge. of stock registered under Mtges. of Stock Act, 1868, containing no sched. &

Sect. 9.—Property in reputed ownership of bankrupt: Sub-sect. 3, B. (c), & (d).]

the mtgee. enters, the furniture passes to the assignees, as being in the possession, order, & disposition of bkpt., with the consent of the true owner, & the registering of the mtge. deed under Bills of Sale Act, 1854, makes no difference.—*Re* LONG, *Ex p.* LONG'S ASSIGNEES (1858), 31 L. T. O. S. 270.

6720. —— —— —— **& demand.**]—Goods in the possession of a person at the time of his bkpcy. subject to a bill of sale, which entitles him to possession until demand of the debt & default, are not in his order & disposition.—*Re* BROADBENT, *Ex p.* HOMAN (1871), L. R. 12 Eq. 598; 36 J. P. 148.

Annotations:—**Consd.** *Re* Fairbrother, *Ex p.* Harding (1873), L. R. 15 Eq. 223. My decision in *Ex p. Homan* has been misunderstood; there is probably an error in the report, but if I said what is there attributed to me as to the effect of the decision in *Ashton* v. *Blackshaw*, I should desire to recall it; but my decision in *Ex p. Homan* was clearly in accordance with the law as long established (BACON, C.J.). **Refd.** Hollinshead *v.* Egan, [1913] A. C. 564, H. L. **Mentd.** *Re* Jeavons, *Ex p.* Mackay, *Ex p.* Brown (1873), 42 L. J. Bcy. 68, L. JJ.; Jarvis *v.* Jarvis (1893), 63 L. J. Ch. 10.

6721. ——————————.]—Goods comprised in a bill of sale, which entitles the holder to take possession upon default in payment after demand, remain, notwithstanding the registration of the bill of sale, until demand is made in the reputed ownership of the grantor.—*Re* FAIRBROTHER, *Ex p.* HARDING (1873), L. R. 15 Eq. 223; 42 L. J. Bcy. 30; 28 L. T. 241.

Annotations:—**Refd.** *Re* Hewer, *Ex p.* Kahen (1882), 21 Ch. D. 871; *Re* Webber, *Ex p.* Slater (1891), 64 L. T. 426; Hollinshead *v.* Egan, [1913] A. C. 564, H. L. **Mentd.** *Re* Ginger, *Ex p.* London & Universal Bank (1897), 46 W. R. 144, D. C.

6722. —— **Bills of Sale Act, 1878 (c. 31)—Possession taken between time of making & time for registration.**]—During the period of seven days between the making & registration of a bill of sale, 1869 Act, s. 15 (5), does not apply to the goods & chattels comprised in the bill of sale, so that as against the trustee in bkpcy., who by the receiver has before the expiration of the seven days taken possession of such goods, the bill of sale holder is entitled.—*Re* HEWER, *Ex p.* KAHEN (1882), 21 Ch. D. 871; 51 L. J. Ch. 904; 46 L. T. 856; 30 W. R. 954.

6723. —— **Registration under Bills of Sale Act, 1878 (c. 31)—Act of bankruptcy after Bills of Sale Act (1878), Amendment Act, 1882 (c. 43), came into operation.**]—The effect of 1882 Act, s. 3, is that the grantee of a bill of sale, registered under 1878 Act, before the coming into operation of 1882 Act, is, so long as the registration is subsisting, entitled to the protection afforded by 1878 Act, s. 20, against the order & disposition of the grantor, even when an act of bkpcy. is committed by the grantor after the coming into operation of 1882 Act.—*Re* CHAPPLE, *Ex p.* IZARD (1883), 23 Ch. D. 409; 52 L. J. Ch. 802; 49 L. T. 230; 32 W. R. 218, C. A.

Annotation:—**Distd.** *Ex p.* Cotton (1883), 49 L. T. 52.

6724. —— **Bills of Sale Act (1878), Amendment Act, 1882 (c. 43)—Agreement that goods to remain until default—No default until bankruptcy.**]—Where the grantor of a bill of sale, a dairy farmer, has become bkpt. before making any default in payment of the sums thereby secured, his possession of stock, cows, calves, horses, etc., assigned by it in such circumstances that he continues to be the reputed owner thereof is a possession by him with the consent of the true owner within 1883 Act, s. 44 (iii).—*Re* GINGER, *Ex p.* LONDON & UNIVERSAL BANK, [1897] 2 Q. B. 461; 66 L. J. Q. B. 777; 76 L. T. 808; 46 W. R. 144; 41 Sol. Jo. 531; 4 Mans. 149, D. C.

Annotations:—**Folld.** *Re* Weibking, *Ex p.* Ward, [1902] 1 K. B. 713. **Consd.** Hollinshead *v.* Egan, [1913] A. C. 564, H. L.

6725. Effect of Bills of Sale Act (1878) Amendment Act 1882 (c. 43), on Bills of Sale Act, 1878 (c. 31), s. 20.]—*Held:* 1882 Act, repealed 1878 Act, s. 20, in respect of bills of sale given by way of security, but not in respect of bills of sale given by way of absolute transfer, & chattels comprised in a registered bill of sale given by way of absolute transfer were not in the order & disposition of the grantor.—SWIFT *v.* PANNELL (1883), 24 Ch. D. 210; 53 L. J. Ch. 341; 48 L. T. 351; 31 W. R. 543.

Annotations:—**Mentd.** Reeves *v.* Barlow (1883), 11 Q. B. D. 610; Robinson *v.* Tucker (1883), Cab. & El. 173; Casson *v.* Churchley (1884), 53 L. J. Q. B. 335; Hall *v.* Smith (1887), 3 T. L. R. 805, C. A.; Read *v.* Joannon (1890), 25 Q. B. D. 300; Heseltine *v.* Simmons, [1892] 2 Q. B. 547, C. A.

See, generally, BILLS OF SALE.

(d) Of Possession, etc., of Firm or continuing Partner.

6726. Of firm—Removal of stock to shop of new partnership.]—Upon a dissolution of partnership between A. & B., it was agreed that, until A. should be provided for, B. should allow him a third of the profits. B. entered into partnership with C., & carried in the stock of A. & B.:—*Held:*

regularly. The first & second instalments were paid. Before the third fell due, A. filed a declaration of insolvency, upon which he was subsequently adjudicated a bkpt.:—*Held:* the furniture passed to the assignees under the order & disposition clause.—*Re* MURRAY, *Ex p.* TICKELL (1859), 9 I. Ch. R. 281.—**IR.**

6719 iii. —— —— ——.]—Where a person is in possession of chattels, of which he has executed a bill of sale, & is subsequently adjudicated a bkpt., before making any default in payment of the sum thereby secured, such chattels are to be deemed to be in the order & disposition of bkpt., with the consent of the true owner.—*Re* HAYES, [1899] 2 I. R. 206.—**IR.**

6719 iv. ——————.]—Where the grantor of a registered bill of sale is adjudicated a bkpt. before making any default in payment of the sums thereby secured, the goods comprised in the bill of sale are, in the absence of evidence displacing the reputation of ownership, in the possession, order, & disposition of bkpt. as reputed owner thereof, with the consent & permission of the true owner.—HOLLINSHEAD *v.* EGAN, LTD., [1913] A. C. 564; 83 L. J. P. C. 74; 109 L. T. 681; 29 T. L. R. 640; 57 Sol. Jo. 661; [1913] 2 I. R. 487; 47 I. L. T. 254, H. L.—**IR.**

x. —— —— *Default before bankruptcy but possession not taken.*]—J., within three months of his being adjudged a bkpt., gave a bill of sale of the chattels in his dwelling-house to F., in order to induce him to withdraw an execution thereon. By the bill of sale it was provided that the chattels should not be liable to seizure or to be taken possession of by F. for any cause other than those specified in Bills of Sale Act Amendment Act, 1883, s. 7. After the day stipulated for payment the grantee failed to take possession in default of payment:—*Held:* the chattels being, with the grantee's consent, in bkpt.'s possession at the time of his bkpcy., the bill of sale was void against the assignee in bkpcy.—*Re* DUNLOP (1890), 24 I. L. T. 68.—**IR.**

y. —— —— *Covenant for quiet enjoyment.*]—A covenant for quiet enjoyment until default in a bill of sale does not operate, so as to defeat the reputed ownership clause.—*Re* BELL & DAVIS, *Ex p.* OFFICIAL ASSIGNEE, COHEN (1892), 13 N. S. W. L. R. 73.—**AUS.**

z. —— *Under agreement that goods to remain until fixed date—Demand by grantee before date not persisted in.*]—A trader executed a bill of sale of chattels, containing a clause that he was to retain possession until a certain day, whereby he was to pay the advances made. Notwithstanding that clause, the mtgee, demanded possession of the goods three days after the execution of the mtge. The trader refused, & the mtgee. seemed to acquiesce in the refusal. The goods were in the trader's apparent possession at the time of his bkpcy.:—*Held:* they were in his order & disposition, with the consent of the true owner, & they passed to the assignees.—*Re* SIM (1862), 14 Ir. Jur. 264.—**IR.**

after the stock was taken into B. & C.'s shop, it was in the order & disposition of B. & C., & A. was not a dormant partner in that partnership. —*Re* SLYTH, *Ex p.* BARROW (1815), 2 Rose, 252, L. C.

Annotation :—**Mentd.** Lovegrove *v.* Nelson (1834), 3 My. & K. 1, L. C.

6727. —— **Destruction of property by fire before bankruptcy—Property belonging to & insured in name of one partner.**]—A. & B., on entering into partnership, agreed that the manufactory & utensils in trade should be the separate property of A., & that B. should pay a rent in proportion to his share of the business. The manufactory & utensils were insured in the name of A., & were subsequently consumed by fire. Afterwards a commission issued against A. & B. :—*Held :* the insurance money was not in the order & disposition of the firm, as there was no visible possession at the time of the bkpcy., & the subject-matter being gone, 21 Jac. 1, c. 19, s. 11, ceased to apply. —*Re* BAKEWELL, *Ex p.* SMITH (1819), Buck, 149 ; 3 Madd. 63 ; 56 E. R. 433.

Annotations :—**Refd.** *Re* Fear, *Ex p.* Hare (1835), 2 Mont. & A. 478, Ct. of R. ; *Re* Baldwin, *Ex p.* Foss (1858), 2 De G. & J. 230, L. JJ.

6728. —— **Dissolution of partnership—No notice to joint debtors.**]—*Held :* debts due to a partnership assigned upon dissolution by the retiring partners to the continuing partner, without notice to debtors, upon the bkpcy. of the partners, remained in the order & disposition of the partnership, within 21 Jac. 1, c. 19, s. 11.—*Re* FOSSETT, COOPER & HOWARD, *Ex p.* BURTON (1822), 1 Gl. & J. 207.

Annotations :—**Folld.** *Re* Barker, *Ex p.* Usborne (1823), 1 Gl. & J. 358 ; Dean *v.* James (1832), 1 Ad. & El. 809, n. **Distd.** Gibson *v.* Overbury (1841), 10 L. J. Ex. 219. **Refd.** *Re* Severn, *Ex p.* Tennyson (1832), Mont. & B. 67, L. C. ; *Re* Windross, *Ex p.* Leaf (1835), 1 Deac. 176, Ct. of R.

6729. —— —— **Notice by advertisement.**]—The dissolution of a partnership was announced in the *Gazette*, with a statement that all debts due from the partnership were to be paid by the continuing partner, & requiring all debts due to the partnership to be paid to him. The continuing partner became bkpt. :—*Held :* the notice in the *Gazette* did not bring the partnership property into the order & disposition of bkpt. before the bkpcy., as apart from the difficulty of construing the notice as a notice to those who had not seen it, it could not put the debts into the ordering of bkpt., when, by its terms, the hand which was to receive them, was the hand to apply them in satisfaction of the demands against the partnership.—*Re* MALLAM, *Ex p.* WHEELER (1817), Buck, 25, L. C.

Annotations :—**Folld.** *Re* Johnston & Danson, *Ex p.* Cooper (1840), 1 Mont. D. & De G. 358. **Refd.** *Re* Coward, *Ex p.* Gibson, *Re* Fear, *Ex p.* Clarkson (1834), 2 Mont. & A. 4, Ct. of R. ; Pearce *v.* Bulteel, [1916] 2 Ch. 544.

6730. —— —— ——.]—A. & B. carried on business in partnership under the style of A. & Co. A. retired from the firm with the knowledge of the joint creditors, the dissolution was advertised, & B. continued the business in his own name. He was afterwards adjudicated a bkpt. :—*Held :* the partnership property was in the order & disposition of bkpt. & belonged to his separate estate.—*Re* STEWART, *Ex p.* FISHER (1855), 2 Bankr. & Ins. R. 67.

6731. —— —— —— **No notice to joint debtors.**]—A. & B. dissolved partnership in Sept. It was agreed the partnership property should belong to A. alone, who should carry on business on his own account, & pay the joint debts, & a notice to that effect was inserted in the *Gazette*, but no other notice was given to the joint debtors. A. took possession of the leasehold premises & other assets of the partnership, & carried on business till Nov., when a joint commission issued against A. & B. :—*Held :* the debts owing by those debtors who had no notice of the agreement, remained in the order & disposition of the partnership, but the leasehold premises, stock, etc., which had been transferred & delivered to A. prior to the commission formed part of A.'s separate estate.—*Re* BARKER, *Ex p.* USBORNE (1823), 1 Gl. & J. 358.

Annotations :—**Refd.** *Re* Severn *Ex p.* Tennyson (1832), Mont. & B. 67, L. C. ; *Re* Windross, *Ex p.* Leaf (1835), 1 Deac. 176, Ct. of R.

6732. —— —— —— **No absolute proof of want of notice to joint debtors.**]—L. & C. employed packmen to travel round various districts in the country to sell their goods, in the course of which dealings were had with three thousand five hundred customers. L. & C. dissolved their partnership, of which notice was given in the *Gazette*, & sold the debts owing on the different rounds to the new firm of S. & C., which continued the same course of dealing, & some of the bills of parcels delivered to the customers by one of the packmen were altered in the heading from the firm of L. & C. to that of S. & C., but it did not appear that any express notice was given to the customers of the assignment of the debts from the old to the new firm. Both firms became bkpt. :—*Held :* there was not such proof of want of notice to the different debtors, of the assignment of the debts from the old to the new firm, as to raise the inference that the debts continued in the order & disposition of the old firm.—*Re* LITTLE, *Ex p.* WOODGATE (1841), 2 Mont. D. & De G. 394 ; 11 L. J. Bcy. 25, Ct. of R.

6733. —— —— —— **Notice given to pay to one partner.**]—A dissolution of partnership was advertised in the *Gazette* & a circular sent in the name of the dissolved firm, requesting debtors to the firm to pay their debts to one partner :—*Held :* the notice was insufficient to take the debts out of the reputed ownership of the firm.—*Re* BREWSTER, *Ex p.* SPRAGUE (1853), 4 De G. M. & G. 866 ; 22 L. J. Bcy. 62 ; 43 E. R. 746, L. JJ.

Annotation :—**Mentd.** Reynolds *v.* Bowley (1866), 7 B. & S. 67.

6734. —— **Death of one partner.**]—Two partners entered into an arrangement with their creditors. One partner died & the surviving partner paid a portion of the balance in the hands of the partnership bankers to sureties for completion of the arrangement, on the understanding that, if the arrangement was not carried out, it should be returned. The arrangement fell through, & the surviving partner became bkpt., the money remaining in the hands of the sureties :—*Held :* the money was not in the order & disposition of the surviving partner, but belonged to the joint estate of the two partners.—*Re* SIMPSON, *Ex p.* LEAF (1840), 4 Deac. 287 ; Mont. & Ch. 662 ; 9 L. J. Bcy. 9 ; 4 Jur. 28, Ct. of R.

Annotation :—**Refd.** Wickham *v.* Wickham (1855), 2 K. & J. 478.

6735. —— ——.]—The decease of one partner, in a firm of underwriters, will not leave the premiums due for insurance in the order & disposition of the survivor, so as to make them liable for his separate debts only.—BRETT *v.* BECKWITH (1856), 26 L. J. Ch. 130 ; 28 L. T. O. S. 214 ; 3 Jur. N. S. 31 ; 5 W. R. 112.

6736. —— —— **Goods purchased for firm & others on joint account—Goods returned for which bill of lading was in hands of holder of firm bill—Goods in hand of agent sent to collect firm debt after death.**]—A., B., C., & D. carried on business in partnership as "A., B. & Co." in London, &

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"C. D. & Co." in Rotterdam, until the death of B., when the business was carried on by A., C. & D. till A.'s bkpcy., which was followed by the bkpcy. of C. & D. Accounts were prepared of the assets of the partnership (a) after, & (b) before, the death of B., & a petition was presented by creditors of A., C. & D. to have the following items transferred from (b) to (a), on the ground that the property to which they related had been left in the order & disposition of the surviving partners. (1) Cotton had been purchased in the lifetime of B., on the joint account of A., B. & Co. & two other firms, in shares of one-third each. It had remained in the possession of one of the other firms up to the bkpcy. (2) Goods which had been sold in the lifetime of B. had been returned, & were at the docks at the bkpcy. The bill of lading was sent to the holder of a bill of exchange drawn on the partnership which was not accepted, & was in his hands at the bkpcy. (3) At the death of B. S. & Co. were indebted to the partnership. After B.'s death, A. as a surviving & sole acting partner, employed W. as his agent to recover the debt. Goods were consigned to W. in part liquidation of the debt, & were in W.'s possession at the bkpcy., & he claimed a lien on them for freight :—*Held :* none of the goods were in the order & disposition of the surviving partners.—*Re* CAMPBELL, *Ex p.* TAYLOR (1831), Mont. 240.

Annotation :—**Refd.** Wickham *v.* Wickham (1855), 2 K. & J. 478.

6737. Of continuing partner—Re-entry by retired partner.]—A., B., & C. being in partnership, A. retired, a balance being due to him, which B. & C. covenanted to pay by instalments, giving a power of re-entry to A., if any instalment were unpaid, & B. & C. were also to reassign the premises to A. on trusts for sale. Then B. retired, & C. alone continued the business; default was made in payment of an instalment, C. became bkpt., & A. re-entered :—*Held :* a debt originally due to A., B., & C. was not in the reputed ownership of C., & A. had a lien thereon.—*Re* STOKES, *Ex p.* PEMBERTON, *Re* STOKES, *Ex p.* HANCOX (1836), 2 Mont. & A. 548; 1 Deac. 421, Ct. of R.

Annotation :—**Refd.** *Re* Brewster, *Ex p.* Brewster & West (1853), 22 L. J. Bcy. 62.

See, generally, PARTNERSHIP.

SUB-SECT. 4.—"IN HIS TRADE OR BUSINESS."

Who is a trader.]—*See* Part I., Sect. 3, sub-sect. 1, *ante.*

6738. Bankrupt must have been trader—When in possession of goods.]—To bring a case within 21 Jac. 1, c. 19, s. 11, bkpt. must have been a trader, when he was in possession of the goods.—GORDON *v.* EAST INDIA CO. (1797), 7 Term Rep. 228; 101 E. R. 946.

Annotations :—**Refd.** Cooke *v.* Hemming (1868), L. R. 3 C. P. 334. **Mentd.** Lucas *v.* Dorrien (1817), 7 Taunt. 278.

6739. —— When assignment granted.]—W held forty shares in the S. office, but to be qualified as manager he required to hold fifty. He acquired ten others, but declared that he held sixteen in trust for T. & ten for N. W. becoming indebted to T. for £800, by deed charged his fifty shares with the payment of the £800 within three months, agreed on default to transfer them to T. to be sold & applied. The £800 being unpaid P. advanced that sum on the security of the shares, & took the deed from T. with an indorsement by him declaring same to be in trust for P. W. subsequently became bkpt. as a trader, & T.'s extrix. paid off P. & got back the assignment of the fifty shares. In an action by W.'s assignees against the extrix. :—*Held :* as the assignment was made before W. became a trader, 21 Jac. 1, c. 19, s. 11, did not apply, & the assignees' claim failed.—BANKS *v.* FARQUHARSON (1752), cited in 2 Ves. Jun. Supp., at p. 178; 34 E. R. 1047, L. C.

6740. —— Intention to carry on trade or business—Insufficient evidence.]—W. was the tenant of seventy-nine acres of land at a rental of £400 per annum, upon which land he resided, & was in the habit of selling the animal & vegetable produce of his holding. Previous to his bkpcy. he had executed a bill of sale upon the property in dispute, under which his wife had bought the whole, & executed a fresh bill of sale in favour of S. S. allowed the goods & chattels to remain in the possession of W., & upon the bkpcy. of W. the trustee claimed the goods & chattels as having been at the commencement of the bkpcy. in the possession, order, or disposition of bkpt. in his trade or business by the consent & permission of the true owner :—*Held :* the facts did not indicate a primary intention on the part of bkpt., when he took the property, to carry on a trade or business, & that primary intention was never changed sufficiently to bring the goods & chattels of bkpt. within the order & disposition of bkpt.—*Re* WALLIS, *Ex p.* SULLY (1885), 14 Q. B. D. 950; 52 L. T. 625; 33 W. R. 733; 2 Morr. 79.

6741. —— Acting as manager for wife.]—Certain furniture belonging to bkpt.'s wife was placed by her in a house carried on by her as a seaside lodging-house. Bkpt. had no proprietorship in the house, & acted only as his wife's manager, but the tenancy of the house was placed in his name by the desire of the solrs. for the landlord. Bkpt. filed his own petition, in which he described himself as a lodging-house keeper. On application by the official receiver as trustee in the bkpcy. for an order declaring that the furniture was in the reputed ownership of bkpt., the county ct. judge declined to allow the petition to be contradicted, or to receive evidence that the furniture & lodging-house business belonged to the wife, & he dismissed the application on the ground that bkpt. did not carry on a trade within 1883 Act, s. 44 :—*Held :* (1) the words of the above sect. included the case of a lodging-house keeper who did not supply his lodgers with board, & the county ct. judge was wrong in his decision on the ground upon which it was given; (2) the ct. having heard evidence which ought to have been admitted by the county ct. judge, could only come to the conclusion that the furniture was not in the reputed ownership of bkpt.—*Re* HARRISON, *Ex p.* OFFICIAL RECEIVER (1892), 67 L. T. 600; 57 J. P. 88; 9 T. L. R. 53; 10 Morr. 1; 5 R. 93, D. C.

6742. Articles not in their nature connected with bankrupt's business—Degree of proof required.]—When a trader is in possession at his place of business of articles not in their nature connected with his business, & the trustee in his bkpcy. claims the articles, on the ground that bkpt. was the reputed owner of them, much stronger evidence will be required to prove the reputed ownership than in the case of articles connected with the business, the inference from the nature of the

6742 i. *Articles not in their nature connected with bankrupt's business.*]—*Qu.:* whether a chattel left in the charge of a member of a firm, whose business is not with chattels of that nature, is in the reputed ownership of the firm.—IVERSON *v.* ROWLANDS (1886), 12 V. L. R. 57.—**AUS.**

articles being that they are not connected with the business.—*Re* MURRELL, *Ex p.* LOVERING (1883), 24 Ch. D. 31; 52 L. J. Ch. 951; 49 L. T. 242; 32 W. R. 217, C. A.

6743. —— Although mortgaged to secure trade account with bank.]—A., who carried on business as a stockbroker, silversmith, & watchmaker, deposited with his bankers certificates of thirty shares in a joint stock co. as security for the balance of his overdrawn account. A. was subsequently adjudged bkpt.:—*Held:* the shares were not at the commencement of the bkpcy. in the possession, order, or disposition of bkpt. in his trade or business, within 1883 Act, s. 44, which did not extend to property unconnected with bkpt.'s trade, although mortgaged to secure his trade account with his bankers.—*Re* JENKINSON, *Ex p.* NOTTINGHAM & NOTTINGHAMSHIRE BANK (1885), 15 Q. B. D. 441; 54 L. J. Q. B. 601; 2 Morr. 131, D. C.

Annotations:—**Consd.** Sharman *v.* Mason, [1899] 2 Q. B. 679, D. C. **Refd.** Colonial Bank *v.* Whinney (1886), 11 App. Cas. 426, H. L.; *Re* Harrison, *Ex p.* Official Receiver (1892), 67 L. T. 600, D. C.

6744. —— Must be in bankrupt's possession for purposes of or connected with his trade.]—In order to establish that goods were, at the commencement of the bkpcy., in the order or disposition of bkpt. in his trade or business, it is not necessary to show they were such as bkpt. could pledge or sell in the course of his business; it is enough to show that they were in his possession, order, or disposition for the purposes of, or purposes connected with, his trade or business.

In an action to recover possession of stands used in the business of a mantle-maker for the purpose of showing off to advantage the mantles in her shop, it was proved that the stands were in her possession with the consent of pltf., the true owner, that the mantle-maker subsequently became bkpt., & deft., her trustee in bkpcy., had removed them from her shop:—*Held:* there was evidence for the jury that the stands were goods in the possession, order, or disposition of bkpt., in her trade or business, by the consent & permission of the true owner, in such circumstances that she was the reputed owner thereof within 1883 Act, s. 44 (iii).—SHARMAN *v.* MASON, [1899] 2 Q. B. 679; 69 L. J. Q. B. 3; 81 L. T. 485; 48 W. R. 142; 16 T. L. R. 11; 44 Sol. Jo. 26; 7 Mans. 19, D. C.

Annotation:—**Consd. & Expld.** *Re* Watson, *Ex p.* Atkin, [1904] 2 K. B. 753, C. A.

6745. Deposit in course of business by one partner —Business carried on in partnership.]—Shares in a railway were purchased with the assets of a firm of stockbrokers, & registered in the name of B., one of the partners. B., in the course of business, & for the purposes of the firm, deposited the certificates of shares, with a transfer in blank executed by himself, with a bank to secure repayment of a loan, but no notice of the security was given to the railway co. until after both B. & his partner T. had committed acts of bkpcy., on which they were adjudicated bkpts., & after presentation of the petition on which they were adjudicated.

At the date of the bkpcy. some calls had been paid out of the assets of the firm, but other calls remained unpaid:—*Held:* the possession, order, or disposition of the shares was not in the business, & the bank were entitled to retain the shares as against the trustee.—COLONIAL BANK *v.* WHINNEY (1886), 11 App. Cas. 426; 56 L. J. Ch. 43; 55 L. T. 362; 34 W. R. 705; 2 T. L. R. 747; 3 Morr. 207, H. L.; *revsg.* (1885), 30 Ch. D. 261, C. A.

Annotations:—**Consd.** Sharman *v.* Mason, [1899] 2 Q. B. 679, D. C. **Refd.** Bradford Banking Co. *v.* Briggs (1886), 12 App. Cas. 29, H. L.; *Re* Harrison, *Ex p.* Official Receiver (1892), 10 Morr. 1; *Re* Goetz, Jonas, *Ex p.* Trustee (1898), 78 L. T. 399, C. A.; Hollinshead *v.* Egan, [1913] A. C. 564, H. L. **Mentd.** *Re* Jenkinson, *Ex p.* Nottingham & Nottinghamshire Bank (1885), 15 Q. B. D. 441, D. C.; Milnes *v.* Huddersfield Corpn. (1886), 11 App. Cas. 511, H. L.; Nanney *v.* Morgan (1887), 56 L. J. Ch. 805; Tennant *v.* Howatson (1888), 13 App. Cas. 489, P. C.; Torkington *v.* Magee (1902), 71 L. J. K. B. 712; Dawson *v.* Great Northern & City Ry. Co., [1904] 1 K. B. 277; Rainford *v.* Keith & Blackmore Co., [1905] 1 Ch. 296.

SUB-SECT. 5.—"BY THE CONSENT AND PERMISSION OF THE TRUE OWNER."

A. Sufficiency of Consent.

6746. Real relation of parties must be considered.]—In determining the question of the consent of the true owner the real relation of the parties must be taken into consideration.—*Re* WATSON & CO., *Ex p.* ATKIN BROTHERS, [1904] 2 K. B. 753; 73 L. J. K. B. 854; 91 L. T. 709; 20 T. L. R. 727; 48 Sol. Jo. 673; 11 Mans. 256, C. A.

Annotations:—**Apld.** *Re* Young, Hamilton, *Ex p.* Carter, [1905] 2 K. B. 381. **Refd.** Hollinshead *v.* Egan, [1913] A. C. 564 H. L.

6747. —— True owner living with bankrupt as wife—In ignorance of prior marriage.]—The goods of a woman married to & living with insolvent as his wife, he having a former wife living, do not pass to his assignees, although such goods were in his possession, if she was ignorant of the former marriage. But if she has allowed him the control & management of her property after discovery of the former marriage such property passes to the assignees.—MILLER *v.* DEMETZ (1835), 1 Mood. & R. 479, N. P.

6748. Knowledge of bankrupt's possession essential—Stock transferred to bankrupt mortgagor without knowledge of mortgagee.]—Stock standing in the Accountant-General's name was mortgaged to secure a debt. The Accountant-General transferred the stock to the mtgor. without the privity of the mtgee. The mtgor. then became bkpt.:—*Held:* the stock could not be claimed by the assignees, under 21 Jac. 1, c. 19, ss. 10 & 11, as it was not in the possession, order, & disposition of bkpt. with the consent of the true owner.—*Re* CHESHIRE, *Ex p.* RICHARDSON (1820), Buck, 480.

Annotations:—**Consd.** *Re* Severn, *Ex p.* Colvile (1831), 9 L. J. O. S. Ch. 56; Bartlett *v.* Bartlett (1857), 1 De G. & J. 127, L. JJ.; *Re* Rawbone's Trust (1857), 3 K. & J. 476. **Refd.** West *v.* Reid (1843), 2 Hare, 249.

6749. —— Property concealed by bankrupt in prior bankruptcy.]—Where the true owner has no knowledge, nor any means of knowing, of bkpt.'s reversionary interest, "consent" on his part cannot be predicated.

Where bkpt., upon the occasion of a previous insolvency, suppressed the circumstance of his being entitled to a reversionary interest, & excluded it from his schedule, & it did not appear that the assignee in insolvency had any knowledge or notice of that circumstance:—*Held:* the latter was entitled, notwithstanding his title had not been perfected by notice to the trustee, as in the circumstances there were no laches on his part. *Semble:* laches on his part would have been equivalent to "consent."—*Re* RAWBONE'S TRUST

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6747 i. *Real relation of parties must be considered—True owner living with bankrupt as wife.*]—W. living with bkpt. as his wife, though not married to him, owned furniture, which was in the house occupied by them both at the commencement of the bkpcy.:—*Held:* the furniture was divisible amongst the creditors in the bkpcy.—*Re* SMITH, *Ex p.* OFFICIAL ASSIGNEE (1895), 16 N. S. W. B. 110.—AUS.

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(1857), 3 K. & J. 476; 26 L. J. Ch. 588; 29 L. T. O. S. 326; 3 Jur. N. S. 837; 5 W. R. 796; 69 E. R. 1197.

Annotations:—**Follid.** Hensley *v.* Wills (1867), 16 L. T. 582. **Consd.** *Re* Caughey, *Ex p.* Ford (1876), 1 Ch. D. 521, C. A. **Refd.** Bartlett *v.* Bartlett (1857), 1 De G. & J. 127; Cooke *v.* Hemming (1868), L. R. 3 C. P. 334. **Mentd.** Joseph *v.* Webb, Joseph *v.* Lyons, Joseph *v.* Pidcock, Joseph *v.* Jones (1883), Cab. & El. 262.

6750. —— Presumed from consent.]—An undischarged liquidating debtor went into business again whereby he acquired property. He afterwards filed a second petition. The question being whether the property so acquired was in his order & disposition with the consent & permission of the true owner:—*Held:* the ct. might assume that the goods were really the property of the trustee in the first liquidation, & if the goods were in the order & disposition of debtor with the consent of the trustee in the first liquidation, they must have been so with his knowledge, for consent presupposed knowledge.

The words used in [1869] Act are "consent & permission." Those words imply knowledge. You cannot consent to a thing unless you have knowledge of it. It is impossible to suppose that these words do not imply that the true owner has at least a knowledge of the events which happened, but they imply something more; there must be a voluntary allowance on the part of the true owner of that mode of dealing with the property (JESSEL, M.R.).—*Re* CAUGHEY, *Ex p.* FORD (1876), 1 Ch. D. 521; 45 L. J. Bcy. 96; 34 L. T. 634; 24 W. R. 590, C. A.

Annotations:—**Consd. & Follid.** *Re* Clark, *Ex p.* Beardmore, [1894] 2 Q. B. 393, C. A. **Refd.** Meggy *v.* Imperial Discount Co. (1878), 3 Q. B. D. 711, C. A.; Hunt *v.* Fripp, [1898] 1 Ch. 675. **Mentd.** *Re* Winn, *Ex p.* Russell (1876), 2 Ch. D. 424; Joseph *v.* Webb, Joseph *v.* Lyons, Joseph *v.* Pidcock, Joseph *v.* Jones (1883), Cab. & El. 262.

See 1914 Act, s. 39.

6751. Must be given intra vires.]—Testator who owned machinery used in his partnership business, authorised his three trustees, one of whom was his partner, to continue the business either alone or in conjunction with other persons. Two of the trustees continued the business & became bkpt. The other took no part in the business, but was aware that it was being continued. The machinery remained in specie:—*Held:* the creditors of the new firm were not entitled to the machinery on the ground that it had remained in their order & disposition with the consent of the creditors of the old firm, the carrying on of the trade by two trustees only being unauthorised.—*Re* MELLOR, *Ex p.* BUTCHER (1880), 13 Ch. D. 465; 42 L. T. 299; 28 W. R. 484, C. A.

Annotation:—**Mentd.** *Re* Daniel (1896), 3 Mans. 312, D. C.

6752. Delivery to bankrupt by mistake of carrier —After notice stopping goods in transitu.]—If a carrier, after notice from the vendor of goods to stop them *in transitu*, by mistake delivers them to the vendee, & the vendee having become a bkpt., the goods pass into the hands of his assignees, yet, inasmuch as they did not come to the possession of bkpt. with the consent of the true owner, they are not in the order & disposition of bkpt. within 21 Jac. 1, c. 19, s. 11.—LITT *v.* COWLEY (1816), Holt, N. P. 338; 2 Marsh. 457; 7 Taunt. 169; 129 E. R. 68.

Annotations:—**Refd.** Whitehead *v.* Hunt (1842), 9 M. & W. 518. **Mentd.** Clay *v.* Harrison (1829), 5 Man. & Ry. K. B. 17; Booth S.S. Co. *v.* Cargo Fleet Iron Co., [1916] 2 K. B. 570, C. A.

6753. Possession retained by bankrupt vendor—Property sold under execution.]—Though the purchaser of goods under an execution permits the party to whom they belonged to retain the possession, on condition that such party will repay such purchaser as he shall raise the money by the sale of the goods, such permission will not entitle the assignees of such party, if he becomes a bkpt., to the goods.—COLE *v.* DAVIES (1699), 1 Ld. Raym. 724; 91 E. R. 1383, N. P.

Annotations:—**Distd.** Ryall *v.* Rolle (1749), 1 Atk. 165, L. C. **Dbtd.** Cooper *v.* Chitty (1756), 1 Burr. 20, L. C. **Consd.** Balme *v.* Hutton (1833), 9 Bing. 471, Ex. Ch.; Garland *v.* Carlisle (1837), 11 Bli. N. S. 421, H. L. **Refd.** Brassey *v.* Dawson (1733), Cunn. 65. **Mentd.** Isitt *v.* Beeston (1869), 38 L. J. Ex. 89; Gladstone *v.* Padwick (1871), L. R. 6 Exch. 203.

6754. —— Property sold not fit to remove—Hay.]—Deft. bought hay of a farmer & left it on the farm, it not being fit to remove. The farmer's bkpcy. occurring before it was fit to remove, deft. then agreed with the assignees to take their interest in the farm & stock at a valuation. The hay was, without his knowledge, included in the valuation. In an action by the assignees for the amount:—*Held:* it was not a case of reputed ownership, & if included in the valuation by error, they were not entitled to recover.—PENNELL *v.* FOX (1859), 1 F. & F. 617, N. P.

6755. Key of locked box kept by true owner.]—Pltf. left his chest of plate with his father for safe custody, but kept the key. The father sent the chest to be kept by his banker. The father on being told by the banker that he had overdrawn his account, pointed to the chest & another, in which were his deeds, & which was also in the custody of the banker, & said, "You have plenty of security there." He subsequently assigned his property to deft. for the benefit of his creditors, & deft. obtained the plate from the banker on paying his claim on the overdrawn account:—*Held:* the plate was not in the possession, order, or disposition of the father as reputed owner, as the banker held it with a lien, &, if it were in the possession of the father, it was not with the consent of the son, who kept the key.—WEBB *v.* WHINNEY (1868), 18 L. T. 523; 16 W. R. 973.

Annotations:—**Refd.** *Re* Symons (1869), 17 W. R. 1040; Lincoln Waggon & Engine Co. *v.* Mumford (1879), 41 L. T. 655.

6756. Consent to change of possession—From firm to continuing partner.]—Two partners mortgaged their loose chattels. The mtge. was not registered as a bill of sale. The partnership was dissolved & the business was carried on by one partner alone. The outgoing partner executed an assignment of his half share in the mortgaged property to the continuing partner, subject to the mtge. The continuing partner afterwards filed a petition. At the date of the filing of the petition the mortgaged property was in his sole possession. The retiring partner remained solvent. The mtgee. had not demanded possession, but there was no evidence of his actual consent to the change of possession:—*Held:* the loose chattels, passed by virtue of the reputed ownership clause to the trustee.—*Re* REED, *Ex p.* BROWN (1876), 9 Ch. D. 389; 48 L. J. Bcy. 10; 39 L. T. 338; 27 W. R. 219, C. A.

Annotation:—**Mentd.** Paine *v.* Matthews (1885), 53 L. T. 872, D. C.

6757. "True owner"—Person entitled to take out administration—As creditor of deceased.]—A person, entitled to take out letters of administra-

6758 i. "*True owner*"—*Person entitled to take out administration—As one of next of kin.*]—A widow, who had not obtained letters of administration, mortgaged the goods of deceased to G. H., her son, & G. allowed the goods to remain in her possession. She became insolvent, & after the insolvency letters of administration were taken out by H. The official assignee seized the goods:—*Held:* the goods were not in the order & disposition of insolvent

tion, neglected to do so, but remained in possession of the goods of intestate, &, being so in possession, became a bkpt. A creditor of intestate afterwards took out letters of administration, & claimed the goods from the assignees:—*Held:* the goods were property in the possession, order, & disposition of bkpt., with the consent of the true owner.—FOX *v.* FISHER (1819), 3 B. & Ald. 135; 106 E. R. 612.

Annotations:—**Consd.** Cooper *v.* De Tastet (1833), 2 Moo. & S. 714. **Foll.** *Re* Thomas (1842), 1 Ph. 159, L. C. **Distd.** *Re* Marshall, *Ex p.* Zwilchenbart (1844), 3 Mont. D. & De G. 671, Ct. of R. **Apld.** Kitchen *v.* Ibbetson (1873), L. R. 7 Eq. 46.

6758. —— —— As one of next-of-kin.]—An innkeeper, a widow, having died intestate, two of her children, a son & daughter, took possession of her furniture & stock-in-trade, & carried on her business in their own names for two years after her death, during which time they paid her funeral expenses & some of her debts, but without taking out administration to her estate, & at the end of that time became bkpts., the daughter having a few months previously retired from the business, & sold her share of it to the son. Another of the children then took out administration to intestate, & claimed that part of her furniture & stock-in-trade which still remained in specie:—*Held:* it belonged to the assignees, as having been in the order & disposition of the son at the time of his bkpcy.—*Re* THOMAS, *Ex p.* THOMAS (1842), 3 Mont. D. & De G. 40; 1 Ph. 159; 12 L. J. Ch. 59; 6 Jur. 979; 41 E. R. 591, L. C.

Annotations:—**Refd.** *Re* Marshall, *Ex p.* Zwilchenbart (1844), 3 Mont. D. & De G. 671, Ct. of R.; *Re* Marshall, *Re* Marshall & Rogers (1846), De G. 273, L. C.

6759. —— Settled property—Trustee for sale on behalf of infants.]—A trustee for sale of a brewery & plant, the *cestuis que trust* being infants, let the purchaser into possession. The purchaser became bkpt.:—*Held:* the plant was in his order & disposition, & passed to his assignees without being subject to a lien for the purchase-money.

By the true owner is to be intended the person who has the legal right to the possession & the power of dealing with the property, & such a person was this trustee (*per* CUR.).—*Re* BARKER, *Ex p.* DALE (1819), Buck, 365.

Annotations:—**Distd.** *Re* Stokes, *Ex p.* Pemberton, *Re* Stokes, *Ex p.* Hancox (1835), 1 Deac. 421, Ct. of R. **Mentd.** *Re* Walsh, *Ex p.* King (1840), 4 Jur. 510, Ct. of R.

6760. —— —— Trustee declining to act.]—Where trustees named in a settlement of property of a person, who afterwards becomes bkpt., have never executed or had any knowledge thereof, or decline the trusts, the beneficiaries, & not the trustees, are the "true owners" for the purpose of giving consent & permission to the property being in the order or disposition of bkpt. as reputed owner at his bkpcy., so as to render the property available for his creditors.—*Re* MILLS' TRUSTS, [1895] 2 Ch. 564; 64 L. J. Ch. 708; 73 L. T. 229; 44 W. R. 21; 39 Sol. Jo. 721; 2 Mans. 479; 12 R. 568, C. A.

6761. —— Person permitted by true owner to deal with goods as his own.]—A mtgee. of coal mines & boats permitted the mtgor. to remain in possession. The mtgor. subsequently sold the boats to M., & while in the possession of M. they were seised by a canal co. for tolls. M. became bkpt. after the seizure:—*Held:* the boats were not in his possession by the consent of the true owner, it not being sufficient that they were in his order & disposition with the consent of a party who was permitted by the true owner to deal with them as his own, but the consent must move directly from the true owner to bkpt.—FRASER *v.* SWANSEA CANAL NAVIGATION (1834), 1 Ad. & El. 354; 3 Nev. & M. K. B. 391; 3 L. J. K. B. 153; 110 E. R. 1241.

Annotation:—**Refd.** Edmands *v.* Best (1862), 7 L. T. 279.

6762. —— Vendor entitled to avoid fraudulent purchase.]—A. bought goods from B. with the fraudulent intention of never paying for them, & kept them until his bkpcy.:—*Held:* they did not pass to A.'s assignees under the fiat, as having been in his possession, order, & disposition as the reputed owner thereof, with the consent of the true owner.—LOAD *v.* GREEN (1846), 15 M. & W. 216; 15 L. J. Ex. 113; 7 L. T. O. S. 114; 10 Jur. 163; 153 E. R. 828.

Annotations:—**Consd.** *Re* Gawan, *Ex p.* Barclay (1855), 5 De G. M. & G. 403, L. C. & L. JJ.; *Re* Rawbone's Trust (1857), 3 K. & J. 476. **Apld.** Smith *v.* Hudson (1865), 6 B. & S. 431. **Consd.** Reynolds *v.* Bowley (1867), L. R. 2 Q. B. 474, Ex. Ch.; *Re* Webber, *Ex p.* Slater (1891), 64 L. T. 426; *Re* Watson, *Ex p.* Atkin, [1904] 2 K. B. 753, C. A. **Refd.** Belcher *v.* Bellamy (1848), 2 Exch. 303; Stevenson *v.* Newnham (1853), 13 C. B. 285, Ex. Ch.; *Re* Shackleton, *Ex p.* Whittaker (1875), 10 Ch. App. 447, n.; Rutter *v.* Everett, [1895] 2 Ch. 872. **Mentd.** White *v.* Garden (1851), 10 C. B. 919; Kingsford *v.* Merry (1856), 11 Exch. 577; Higgins *v.* Burton (1857), 29 L. T. O. S. 165; Biddle *v.* Bond (1865), 5 New Rep. 485; Lindsay *v.* Cundy (1876), 34 L. T. 314.

6763. —— Must be sui juris.]—To give consent as "true owner," within 1883 Act, s. 44 (iii), the owner must be *sui juris*.—*Re* MILLS' TRUSTS, [1895] 2 Ch. 564; 64 L. J. Ch. 708; 73 L. T. 229; 44 W. R. 21; 39 Sol. Jo. 721; 2 Mans. 479; 12 R. 568, C. A.

6764. —— Retiring partner to whom share of firm debt has been assigned.]—C. & S. traded in

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with the consent of the true owners.—HASKNESS *v.* SEMPILL (1878), 1 N. S. W. S. C. R. N. S. 151.—**AUS.**

6759 i. —— *Settled property.*]—A husband devised & bequeathed to his wife & their children all his real & personal estate for their use & benefit, but should his wife marry again, the second husband to have no power to mtge., sell, or make away with any of the property, & after the death of his wife, then all the estate, both real & personal to be sold, & the money to be equally divided between his children. The wife married again, & her second husband dealt with the property as his own, selling the land & wool, the produce of the sheep bequeathed, in his own name. He then, while so in possession of the property, became insolvent, & his estate was sequestrated:—*Held:* the goods & chattels of the wife so in possession of her husband were not in his possession by consent of the true owner & his official assignee could not sell them.—HINTON *v.* MILLER (1876), 14 N. S. W. S. C. R. 403.—**AUS.**

a. —— *Charged-holder.*]—A charged-holder is as much the substantial owner of, & has as substantial an interest in, the goods & chattels as a mtgee. thereof, & if either allows the mtgor. or the person creating the charge to remain in possession, in circumstances which will lead to his being the reputed owner & to his being enabled to command credit thereby, he will be estopped from asserting his substantial interest or ownership in the property as against the official assignee.—PUNINTHAVELU MUDALIAR *v.* BHASHYAM AYYANGAR (1901), I. L. R. 25 Mad. 406.—**IND.**

b. —— *Person beneficially interested.*]—H., an insolvent, being indebted to T., deposited with her certificates of shares in a co. T. afterwards assessed the value of the shares & proved for the balance of the debt against H.'s estate. H. had, after the deposit, continued to receive the dividends of the shares, & to vote at meetings of the shareholders:—*Held:* the term "true owner" in 5 Vict. No. 17, s. 55, indicated the person beneficially interested, & T. had forfeited her right to the shares by allowing the order & disposition of the shares to remain in insolvent, as reputed owner.—*Re* HUGHES, *Ex p.* TERRY (1845), 1 Legge, 265.—**AUS.**

d. —— *Real property purchased by persons unable to be registered—Conveyance to bankrupt—Agreement between bankrupt & purchasers as to ownership.*]—Two Asiatics purchased immovable property, &, owing to their disqualification from becoming registered owners under law 3 of 1885, had the transfer passed to L. in his private capacity, but under an unregistered agreement between them & L., whereby L. agreed to hold the property for them. Thereafter L. became insolvent, & the property was expropriated & £2,000 awarded as compensation. The Asiatics had always occupied the property under lease from L., & had executed certain improvements:—*Held:* the *dominium* of the property had passed to L., & on his

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partnership, & in the course of business lent money to R. In 1894 the partnership was dissolved by deed, whereby the assets of the partnership were assigned to C., who agreed to pay over to S. one-fifth part of any money which he might receive from R. in respect of R.'s debt to the firm. In 1898 C. became bkpt. S. gave no notice to R. of his interest in the debt due from R. to the firm under his agreement with C. In 1900 the trustee in C.'s bkpcy. received from R. £150 in settlement of R.'s debt. S. claimed to recover one-fifth of the sum from the trustee:—*Held:* S. was the "true owner" of the share assigned to him.—*Re* CROUCH, *Ex p.* SMITH (1901), 83 L. T. 746.

6765. —— Landlord under building agreement —In which all plant to be "deemed to be annexed to freehold."]—A builder entered into a building agreement, which provided that all the materials & plant brought upon the ground should "be deemed to be annexed to the freehold":—*Held:* the plant & materials on the land at the date of the commencement of the bkpcy. were in the order & disposition of bkpt., with the consent of the freeholder, who was the true owner, & passed to the trustee in the bkpcy.—*Re* WEIBKING, *Ex p.* WARD, [1902] 1 K. B. 713; 71 L. J. K. B. 389; 86 L. T. 455; 50 W. R. 460; 9 Mans. 131.

6766. —— Need not be expressly stated in order.]—An order of the Bkpcy. Ct. stated that "J. (bkpt.) had at the time he became bkpt. by the consent of R. (the owner), who then claimed & still claims to be the true owner thereof, in his, J.'s possession, order, & disposition," etc.:—*Held:* the order was good, although it did not state in express terms that R. was the true owner.—HESLOP *v.* BAKER (1853), 8 Exch. 411; 22 L. J. Ex. 333; 20 L. T. O. S. 191; 17 J. P. 136; 155 E. R. 1408.

Annotations:—**Follid.** Fielding *v.* Lee (1865), 18 C. B. N. S. 499. **Refd.** Cooke *v.* Hemming (1868), L. R. 3 C. P. 334.

B. Withdrawal or Determination of Consent.

6767. Demand for possession—Fractions of day taken into account.]—The ct. will regard the fraction of a day in notices to prevent reputed ownership, & a notice given prior to the act of bkpcy. on the same day is sufficient.—*Re* NEWTON, *Ex p.* BIGNOLD (1836), 2 Deac. 66; 3 Mont. & A. 9; 6 L. J. Bcy. 65, Ct. of R.

6768. —— Before bankruptcy.]—A chariot was built to pltf.'s order, & paid for by him. When finished in other respects, pltf. ordered a front seat to be added, but the builder being slow in making the addition, pltf. sent for the chariot repeatedly, & the builder promised to deliver it. Pltf. being afterwards dissatisfied, ordered the chariot to be sold, & while it was, according to the custom of the trade, standing in the builder's warehouse for that purpose, the front seat not having been added, the builder became a bkpt.:—*Held:* the chariot did not pass to the assignee as being in the order & disposition of bkpt. with the consent of the owner.—CARRUTHERS *v.* PAYNE (1828), 5 Bing. 270; 2 Moo. & P. 429; 7 L. J. O. S. C. P. 84; 130 E. R. 1065.

Annotations:—**Refd.** Clarke *v.* Spence (1836), 4 Ad. & El. 448. **Mentd.** Edge *v.* Parker (1828), 8 B. & C. 697; Worth *v.* Budd (1831), 9 L. J. O. S. K. B. 237; Knight *v.* Turquand (1836), 2 Gale, 187.

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insolvency had vested in his trustee for the benefit of the estate, & not for the Asiatics only.—LUCAS, TRUSTEE *v.* ISMAIL (1905), T. S. 239.—**S. AF.**

e. *Possession taken by trustee of marriage settlement—No objection by true owner.*]—Where the owner of chattel property, & of an establishment where he carried on his business, left the country without giving any directions as to his affairs, or making any provision for his wife, & one of the trustees of her marriage settlement took possession of chattels, the subject of the settlement, & paid the wife a weekly sum for their hire, with the consent of co-trustees, & they so remained with him to his bkpcy.:—*Held:* they were in his order & disposition, & the true owner could not claim them as he knew of the arrangement, but did not remonstrate against it.—*Re* MURRAY (1864), 16 Ir. Jur. 98.—**IR.**

f. *Possession retained by bankrupt by false & fraudulent excuses.*]—B., having borrowed £500 from W., agreed to insure his life for that amount, & assign the policy to W. as security. He took out a policy, but did not deliver it to W., & afterwards, being pressed for it, he stated that he had mislaid it, but gave W. a receipt for a premium, with an indorsement signed by him, to the effect that he assigned the policy to W. by way of security:—*Held:* assuming the doctrine of reputed ownership applicable, it could not be resorted to by the official assignee in the circumstances, as the policy was not in B.'s possession by the consent & permission of the true owner, B. having engaged to deliver it to W., & having evaded performance of his engagement by false & fraudulent excuses calculated to deceive, & which did deceive W.—*Re* LOWTHER BROAD'S ESTATE, *Ex p.* WELDON (1893), 12 N. Z. L. R. 666.—**N.Z.**

PART XX. SECT. 9, SUB-SECT. 5.—B.

6768 i. *Demand for possession—Before bankruptcy.*]—The furniture of a hotel was lent on hire by A. to B., on the agreement that, upon payment of certain instalments it was to belong to B., but until such payment it should continue the absolute property of A., who, on default of payment of any instalment, might resume the possession. A. demanded possession of the goods on Oct. 1, B. having made default in payment of an instalment, which became due on Sept. 9, & having taken steps to file a petition of arrangement. B. filed a petition for arrangement on Oct. 2. A. again demanded possession on Oct. 22, but was refused. The arrangement proceedings were turned into bkpcy. on Oct. 28, up to which time the goods remained in the possession of B., as reputed owner:—*Held:* the goods did not pass to B.'s assignees, as, A. having previously demanded possession, it was not with his consent & permission that they remained in B.'s possession, at the time of the arrangement proceedings being turned into bkpcy.—*Re* SMITH, *Ex p.* HARPUR (1874), 9 I. L. T. 52.—**IR.**

6768 ii. —— —— *Further time for payment granted.*]—In 1883 B. mortgaged furniture to D. The mtge.-deed provided that until default the mtgor. should have free use of the mortgaged property, that the mtgee. should be at liberty to place a durwan in charge of the furniture, & that on default by the mtgor. the mtgee. should have power to enter the premises & deal with the goods as his own. A durwan was placed in charge, & in Jan. 1884 the mtgor. defaulted & was pressed for payment at different times previous to Aug. On Aug. 1, the mtgee. sent to the premises people for the purpose of cataloguing the furniture. Admittance into the house was refused to them by B., although they were admitted into the compound by the durwan of the mtgee. At about that date B. asked for further time for payment, which was granted. On Aug. 6, B. filed his petition in insolvency:—*Held:* on Aug. 6 the furniture was not in the possession, order, or disposition of B. as reputed owner with the consent of the true owner, & the fact that further time for payment was granted had not the effect of a fresh consent on the part of the mtgee. to the goods being in the possession of B. as reputed owner.—*Re* BROWN (1886), I. L. R. 12 Calc. 629.—**IND.**

6768 iii. —— *Before act of bankruptcy.*]—B. having made default in the payment of the instalments due under a hire purchase agreement of an engine, on Oct. 19 the owner wrote him demanding the return of the engine. On the following Nov. 2 B. committed an act of bkpcy. The owner of the engine, not having received any reply to his demand for its return, sent his agent on Nov. 2 to take possession of it:—*Held:* as the owner had *bonâ fide* demanded possession of the engine on Oct. 19, before the commencement of the bkpcy. of B., & had within a reasonable time after his demand taken steps to obtain possession, the engine was not at the date of the commencement of the bkpcy. in the possession of bkpt. with the consent of the true owner.—CAMPBELL *v.* BUCKMAN'S OFFICIAL ASSIGNEE (1909), 28 N. Z. L. R. 875.—**N.Z.**

6768 iv. —— —— *Possession obtained after act of bankruptcy.*]—B., the holder of a registered bill of sale on the furniture in W.'s hotel, demanded possession on Feb. 2. On Feb. 3 W. left the country, & on attending at the office of the solrs., B. was advised by them to take possession, which he did forthwith. On Mar. 9 W. was adjudged bkpt. on the act of bkpcy. committed in leaving the country on Feb. 3:—*Held:* the demand of possession of the goods made by B. was, in the circumstances, insufficient to negative his consent to their remaining in the order & disposition of W.—*Re* WALSHE, *Ex p.* BRUNKER (1878), 12 I. L. T. 87.—**IR.**

6769. —— ——.]—A merchant in France employed debtor in England to sell wines on commission, & to purchase wines on his account, for which he provided letters of credit. The wines were generally bought & sold by debtor in his own name. Part of the wines were at the docks in debtor's name, & part formed one indiscriminate stock in debtor's cellar. The merchant required debtor to deliver up all his wines, debtor neglected to comply & became bkpt. :—*Held :* the wines were not in the order & disposition of bkpt., & those which were consigned to debtor or purchased with the merchant's money must be delivered up. —*Re* HUNTER, *Ex p.* MOLDAUT (1833), 3 Deac. & Ch. 351, Ct. of R.

6770. —— ——.]—B. was the sole registered proprietor of certain newspapers published by him on premises, of which he was the rated occupier, & he was the owner of the type & plant used in the publication. He mortgaged the newspapers, type, & plant to F., who took no steps to alter the registration of proprietorship. The sheriff entered under an execution issued by a creditor of B. &, though possession was demanded by F., remained in possession till B. had become bkpt., which took place after two days :—*Held :* the type & plant were not within the order & disposition of bkpt., at the time of his bkpcy., with the consent of the true owner.—*Re* BALDWIN, *Ex p.* FOSS, *Ex p.* BALDWIN (1858), 2 De G. & J. 230 ; 27 L. J. Bcy. 17 ; 31 L. T. O. S. 30 ; 4 Jur. N. S. 522 ; 6 W. R. 417 ; 44 E. R. 977, L. JJ.

Annotations :—**Consd.** *Re* Cuthbertson, *Ex p.* Edey (1875) L. R. 19 Eq. 264. **Mentd.** Platt *v.* Walter (1867), 17 L. T. 157, L. C. ; Kelly *v.* Hutton (1868), 3 Ch. App. 703, L. JJ.

6771. —— ——.]—M., a warehouseman, borrowed £700 of pltf., & gave bills of exchange for the amount, & at the same time delivered to pltf. a warehouse warrant in the following form : "13th Jan. Warehouse warrant for 16,000. Archangel cargo mats, now lying in my warehouse, which I will deliver to the order of H. only, or hold on his account" ; & also another document of the same date, purporting to give pltf. a general lien on the mats, with a discretionary power to sell them for pltf.'s benefit. On Mar. 4 M. committed an act of bkpcy., the mats being still in his warehouse, but on Feb. 19, & on several occasions between that date & Mar. 4, pltf. had demanded possession. On Mar. 16 M. was adjudicated a bkpt., & his assignee claimed the goods :—*Held :* there had been a complete transfer of the property to pltf., & after pltf.'s demand on Feb. 19, there had been no consent on his part to the goods remaining in bkpt.'s possession, & pltf. was entitled to judgment.—HORNCASTLE *v.* THOMPSON (1867), 16 L. T. 774.

6772. —— —— **By clerk.**]—Where the true owner had permitted his goods to remain in the order & disposition of A. until the day before he became bkpt., & then demanded the possession of them, which A. refused to deliver :—*Held :* (1) a clerk, who transacted the true owner's business, but did not accept bills or sell goods for him, had sufficient authority to make such demand ; (2) they did not pass to A.'s assignees.—SMITH *v.* TOPPING (1833), 5 B. & Ad. 674 ; 2 Nev. & M. K. B. 421 ; 3 L. J. K. B. 47 ; 110 E. R. 939.

Annotations :—**Apld.** *Re* Couston, *Ex p.* Ward (1872), 8 Ch. App. 144, L. JJ. **Consd.** Rutter *v.* Everett, [1895] 2 Ch. 872. **Refd.** Fawcett *v.* Fearne (1844), 6 Q. B. 20 ; Price *v.* Groom (1848), 2 Exch. 542 ; *Re* Rawbone's Trust (1857), 3 K. & J. 476 ; Reynolds *v.* Hall (1859), 28 L. J. Ex. 257 ; Sacker *v.* Chidley (1865), 11 Jur. N. S. 654.

6773. —— —— **Possession obtained after bankruptcy.**]—A., a factor & warehouse keeper, by letter of hypothecation pledged to B. wools to secure a sum of money. No delivery of the warrants for the wools was made, but a promise to deliver them on the following morning was added at the foot of the letter. After being pressed daily to deliver the warrants, A. absconded. B. thereupon obtained from A.'s clerk the keys of the warehouses & possession of the wools. A. was adjudicated bkpt. :—*Held :* the goods were not in the order & disposition of bkpt., & B. had a good title against the trustee in bkpcy.—*Re* SLEE, *Ex p.* NORTH WESTERN BANK (1872), L. R. 15 Eq. 69 ; 42 L. J. Bcy. 6 ; 27 L. T. 461 ; 21 W. R. 69.

Annotations :—**Distd.** *Re* Steele, *Ex p.* Conning (1873), L. R. 16 Eq. 414. **Consd.** *Re* Hamilton, Young, *Ex p.* Carter, [1905] 2 K. B. 772, C. A. **Mentd.** Reeves *v.* Barlow (1883), 11 Q. B. D. 610 ; *Re* Hall, *Ex p.* Close (1884), 14 Q. B. D. 386.

6774. —— —— **Property in hands of warehouseman—To whom no notice given.**]—In Dec., 1870, W. bought from C. whisky in bond, to remain in bond to C.'s order rent free for twelve months, after which warehouse rent was to be paid. In Mar., 1871, the price was paid. On Feb. 19, 1872, W. wrote to C., directing him to forward a specified hogshead of the whisky, & enclosing a cheque of sufficient amount to pay duty & clear the whisky. On the 26th C. filed a petition for liquidation, having retained the cheque, but not paid the duty nor in any way complied with W.'s directions. At the time of sale the whisky had been all carried to W.'s credit in C.'s books, but had throughout been lying to C.'s order at a dock warehouse :—*Held :* the hogshead did not pass to the trustee in liquidation as being within C.'s order & disposition, as the consent of the true owner had been determined by the demand of possession, though no notice had been given to the warehouseman.—*Re* COUSTON, *Ex p.* WARD (1872), 8 Ch. App. 144 ; 42 L. J. Bcy. 17 ; 27 L. T. 502 ; 21 W. R. 115 L. JJ.

Annotation :—**Consd.** Rutter *v.* Everett, [1895] 2 Ch. 872.

6775. —— —— —— **Who delivers to bankrupt before notice of delivery order.**]—Debtor gave his bankers a memorandum of lien on oil at a warehouse to secure an advance, which memorandum gave them authority to dispose of the oil & place the proceeds to his credit. At the same time he gave the bankers a written request addressed to the warehouse keeper to transfer the oil to the bankers. The order was presented on the afternoon of the following day, but in the morning of that day the oil had been delivered to debtor, & mixed with other oil in his warehouse. Debtor became bkpt. :—*Held :* the oil was not in the possession of bkpt. with the consent of the true owners.—*Re* TUNSTALL & CASH, *Ex p* BELL (1847), De G. 577 ; 17 L. J. Bcy. 9 ; 10 L. T. O. S. 139 ; 11 Jur. 986.

6776. —— **After but without notice of act of bankruptcy.**]—Goods had been in the order & disposition of a bkpt. with the consent of the owner, who shortly before the bkpcy. had made application that the goods might be given up, notwithstanding which they remained in the order & disposition of bkpt. :—*Held :* though an act of bkpcy. might have been committed previously to the demand the owner, not having had notice, was entitled to the goods.—*Re* PRITCHARD, *Ex p.* KNOWLYS (1852), Fonbl. 238.

6777. —— ——.]—Debtor on the eve of insolvency being pressed for payment by a creditor, wrote a letter purporting to transfer to him coal lying at his wharf, the proceeds of which he agreed to hand over to the creditor till his debt was discharged. The next day the creditor, not having

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heard of the filing of the petition, but suspecting that debtor was insolvent, made a formal demand for the coal, & sent a man to take possession of it, who was forcibly ejected by debtor. On the following day debtor filed a petition:—*Held:* although it was intended by the parties that the coal should remain in the possession of debtor, yet the creditor had a right to demand possession of it if he suspected the insolvency of debtor, & when that was done it ceased to be in the order & disposition of debtor with the consent of the true owner.—*Re* O'BRIEN, *Ex p.* MONTAGU (1876), 1 Ch. D. 554; 34 L. T. 197; 24 W. R. 309, C. A.

6778. —— **After notice of act of bankruptcy.**]—W., a trader, by bill of sale, dated July 14, 1856, assigned all his stock & household furniture to pltf. as security for an advance of £100. The deed contained a proviso that, in case W., his exors., etc., should pay to pltf., his exors., etc., the £100 on July 14, 1866, or at such earlier day or time as pltf., his exors., etc., should appoint for payment thereof in & by a notice in writing given to W., his exors., etc., twenty-four hours before the day or time so to be appointed for payment, & should in the meantime pay the interest half-yearly to pltf., his exors., etc., the deed should cease & be void. There was also a covenant by W. for payment of the £100 & interest, & a further proviso that, until default should have been made in payment of the £100 at the day appointed for payment, or of the interest, after notice, it should be lawful for W., his exors., etc., to hold, make use of, & possess the goods assigned, without any hindrance or disturbance by pltf., his exors., etc. W. continued in possession of the goods until Jan. 19, 1862, when he committed an act of bkpcy. On the 21st, pltf., having heard of that, left at his dwelling-house a notice in writing requiring payment of the £100 & interest on the 23rd. On the 22nd, W. was adjudicated a bkpt.:—*Held:* the goods passed to the assignees of W., as goods in his possession, order, & disposition, at the time of the bkpcy., with the consent of the true owner, within 1849 Act, s. 125.—SPACKMAN *v.* MILLER (1862), 12 C. B. N. S. 659; 31 L. J. C. P. 309; 9 Jur. N. S. 50; 142 E. R. 1301.

Annotations:—**Folld.** *Re* Ginger, *Ex p.* London & Universal Bank, [1897] 2 Q. B. 461, D. C.; Hollinshead *v.* Egan, [1913] A. C. 564, H. L.

6779. —— **After bankruptcy.**]—Bkpt., before his bkpcy., on behalf of an unnamed principal (deft.) took in exchange a quantity of timber, to be delivered free on board, & at the same time bought other timber of the same party on his own account. The timber was delivered to bkpt., & lay, till after the bkpcy., on a common, mixed with other timber of bkpt., & in his actual possession. Deft., after the bkpcy., but more than two months before the commission issued, wrote to the vendor, stating himself to be the principal, adopting the contract as to the goods taken in exchange, but no others, & directing that bkpt. should not be suffered to take them, & the vendor accepted him as purchaser. Before the commencement of the two months deft. had required bkpt. to deliver the timber belonging to him (deft.), & bkpt. had proposed to make up a deficiency in the quantity by delivering some of his own timber, but no contract of sale was made as to the latter, nor did anything further pass respecting the timber till two months before the commission, when bkpt. made a formal delivery to deft. of part of the sold & part of the exchanged timber, lying on the common, & the whole of the timber belonging to deft. was in the order, possession, & disposition of bkpt., with the consent of the true owner, till after the bkpcy.:—*Held:* there was a delivery of the timber to bkpt., though it was not shipped, & the timber remained in bkpt.'s apparent possession, with the owner's consent, up to the time of the delivery.—SHAW *v.* HARVEY (1834), 1 Ad. & El. 920; 3 L. J. K. B. 106; 110 E. R. 1460.

6780. —— ——.]—A piano, which bkpt.'s father-in-law had lent to his daughter, remained in bkpt.'s house for three or four years, when it was seized by the sheriff under a *fi. fa.*, but not removed by him. The sheriff remained in possession until after the bkpcy., which occurred a few days after:—*Held:* it passed to the assignee as being in the reputed ownership of bkpt. at the time of the bkpcy. with the consent of the true owner, he not having claimed it until after that event.—*Re* ROUSE, *Ex p.* THE ASSIGNEES (1865), 13 L. T. 337; *sub nom. Re* ROUSE, *Ex p.* LAMB, 14 W. R. 112.

6781. **Intention to demand possession—Possession obtained after notice of act of bankruptcy.**]—The true owner of goods under a bill of sale permitted them to remain in the order & disposition of debtor. At a meeting of creditors, at which the bill of sale holder was present, an assignment for the benefit of creditors was proposed. The next morning debtor committed an act of bkpcy. by executing it. A few hours later the bill of sale holder sent a man to take possession, but was referred to the trustee under the assignment who was in possession, who gave him notice of the act of bkpcy., & told him he was too late. He replied he would inform the bill of sale holder, who afterwards obtained possession by force:—*Held:* what had been done before notice of the act of bkpcy., only amounted to an intention to demand & obtain possession under the bill of sale, & did not defeat the title of the assignees.—BREWIN *v.* SHORT (1855), 5 E. & B. 227; 24 L. J. Q. B. 297; 25 L. T. O. S. 159; 3 W. R. 514; 1 Jur. N. S. 798; 3 C. L. R. 1217; 119 E. R. 466.

Annotations:—**Apld.** Rutter *v.* Everett, [1895] 2 Ch. 872. **Consd.** Krehl *v.* Great Central Gas Consumers Co. & Muzio (1870), 18 W. R. 1035; *Re* Spark, *Ex p.* Cohen (1870), 40 L. J. Bcy. 14.

6782. **Attempted sale—Bankrupt allowed to continue in possession.**]—A trader executed a bill of sale of his stock-in-trade to deft. On June 17, in pursuance of an arrangement between the parties, deft. came on the premises of the trader & attempted to sell the goods, but there were no buyers & nothing was sold. Deft. then left the premises, & the trader remained there & continued to carry on business till the 22nd, when he committed an act of bkpcy. The sale had been advertised, but it did not appear that the goods were advertised to be sold as the goods of deft.:—*Held:* notwithstanding the attempted sale the goods were in the possession of bkpt. as reputed owner with the consent of the true owner at the time of the bkpcy., & passed to his assignees.—REYNOLDS *v.* HALL (1859), 4 H. & N. 519; 28 L. J. Ex. 257; 157 E. R. 943.

6783. **Attempt to take possession without demand—Everything done short of forcible entry.**]—Debtor assigned goods as security for the payment of his debt on a certain day, by a bill of sale which authorised the creditor to enter the house at any time, take possession of the goods, &, if refused admission, break into the house. Debtor retained possession, without interference by the creditor, till the day when payment was due. On that evening & the next morning the creditor's agents

kicked at the gates & tried for hours to get in, intending to take possession. The gates were kept closed, & they were refused admission till debtor had filed his petition, & thereby committed an act of bkpcy. His trustee claimed the goods as being, at the commencement of the bkpcy., in the possession of debtor, as reputed owner, by the consent of the true owner :—*Held :* though the creditor had made no actual demand of possession, as he had done all in his power to take possession short of a forcible entry, there was no consent of the true owner & the creditor was entitled to his security.—*Re* SPARKE, *Ex p.* COHEN (1870), 40 L. J. Bcy. 14 ; 19 W. R. 126 ; *subsequent proceedings* (1871), 7 Ch. App. 20, L. JJ.
Annotation :—**Refd.** *Re* Couston, *Ex p.* Ward (1872), 27 L. T. 502, L. JJ.

6784. Possession taken of part of goods—Terminates consent as to whole.]—A trader executed a bill of sale of his stock-in-trade in his shop & his furniture in his dwelling-house to secure a debt. The shop & the dwelling-house were situate in different streets in the same town. The bill of sale holder instructed his agent to take possession, & he entered into possession of the property in the shop before the filing of a petition by debtor, & took possession of the furniture in the course of the same day, after notice of the petition :—*Held :* the taking possession of the stock-in-trade operated as a withdrawal of the consent to the whole of the property comprised in the bill of sale remaining in debtor's order & disposition. *Semble :* the instruction to the agent to take possession amounted to a withdrawal of the consent to the property remaining in debtor's order & disposition.—*Re* ESLICK, *Ex p.* PHILLIPS, *Ex p.* ALEXANDER (1876), 4 Ch. D. 496 ; 35 L. T. 912 ; 25 W. R. 231.

SUB-SECT. 6.—"UNDER SUCH CIRCUMSTANCES THAT HE IS THE REPUTED OWNER THEREOF."

A. In General.

6785. Question of fact for jury.]—If A. let a house to B., with a covenant that the lease shall determine on B. committing any act of bkpcy. on which a commission of bkpcy. should issue, & by another deed of the same date, A. grants the use of the furniture to B. in like manner, & with a similar covenant, to allow A. to resume the possession of the furniture on the commission of an act of bkpcy., if B. become bkpt., & the jury find that B. was the reputed owner of the furniture, it will pass to the assignees notwithstanding these covenants, & if it be proved, on the one side, that several of the servants of B., & many of his customers knew that the goods belonged to A., & on the other side, several of B.'s creditors prove that they considered the goods to belong to B., & gave him credit upon the faith of them, & that he acted as master of the house, etc., it will be for the jury to say, whether B. was held out to the world as the owner of the goods, & obtained credit by the possession of them.—HICKENBOTHAM *v.* GROVES (1826), 2 C. & P. 492, N. P.
Annotation :—**Refd.** Watson *v.* Peache (1834), 1 Bing. N. C. 327.

6786. ———.]—*Semble :* the question of reputed ownership is purely a question of fact.—*Re* STYAN, *Ex p.* SMITH (1841), 2 Mont. D. & De G. 213 ; 10 L. J. Bcy. 79 ; 5 Jur. 874, Ct. of R. ; *affd.* on another point (1842), 2 Mont. D. & De G. 219, L. C.
Annotations :—**Refd.** *Re* Young, *Ex p.* Cooper (1842), 11 L. J. Bcy. 29, Ct. of R. ; Fawcett *v.* Fearne (1844), 6 Q. B. 20 ; Graham *v.* Furber (1853), 14 C. B. 134. **Mentd.** Pariente *v.* Pennell (1843), 2 Mood. & R. 517, N. P. ; West *v.* Reid (1843), 2 Hare, 249 ; Young *v.* Hope (1848), 2 Exch. 105 ; Krehl *v.* Great Central Gas Consumers Co. & Guarantee Soc. (1870), 39 L. J. Ex. 197 ; Rutter *v.* Everett, [1895] 2 Ch. 872.

6787. ———.]—Pltf. on July 16 negotiated with L. for the sale to him of some sheep, but they could not then agree as to the price. On the 18th the sheep were, by agreement, sent to L.'s farm, there to remain for a few days, when the parties were to meet & settle about the price. On the 23rd and before such meeting, L. was adjudicated a bkpt., & the sheep were on that day seized on his farm, by the messenger of the ct. At the trial of an action of trover by pltf. against defts., as assignees of L., defts. contended that the sheep were in L.'s possession, order, or disposition as reputed owner, under 1849 Act, s. 125, at the time of his bkpcy., but they called no witnesses to contradict pltf.'s evidence that the sheep were not sold but were sent to L.'s farm on sale or return :—*Held :* the question whether bkpt. had the sheep in his order or disposition as reputed owner, at the time of the bkpcy., was not a question

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6784 i. *Possession taken of part of goods.*]—Assignees under a bill of sale took possession of the property, kept bkpt. in their employment, & removed off the premises goods, when manufactured, of portions of which bkpt. disposed :—*Held :* such goods were not within his disposition & order, but those which remained on the premises were.—*Re* FOX (1861), 13 Ir. Jur. 375. —**IR.**

h. *Demand for first mortgage of debts due to bankrupt.*]—By deed dated Apr. 6, 1892, a bank agreed to sell, & R. agreed to purchase, property & debts, payment of the purchase money to be secured to the bank by an agreement to mtge. over the debts. In pursuance of the deed, & on the same date, the bank, by a separate deed, assigned the debts to R. absolutely. In further pursuance of the purchase deed, & on the same date, by a separate agreement in writing contemporaneous with the two deeds, R. agreed to execute & deliver to the bank upon demand a first mtge. or assignment by way of mtge. of the property & debts of which he had become the purchaser, & also of all future debts which might become owing to him whilst engaged in any business, which might be carried on by him during the continuance of the security. The agreement also provided that until the mtge. or assignment should be executed the debts & other property should continue to be a security to the bank for the payment of the purchase money, & R. declared & agreed that he held the debts & other property as a trustee for the bank, for the purposes mentioned. On Dec. 14 the bank called upon R. to execute a first mtge. in its favour in accordance with the terms of the agreement, but R. declined to execute the mtge. *Semble :* after the refusal by R. to comply with the demand made by the bank the property did not remain in the possession, order, & disposition of R. with the consent & permission of the true owner.—BANK OF NEW SOUTH WALES *v.* COOK (1894), 12 N. Z. L. R. 545.—**N.Z.**

j. *Charging order nisi on letter of credit in favour of bankrupt.*]—A letter of credit was drawn in favour of A., who afterwards became bkpt. Before the bkpcy, A., for valuable consideration, made an equitable assignment to B. of part of the money covered by the letter, & by way of additional precaution it was agreed that the letter of credit should, in the interest of B., be forwarded to C. At the date of the bkpcy. the letter of credit was in the hands of C. Before the bkpcy. B. had obtained a charging order *nisi* against C. :—*Held :* the letter of credit was not in the order & disposition of bkpt. with the consent of B.—*Re* JONES (1890), 8 N. Z. L. R. 695.—**N.Z.**

l. *Suit to enforce charge on debt due to bankrupt.*]—A debt is taken out of the order & disposition of insolvent, if a suit be brought to enforce a charge upon the debt prior to his adjudication.—PUNINTHAVELU MUDALIAR *v.* BHASHYAM AYYANGAR (1901), I. L. R. 25 Mad. 406.—**IND.**

n. *Removal of goods by true owner —Whether attachment will issue.*]—An attachment will not be granted against a party, who removes goods of his own which were on the premises of bkpt.—*Re* DOYLE (1828) 1 Ir. L. Rec. 1st ser. 413.—**IR.**

PART XX. SECT. 9, SUB-SECT. 6.—A.

p. *General rule.*]—Where goods are in the order & disposition of any person in such circumstances as to enable him by means of them to obtain false credit, then the owner of the goods, who has permitted him to obtain false credit, must suffer the penalty of losing such goods for the benefit of those who have given the credit.—*Re* MARSHALL (1881), I. L. R. 7 Calc. 421 ; *affd.* 10 C. L. R. 591.—**IND.**

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of law for the decision of the ct., but purely a matter of fact for the jury.

The ct. cannot lay it down as a matter of law, that a man was reputed owner of certain articles, where there is not a tittle of evidence to support such a finding (POLLOCK, C.B.).—PRISMALL *v.* LOVEGROVE (1862), 6 L. T. 329.

Annotations :—**Consd.** Priestley *v.* Pratt (1867), L. R. 2 Exch. 101 ; *Re* Couston, *Ex p.* Watkins (1873), 8 Ch. App. 520, L. C. & L. J.

6788. Reputed owner & true owner same person.]—A British ship registered under 3 & 4 Will. 4, c. 55, was conveyed by A., the registered owner, to B., for a valuable consideration, by a bill of sale executed before, but not registered until after, the bkpcy. of A. :—*Held :* B. thereby acquired no property in the ship, but it passed to A.'s assignees.

Defts. are the assignees of A., & claimed the ship, either as having passed to them as the property of bkpt., under the fiat, or, on the supposition that B. acquired some interest under the bill of sale, as having been in the order & disposition of bkpt. as reputed owner, at the time of the bkpcy., with the consent of the true owners. The ship passed to the assignees, as part of the property of bkpt., & it did not pass as property of pltfs. in bkpt.'s order & disposition (MAULE, J.). —BOYSON *v.* GIBSON (1847), 4 C. B. 121 ; 16 L. J. C. P. 147 ; 136 E. R. 449.

Annotation :—**Mentd.** Stapleton *v.* Haymen (1864), 3 New Rep. 481.

6789. —— Bankrupt obtaining property in breach of trust.]—A. assigned a leasehold messuage & household furniture to B., upon trust for the use of A. for life, & after his decease, for the use of C., his wife, for life, & after the decease of the survivor, for the use of their daughter, D. A. died in Oct., 1816. In Oct., 1817, C., the widow, married E., who immediately took possession of the messuage & furniture, & continued in possession until Oct., 1828, when a commission of bkpcy. issued against him. In Oct., 1818, E. had procured B. to assign the messuage & furniture to him by a deed, which contained false recitals, & was in breach of the trust :—*Held :* the furniture was not in the order & disposition of E.

He is trustee for the wife, & for the daughter. He is not in possession with the consent of the real owner. He is the real owner, but only as trustee. He is legal owner by assignment of the trust (*per* CUR.).—*Re* HORWOOD, *Ex p.* HORWOOD (1828), Mont. & M. 169 , *affd. sub nom. Re* HORWOOD, *Ex p.* HENCLIFFE (1830), Mont. 24, L. C.

Annotation :—**Refd.** *Re* Kidder, *Ex p.* Burbridge (1835), 1 Deac. 131.

6790. —— Executor transferring shares to himself.]—J. became possessed in trust, as exor. of his deceased father, of certain shares in the joint stock of a co. The only evidence of a party's interest in the stock of that co. was a book, in which were entered all transfers of shares. There was an entry in the book signed by J., purporting to be a transfer of the shares in question from himself as exor. to himself in his individual character. Where the transfer was made in pursuance of a *bonâ fide* sale for a money consideration, the words " sell & assign " were used ; but those words were erased. On the faith of his apparent ownership of the shares, J. acted as a director of the co., & received the dividends to his own use up to the time of his bkpcy. ; &, on passing his accounts under the commission, he treated the shares as his own property. Upon an issue directed to try the right to the shares, between J. & another, as exors. of the original proprietor, & the assignees of J., it was left to the jury to say whether or not the shares were, at the time of the bkpcy., in the possession, order, or disposition of bkpt. with the consent & permission of the true owner. The jury having found for pltfs., the ct. refused to disturb the verdict.—COOPER *v.* DE TASTET (1833), 2 Moo. & S. 714.

6791. —— Purchaser who has obtained delivery order.]—A party having goods in his warehouse at Liverpool sold them, & gave the following delivery order to the vendee :—" We hold to your order thirty-nine pipes," etc., " rent free to Nov. 29 next." The goods remained in the same warehouse unpaid for till the vendee became bkpt. In an action of trover for the goods by the assignee, evidence was given that, by the usage of Liverpool, goods sold while in warehouse were delivered by the vendor handing to the vendee a delivery order, & that the holder of such order might obtain credit with a purchaser as having possession of the goods :—*Held :* bkpt. had not possession of the goods as reputed owner, with the consent of the true owner.

Here bkpt., if he had possession, was himself the true owner under the contract of sale (LORD DENMAN, C. J.).—TOWNLEY *v.* CRUMP (1835), 4 Ad. & El. 58 ; 1 Har. & W. 564 ; 5 Nev. & M. K. B. 606 ; 5 L. J. K. B. 14 ; 111 E. R. 709.

Annotations :—**Mentd.** Pearson *v.* Dawson (1858), E. B. & E. 448 ; Dublin City Distillery *v.* Doherty, [1914] A. C. 823, H. L.

6792. —— Contractor under building contract—Containing forfeiture clause.]—A contract with a railway co. to erect a bridge provided that the contractors were to provide the implements & materials & that, if they did not proceed with proper expedition, the co., on giving notice, might employ other workmen, & in that case might use the contractors' implements & materials therein or about the works. The contractors committed an act of bkpcy., & a fiat was issued. Certain goods, timbers, etc., for building the bridge, had been previously deposited by them, on it & the land adjoining, & consisted of four kinds :—(1) those actually on the line of the railway, value £612 13*s.* 6*d.*, (2) those upon land adjoining the line of railway, not the property of the co., but enclosed & taken possession of by them under their Act, value £634 13*s.* 9*d.*, (3) those deposited upon the line of a temporary railway, made by bkpts., over land not belonging to the co., for the convenience of conveying materials, their value being £7 19*s.* 6*d.*, & that of the materials of the temporary railway, £131 15*s.* 4*d.*, (4) a crane, erected by the contractors at the end of the temporary railway, value £50. The co. took possession of all the goods, &, having given notice, took upon themselves the completion of the bridge, using some of the goods & retaining the remainder. In an action of trover, brought by the assignees of bkpts. for the goods :—*Held :* the lien of the co. on the first & second classes was not invalidated by the possession of bkpts., the case not being one of apparent ownership, for down to the date of the bkpcy., bkpts., who had the possession, were the true owners of the property.—HAWTHORN *v.* NEWCASTLE-UPON-TYNE & NORTH SHIELDS RY.

6788 i. *Reputed owner & true owner same person.*]—M. was adjudicated bkpt. on Aug. 21, 1914, upon an act of bkpcy. committed on June 21. Between those dates he had deposited share certificates & a policy of insurance with a bank as security for his account :—*Held :* as at that date he himself was the true owner of the shares, the order & disposition section did not apply.—*Re* MACKAY, [1915] 2 I. R. 347.—IR.

Co. (1840), 3 Q. B. 734, n.; 2 Ry. & Can. Cas. 288; 9 L. J. Q. B. 385; 114 E. R. 688, n.

Annotations:—**Distd.** Freeman *v.* Edwards (1848), 2 Exch. 732; Baker *v.* Gray (1856), 17 C. B. 462. **Apld.** *Re* Waugh, *Ex p.* Dickin (1876), 4 Ch. D. 524.

6793. —— —— ——.]—By a building contract made between a firm of builders & a school board, it was provided, by clause 10, that all plant & materials brought on to the ground by the builders for the purposes of the building should be considered to be the property of the board, & that they should not be removed by the builders or any other person without the licence of the architect, but that the board should not be answerable for any loss or damage which might happen to them, &, by clause 20, that, if the builders should delay the performance of their contract, the board might give the builders notice to proceed with the work, & that in the event of their not doing so within seven days the plant, etc., should be forfeited to the board. The builders having become bkpt., the board subsequently to the commencement of the bkpcy. gave to the builders & to their trustee notice under clause 20 to proceed with the work, & upon non-compliance with the notice the board claimed that the plant & materials upon the premises were forfeited, & that they were entitled to retain them as against the trustee:—*Held:* clause 10 of the contract did not vest the ownership of the goods in the board, & they were not in the order & disposition of debtors by the consent of the true owner within 1883 Act, s. 44, & did not pass to the trustee as being in the reputed ownership of debtors.—*Re* KEEN & KEEN, *Ex p.* COLLINS, [1902] 1 K. B. 555; 71 L. J. K. B. 487; 86 L. T. 235; 50 W. R. 334; 46 Sol. Jo. 268; 9 Mans. 145, D. C.

Annotations:—**Mentd.** Hart *v.* Porthgain Harbour Co., [1903] 1 Ch. 690; Byford *v.* Russell & Morris (1907), 76 L. J. K. B. 744, D. C.; Metropolitan Water Board *v.* Dick, Kerr, [1917] 2 K. B. 1.

6794. —— Purchaser under sale voidable for fraud.]—B. fraudulently bought goods from pltfs. without an intention of paying for them. After sale & delivery he became a bkpt., & his assignees took possession of the goods, as being in the order & disposition of bkpt. with the consent of the true owner, whereupon pltfs. brought an action of trover:—*Held:* as at the time of the bkpcy., bkpt. was not the apparent but the real owner of the goods, pltfs. were entitled to recover. *Qu.:*—whether the case would have fallen within 6 Geo. 4, c. 16, s. 72, if pltfs. had discovered the fraud long before the act of bkpcy., & had omitted, for an unreasonable time, to rescind the contract.—LOAD *v.* GREEN (1846), 15 M. & W. 216; 15 L. J. Ex. 113; 7 L. T. O. S. 114; 10 Jur. 163; 153 E. R. 828.

Annotations:—**Consd.** *Re* Gawan, *Ex p.* Barclay (1855), 5 De G. M. & G. 403, L. C. & L. JJ.; *Re* Rawbone's Trust (1857), 3 K. & J. 476. **Folld.** Smith *v.* Hudson (1865), 6 B. & S. 431. **Consd.** Reynolds *v.* Bowley (1867), L. R. 2 Q. B. 474; *Re* Webber, *Ex p.* Slater (1891), 64 L. T. 426; *Re* Watson, *Ex p.* Atkin, [1904] 2 K. B. 753, C. A. **Refd.** Belcher *v.* Bellamy (1848), 2 Exch. 303; White *v.* Garden (1851), 10 C. B. 919; Stevenson *v.* Newnham (1853), 13 C. B. 285; Kingsford *v.* Merry (1856), 11 Exch. 577; *Re* Shackleton, *Ex p.* Whittaker (1875), 10 Ch. App. 447, n.; Rutter *v.* Everett, [1895] 2 Ch. 872. **Mentd.** Higgins *v.* Burton (1857), 29 L. T. O. S. 165; Biddle *v.* Bond (1865), 5 New Rep. 485; Lindsay *v.* Cundy (1876), 34 L. T. 314.

6795. —— Person retaining possession after declaration of trust.]—A sole trustee, who had appropriated £4,000, part of the trust property, deposited in the box in which he kept the trust deed & the securities for other portions of the trust funds two policies of assurance, one on his own life for £2,000, the other on the life of his father for £3,000, inclosing them in an envelope with a memorandum that, "in the event of his" (the trustee's) "death," the amount of the inclosed policies was to be applied to the repayment of £4,000 borrowed by him of the *cestui que trust.* Six years afterwards the trustee became bkpt. The policy for £2,000 was found inclosed with the memorandum in the box, the other policy having been paid to bkpt. upon his father's death:—*Held:* there being a valid declaration of trust by the sole trustee, he was the proper person to be in possession of the policy, in other words the true owner within 1849 Act; & he being also in the reputed possession of the property when the bkpcy. took place, there was no separation of interests, the true owner & the reputed owner were the same person, & s. 125 did not apply.—*Re* BANKHEAD'S TRUSTS (1856), 2 K. & J. 560; 4 W. R. 589; 69 E. R. 905.

6796. —— One of several trustees of settlement.]—Trustees, in breach of trust, advanced part of the trust money to a banking firm, in which one of the trustees was a partner, on the security of a mtge. of bonds in which some of the bankers were obligees. The bonds were left in the custody of the bankers, & no notice of the mtge. was given to any of the obligors. One of the partners & trustees of the settlement was the sole surviving obligee in one of the bonds:—*Held:* he was the real, & not the reputed owner of the bond debt, but he held it in trust, & it was not in the reputed ownership of the firm or of himself.

Others of the bonds had, without the knowledge of the *cestui que trust* been paid off & replaced by different securities, which the bankers had set apart & marked with the names of the trustees of the settlement:—*Held:* the securities were not in the reputed ownership of the bankers.—*Re* STRAHAN, *Ex p.* GEAVES (1856), 8 De G. M. & G. 291; 25 L. J. Bcy. 53; 27 L. T. O. S. 129; 2 Jur. N. S. 651; 4 W. R. 536; 44 E. R. 402, L. JJ.

Annotations:—**Refd.** *Re* Bankhead's Trust (1856), 2 K. & J. 560; Cavendish *v.* Geaves (1857), 24 Beav. 163.

6797. —— One of several trustees for sale.]—W., who had carried on business with his son, by his will gave to his son, whom he also appointed one of his trustees & exors., the option of purchasing at a fixed price W.'s share in the business. The son, after W.'s death, elected to purchase, & paid part of the purchase-money, but before the residue of it was paid became bkpt. The receiver, in an action to administer W.'s estate, claimed to have a charge upon certain stock in the possession of the son for the residue of the purchase-money due to W.'s estate as against the trustee in bkpcy. of the son:—*Held:* bkpt. was both the reputed owner & also, as one of the trustees of his father's estate, a true owner, & the above sect. had no application.—*Re* WEBBER, *Ex p.* SLATER (1891), *Times*, July 14, C. A.; *revsg.* 64 L. T. 426.

Annotation:—**Refd.** *Re* Ginger, *Ex p.* London & Universal Bank (1897), 46 W. R. 144, D. C.

6798. Consent by true owner that bankrupt should hold as real owner.]—Under 1849 Act, s. 125, the true owner must consent that bkpt. shall have the goods in his possession, order, or disposition, at the moment of his bkpcy. as reputed owner, & a case where the true owner consents

6795 i. —— *Bankrupt trustee for testator taking shares as residuary legatee.*]—T. held shares in a trading co. in trust for W. who by his will appointed T. his residuary legatee. T. continued in possession of the shares, & became bkpt.:—*Held:* the shares were not within 11 & 12 Geo. 3, c. 8, s. 9, as T. was himself the "true owner & proprietor thereof," subject to the debts & legacies of W.—JOY *v.* CAMPBELL (1804), 1 Sch. & Lef. 328; 3 Bli. N. S. 110, n.—**IR.**

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that bkpt. shall so have them as real owner, & not as reputed owner, is not within the sect.—SMITH *v.* HUDSON (1865), 6 B. & S. 431 ; 6 New Rep. 103 ; 34 L. J. Q. B. 145 ; 12 L. T. 377 ; 11 Jur. N. S. 622 ; 13 W. R. 683 ; 122 E. R. 1254.

Annotations :—**Consd.** *Re* Bell, *Ex p.* Clarke (1877), 47 L. J. Bcy. 33 ; *Re* Watson, *Ex p.* Atkin, [1904] 2 K. B. 753, C. A. **Mentd.** Taylor *v.* Smith, [1893] 2 Q. B. 65, C. A.

6799. Possession retained by bankrupt who has once been true owner—After sale.]—A. by deed assigned the cargoes of two ships to B. & C., but had no charter-party or bill of lading to deliver to them. On the arrival of one of the ships he assigned to another person, & afterwards committed an act of bkpcy. :—*Held :* B. & C. not having been ready to take possession of the ship on her arrival had thereby permitted A. to continue reputed owner.—PHILPOT *v.* WILLIAMS (1764), 2 Eden, 231 ; 28 E. R. 887, L. C.

6800. —— ——.]—If a person buying wine of a merchant permit it to remain in his cellar, though for the purpose of ripening, & the merchant becomes a bkpt., the assignees may take the wine as being in the order & disposition of bkpt.—TANNER *v.* BARNETT (1796), Peake, Add. Cas. 98, N. P.

6801. —— —— **Under agreement giving right to possession—Transaction well known in district.**]—By agreement between B. & deft., B. agreed, on payment to him of a sum certain, to convey to deft. a dwelling-house & to deliver possession of all the household furniture & stock, & that after formal possession delivered to deft., B. should be allowed to remain in possession for three months without paying rent. The agreement was notorious in the neighbourhood. The money was paid by deft., & a formal delivery made to him, & B. afterwards left in possession according to the agreement. B. became bkpt. whilst he so remained in possession & before the expiration of the three months :—*Held :* this was not a possession by bkpt. within 21 Jac. 1, c. 19, s. 11.—MULLER *v.* MOSS (1813), 1 M. & S. 335 ; 2 Rose, 99 ; 105 E. R. 126.

Annotation :—**Consd.** Oliver *v.* Bartlett (1819), 1 Brod. & Bing. 269.

6802. —— —— **Under subsequent hiring agreement.**]—A draper, being the owner of household furniture in his dwelling-house & shop, signed an agreement by which he sold the furniture to a furniture dealer & hired it back at a rent of 12*s.* 6*d.* a week. He remained in the use & occupation of the furniture under the agreement for more than four years, & then filed a petition : —*Held :* the furniture was in the order & disposition of debtor as the reputed owner at the commencement of the liquidation, & the trustee was entitled to it.—*Re* JONES, *Ex p.* LOVERING (1874), 9 Ch. App. 621 ; 43 L. J. Bcy. 116 ; 30 L. T. 622 ; 22 W. R. 853, L. J.

Annotations :—**Distd.** *Re* Matthews, *Ex p.* Powell (1875), 1 Ch. D. 501. **Folld.** *Re* Fowler, *Ex p.* Brooks (1883), 23 Ch. D. 261, C. A.

6803. —— —— **Property specially marked.**]—Wine sold by bkpt. & paid for by the purchaser was for their convenience bottled & deposited in bkpt.'s cellars, being set apart in a particular bin, & each bottle was sealed with the purchaser's seal, & the whole entered in bkpt.'s books as belonging to the purchaser. About three weeks after the wine was so paid for & deposited in bkpt.'s cellars, the commission issued & the purchaser's application to have possession of the wine was refused by the assignees as being within the reputed ownership of bkpt. :—*Held :* it was not within the order & disposition of bkpt., very cautious provisions having been made to prevent it having the appearance of stock to which creditors might give credit.—*Re* BROWN, *Ex p.* MARRABLE (1824), 1 Gl. & J. 402.

Annotations :—**Apld.** Sinclair *v.* Wilson (1855), 20 Beav. 324. **Distd.** *Re* Cohn, *Ex p.* Cohen (1878), 38 L. T. 884.

6804. —— —— ——.]—A. purchased from B., an oil manufacturer, ten tons of oil. The oil was paid for, & was drawn off by B. from the cisterns into nineteen casks, which were all numbered & marked with the initial of A.'s firm, & placed in the shipping warehouse to await A.'s order, & it so remained to the time of the bkpcy. :—*Held :* the oil was not in the order & disposition of B. as reputed owner.—*Re* POPPLE, *Ex p.* DOVER (1841), 2 Mont. D. & De G. 259 ; 5 Jur. 846, Ct. of R.

6805. —— —— **Property deposited with stranger for custody—Notice given that property did not belong to bankrupt.**]—A. employed B. to build him a greenhouse for £50. When it was completed, B. gave A. notice, & requested him to remit the price. A. remitted the amount & desired B. to keep the greenhouse till sent for. Afterwards B., unknown to A., deposited the greenhouse with C., telling him it was the property of A., & requesting him to keep it for A., which he agreed to do. B. having become bkpt., his assignees took possession of the greenhouse :—*Held :* the greenhouse was not in the possession, order, & disposition of B. as reputed owner.—WILKINS *v.* BROMHEAD (1844), 6 Man. & G. 963 ; 7 Scott, N. R. 921 ; 13 L. J. C. P. 74 ; 2 L. T. O. S. 328 ; 8 Jur. 83 ; 134 E. R. 1182.

6806. —— —— **Property not specially marked.**]—Debtors agreed with N. & K. to sell to them at a price to be fixed all the linseed oil manufactured by them within a specified period, the oil to be retained by them in tanks & delivery orders to be issued upon it upon which payment should be made by N. & K. On debtors becoming bkpt. before the termination of the contract, the official receiver took possession of certain oil in the tanks with regard to which delivery orders had been issued to N. & K., on the ground that it was

6799 i. *Possession retained by bankrupt who has once been true owner—After sale—Bankrupt & purchaser living in same house.*]—A father & son lived in the same house. In 1892 the son purchased of the father a safe, a buggy, & a billiard-table. The contract was embodied in sale-notes, which had not been registered under Chattels Transfer Act, 1889. The safe & buggy were kept in the premises where the father & son lived. The son had the key of the safe, & kept his papers in the safe. The buggy was generally known to be the son's property. The billiard-table was kept in a house belonging to the purchaser's mother, & away from the residence of the father. The mother let her house & the billiard-table, with the consent of the son, to a third party on the day on which the father committed an act of bkpcy. In June, 1894, the father became bkpt. :—*Held :* the goods were not in the possession, order, or disposition of bkpt. at the time of his bkpcy.—SLATTERY'S OFFICIAL ASSIGNEE *v.* SLATTERY (1895), 16 N. Z. L. R. 332.—**N.Z.**

6802 i. —— —— *Under subsequent hiring agreement.*]—The proprietor of premises let as a printing-office bought the plant, types, etc., from his tenant. He then granted to him a new lease of the premises, with the use of the plant, types, etc., & the tenant continued in possession. After some years the tenant became bkpt. :—*Held :* the possession of the plant, etc., by bkpt. must be regarded as the landlord's possession, & the sale was effectual.—TAYLOR (ORR'S TRUSTEE) *v.* TULLIS (1870), 8 Macph. (Ct. of Sess.) 936.—**SCOT.**

6802 ii. —— —— *After pretended sale.*]—Goods sold by insolvent remained in his possession with a right of repurchase :—*Held :* (1) there had been no real sale but an attempt by insolvent to pledge goods with dispossessing himself of them, which was illegal ; (2) such a sale would be fraudulent against creditors.—EDGERTON *v.* LAPIERRE (1903), 5 Q. P. R. 389.—**CAN.**

in the possession of debtors as reputed owners with the consent of N. & K.:—*Held:* he was right in doing so.—*Re* WALKER & SON, *Ex p.* NICKOLL & KNIGHT (1884), 1 Morr. 188, D. C.

6807. —— After execution—Under subsequent hiring agreement.]—If the furniture of a coffee-house be taken in execution by a creditor, & without ever being removed, be let by him to the keeper of the coffee-house, who becomes bkpt. while in possession of it, the assignees may seize it under 21 Jac. 1, c. 19, s. 11.—LINGHAM *v.* BIGGS (1797), 1 Bos. & P. 82; 126 E. R. 790.

Annotations:—**Consd.** Horn *v.* Baker (1808), 9 East, 215. **Folld.** Lingard *v.* Messiter (1823), 1 B. & C. 308. **Distd.** Lyon *v.* Weldon (1824), 9 Moore, C. P. 629. **Consd.** Spackman *v.* Miller (1862), 12 C. B. N. S. 659. **Apld.** *Re* Jones, *Ex p.* Lovering (1874), 9 Ch. App. 621, L. J. **Consd.** Hollinshead *v.* Egan, [1913] A. C. 564, H. L. **Reid.** Oliver *v.* Bartlett (1819), 1 Brod. & Bing. 269.

6808. —— —— ——.]—In an action by the assignees of bkpt. to recover property in the bkpt.'s possession as reputed owner, deft. proved that, long before the act of bkpcy., the goods had been seized under an execution, at the suit of a creditor, by the sheriff, & that they were conveyed by bill of sale to the creditor, & he afterwards demised them at an annual rent to bkpt., who continued in possession of them till the time of his bkpcy. Soon after the bill of sale was executed, the creditor's initials were marked on all the goods:—*Held:* this was no evidence of the notoriety of the change of property, & there was no evidence to go to the jury that bkpt. had ever ceased to be the reputed owner.—LINGARD *v.* MESSITER (1823), 1 B. & C. 308; 2 Dow. & Ry. K. B. 495; 1 L. J. O. S. K. B. 121; 107 E. R. 115.

Annotations:—**Distd.** Storer *v.* Hunter (1824), 3 B. & C. 368. **Consd.** Watson *v.* Peache (1834), 1 Bing. N. C. 327. **Folld.** Leake *v.* Loveday (1842), 4 Man. & G. 972. **Consd.** Hamilton *v.* Bell (1854), 10 Exch. 545; *Re* Sketchley, *Ex p.* Boulton (1857), 1 De G. & J. 163. **Distd.** Vicarino *v.* Hollingsworth (1869), 20 L. T. 362. **Apld.** *Re* Jones, *Ex p.* Lovering (1874), 9 Ch. App. 621, L. J. **Folld.** *Re* Fowler, *Ex p.* Brooks (1883), 23 Ch. D. 261. **Consd.** Sharman *v.* Mason, [1899] 2 Q. B. 679, D. C.

6809. —— After mortgage.]—A sole proprietor of a vessel secretly mortgaged three fourth shares in her, as a security for a debt due to a creditor, & the mtgor. was permitted by the former to retain the sole possession, management, & control of the ship, until he became bkpt. The requisites of the registry had been complied with:—*Held:* as bkpt. had once been the real owner of the whole ship, & had never done anything to make it notorious to the world that he had ceased to be the owner of three fourths, he continued to be the apparent owner, & these shares passed to his assignee.—KIRKLEY *v.* HODGSON (1823), 1 B. & C. 588; 2 Dow. & Ry. K. B. 848; 1 L. J. O. S. K. B. 185; 107 E. R. 216.

Annotations:—**Distd.** Storer *v.* Hunter (1824), 3 B. & C. 368. **Reid.** Reynolds *v.* Bowley (1866), 7 B. & S. 67.

6810. —— After deed of gift.]—A. being at the time in partnership with his son & others, executed a deed of gift, whereby he gave to his son certain paintings, & other effects, in his dwelling-house, upon trust for himself (A.), for life, & after his decease for his son absolutely. At the time the deed was executed, formal possession was given to the son by the delivery of one painting in the name of the whole, but the effects were left in the possession of A. at his house, & the change of ownership was not made public further than by its being communicated by A. to some of his friends:—*Held:* as the son had omitted to give notice of the change of ownership the possession of A. was referable to his original title, & A. was in the reputed ownership of the goods at the time of his bkpcy.—*Re* ACRAMAN, *Ex p.* CASTLE (1842), 3 Mont. D. & De G. 117; 12 L. J. Bcy. 30; 7 Jur. 47, Ct. of R.

6811. —— After assignment for benefit of creditors.]—Debtor, in pursuance of a *bonâ fide* arrangement with his creditors, assigned his stock-in-trade to a third person as trustee, but continued to manage the business. The change of possession having been made openly, & the public having been fully notified that debtor was acting only as manager:—*Held:* the stock did not pass to his trustee in bkpcy. under 1883 Act, s. 44.—ARTHUR *v.* NASH (1886), 2 T. L. R. 839.

6812. Possession by bankrupt as factor or agent for sale—General rule.]—Reputed ownership cannot be had of property in the hands of factors as such.—*Re* MANNING, *Ex p.* SMITH (1834), 4 Deac. & Ch. 579; 4 L. J. Bcy. 14, Ct. of R.

6813. —— ——.]—If it be a matter of notoriety that a man is acting in capacity of factor to another, & the factor becomes bkpt., goods consigned by the principal to the factor for sale will not pass to bkpt.'s trustee.—*Re* WOOD, *Ex p.* BODEN (1873), 28 L. T. 174.

Annotation:—**Distd.** *Re* Fawcus, *Ex p.* Buck (1876), 3 Ch. D. 795.

6814. —— ——.]—Where the fact of the relation of principal & factor is clearly established, the order & disposition clause does not apply.—*Re* FAWCUS, *Ex p.* BUCK (1876), 3 Ch. D. 795; 34 L. T. 807.

6815. —— Sale on commission.]—Books deposited by the owner with a bookseller, kept by him as part of his general stock, & sold by him on commission, do not, on his bkpcy., pass to his

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q. *Possession redelivered to bankrupt who has once been true owner—After pledge—Under agreement for sale on commission.*]—M., who carried on the business of a watch & clock maker in Calcutta, borrowed from D. R6,000, & as collateral security he pledged watches, clocks, etc., with D. The articles remained for some months in the custody of D., who then redelivered them to M. for sale on commission, the proceeds to be applied in liquidation of the debt. M. gave a receipt for the articles. & some of them were sold by M. on those terms. On May 2, 1877, M. filed his petition in the Insolvent Ct. It was alleged that it was customary for European jewellers in Calcutta to receive articles on commission sale. & it was contended that such receipt did not divest the true owners of possession:—*Held:* the articles were rightly vested in the official assignee, as insolvent was the true owner of the goods.—*Re* MURRAY, *Ex p.* DWARKANATH MITTER (1877), I. L. R. 3 Calc. 58.—**IND.**

6812 i. *Possession by bankrupt as factor or agent for sale—General rule.*]—Goods on consignment to an agent are specially exempted from "reputed ownership"—MCNAUGHTON'S TRUSTEE *v.* PERKINS, OGILVIE & CO. (1861), 4 S. 16.—**S. AF.**

r. —— *Mixed with stock of bankrupt.*]—P. carried on business in London, Melbourne, & elsewhere as a bookseller. On July 19, 1894, he was adjudicated bkpt. in England, but no insolvency or bkpcy. proceedings were taken against him elsewhere. Pltfs., a bank domiciled in Victoria, from time to time advanced money to P. to enable him to carry on his business in Victoria & to import goods. To secure those advances pltfs. received from P. the bills of lading of consignments of books, the bills of lading being indorsed absolutely to them. Those consignments on reaching Melbourne were placed in bond, & the parties agreed under seal that when P. required, for the purposes of his trade, any of the books so consigned, he was to apply to pltfs., & on giving an acknowledgment, to receive the bill of lading relating to such books, & obtain the books from the bond. In pursuance of the arrangement he obtained certain books from the bond, took them to his place of business, & disposed of them there in the usual course of business. At the date of P.'s bkpcy. some of the books thus obtained from the bond were on his business premises for sale in the usual course of his business. On that date pltfs., as owners under the indorsed bills of lading & as P.'s principals, seized the books. P.'s debt to pltfs. at the time exceeded the value of the books seized. Deft. claimed them as part of the bkpt.'s estate:—*Held:* the goods exposed for sale in P.'s warehouse at the date of the bkpcy. were at that date in the possession, order, & disposition of bkpt. by the consent & permission of the true owners, & P. under the style of his firm, was the reputed owner of them. Application

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assignees, as being in his possession, order, or disposition, as reputed owner.—WHITFIELD *v.* BRAND (1847), 16 M. & W. 282; 16 L. J. Ex. 103; 153 E. R. 1195.

Annotations:—**Consd.** *Re* Barclay, *Ex p.* Gawan (1855), 25 L. J. Bcy. 1, L. C. & L. JJ. **Refd.** *Re* Sketchley, *Ex p.* Boulton (1857), 1 De G. & J. 163; Cooke *v.* Hemming (1868), L. R. 3 C. P. 334; Sharman *v.* Mason, [1899] 2 Q. B. 679, D. C. **Mentd.** Stevens *v.* Biller (1883), 25 Ch. D. 31.

6816. —— ——.]—Books left with the publisher for sale in the usual course of trade, do not upon his bkpcy. pass to his assignees under 1849 Act, s. 125.—*Re* THICKBROOM, *Ex p.* GREENWOOD (1862), 6 L. T. 558.

Annotation:—**Refd.** Cooke *v.* Hemming (1868), 15 W. R. 903.

6817. —— ——.]—Goods consigned for sale on commission are in possession of the consignee as factor, & do not pass to his assignees on his bkpcy.—*Re* KULBERG (1863), 3 New Rep. 197; *sub nom. Re* KULLBERG, *Ex p.* BYORNEBORG TANDSTICKS LUCIFER MATCH FACTORY ASSOCN., 9 L. T. 460; 12 W. R. 137.

6818. —— ——.]—Goods were consigned by manufacturers under an agreement, which made the consignees, not purchasers of the goods, but agents of the manufacturers for their sale. The agents described themselves, upon a brass plate, which was affixed at their place of business, & also upon the invoices which they used, as "merchants & manufacturers' agents." They acted as agents in the same way for several other manufacturers:—*Held:* the trustee in their liquidation must deliver up to the manufacturers goods of theirs which were in the possession of the agents, in specie, at the commencement of their liquidation, & to pay over to the manufacturers the proceeds of the sale of their goods which had been sold.—*Re* SMITH, *Ex p.* BRIGHT (1879), 10 Ch. D. 566; 48 L. J. Bcy. 81; 39 L. T. 649; 27 W. R. 385, C. A.

Annotation:—**Consd.** *Re* Watson, *Ex p.* Atkins, [1904] 2 K. B. 753, C. A.

6819. —— —— **Samples.**]—Bkpts. carried on business as bankers & East India agents, & in connection with that business they sold goods upon commission. Upon the invitation of bkpts. appcts., wholesale silversmiths, sent plated goods to bkpts.' office to be exhibited in show-cases as samples, to remain at the risk of appcts. The usual practice of bkpts. was to introduce their customer to appcts., who supplied him from their warehouse with goods corresponding to the samples, but in case of urgency bkpts. sold the samples themselves:—*Held:* the goods were not in the reputed ownership of bkpts.—*Re* WATSON & CO., *Ex p.* ATKIN BROTHERS, [1904] 2 K. B. 753; 73 L. J. K. B. 854; 91 L. T. 709; 20 T. L. R. 727; 48 Sol. Jo. 673; 11 Mans. 256, C. A.

Annotations:—**Apld.** *Re* Young Hamilton, *Ex p.* Carter, [1905] 2 K. B. 381. **Refd.** Hollinshead *v.* Egan, [1913] A. C. 564, H. L.

6820. Possession by bankrupt—On sale or return.]—Goods in the hands of a retail dealer upon sale or return are within the order & disposition of bkpt.—LIVESAY *v.* HOOD (1809), 2 Camp. 83, N. P.

Annotations:—**Distd.** Gibson *v.* Bray (1817), 8 Taunt. 76; *Re* Smith, *Ex p.* Bright (1879), 39 L. T. 649, C. A. **Mentd.** *Re* Sinclair, *Ex p.* Chaplin (1884), 53 L. J. Ch. 732, C. A.

6821. —— ——.]—Circumstances in which:—*Held:* goods sent to a trader upon sale & return did not pass to his assignees, under 21 Jac. 1, c. 19, as bkpt. should have been allowed a reasonable time to have selected such goods as he was disposed to retain.—GIBSON *v.* BRAY (1817), 8 Taunt. 76; 1 Moore, C. P. 519; 129 E. R. 311.

Annotations:—**Folld.** Sadler *v.* Whitmore (1840), 5 Jur. 315. **Refd.** Smith *v.* Hudson (1865), 6 New Rep. 103; *Re* Watson, *Ex p.* Atkin, [1904] 2 K. B. 753, C. A.

6822. —— —— **Mixed with stock of bankrupt.**]—Goods deposited with a trader upon terms of sale or return, & by him exposed in his shop for sale, & in no way distinguished from his own goods, & remaining in his possession at the time of his bkpcy., pass to his assignees as being in his reputed ownership, notwithstanding an alleged custom & usage in the trade, that goods so deposited did not lead to the belief that they belonged to the trader.—*Re* CLAPHAM, *Ex p.* SHEPPARD (1861), 4 L. T. 808.

See, also, No. 6527, *ante*, & No. 7384, *post.*

6823. Possession by bankrupt to do work in course of trade—Dressing skins.]—A. was in the habit of sending skins to B.'s tanyard to be dressed, with an account, as if a sale, of each parcel to B., & B. rendered the account of the dressed leather as being sold by him to A. That mode of dealing was only practised by B. with A., B. not dressing skins for other persons:—*Held:* a quantity of the skins which were mixed with B.'s general stock at the time of his bkpcy., passed to his assignees on the principle of reputed ownership.—*Re* WILLMINGTON, *Ex p.* BATTEN (1833), 3 Deac & Ch. 328, Ct. of R.

6824. —— **Repairs.**]—Pltf. purchased clocks of a London tradesman who kept a shop, in which were exposed for sale clocks & watches. A portion of the tradesman's business was to repair clocks, & such as were sent for that purpose stood amongst those in the shop which were for sale. Pltf. left the clocks which he had purchased with directions that they were to be sent to him when they had been cleaned. The tradesman became bkpt., pltf.'s clocks still remaining in his shop:—*Held:* there was no evidence either that bkpt. was the reputed owner of the goods, or that they were in his possession, order, or disposition.—HAMILTON *v.* BELL (1854), 10 Exch. 545; 24 L. T. O. S. 118; 18 Jur. 1109; 3 W. R. 62; 3

of English 1883 Act, s. 44 (iii) to Victoria discussed.—FEDERAL BANK OF AUSTRALIA, LTD. *v.* WHITE (1895), 21 V. L. R. 451.—**AUS.**

t. —— —— *Promissory notes received in part payment.*]—A merchant sent goods on consignment to a country storekeeper:—*Held:* (1) on insolvency of the consignee, the consignor was entitled to the goods, though they had, while in the possession of the consignee, been mixed with his own stock; (2) (WATERMEYER, J.) promissory notes in the possession of the consignee at the date of his insolvency, & given to him for part of such goods sold by him, were the property of the consignor.—MCNAUGHTON'S TRUSTEE *v.* PERKINS, OGILVIE & CO. (1861), 4 S. 16.—**S. AF.**

6820 i. *Possession by bankrupt—On sale or return.*]—Although goods may be "sent on sale" by English manufacturers to Irish traders, where the words "or return" do not appear, & no commission appears by the account between the parties ever to have been paid, upon the bkpcy. of the trader, the goods will not be given back to the manufacturer.—*Re* —— (1870), 22 L. T. 310.—**IR.**

6820 ii. ——.]—Applt. left in the back portion of bkpt.'s shop, prior to her bkpcy., articles, to be sold by her should a customer offer. There was no evidence that the goods were not visible to any one entering bkpt.'s premises:—*Held:* the goods at the time of the bkpcy. were in bkpt.'s possession, order, & disposition, by the consent & permission of the true owner.—*Re* MASSEY (1915), 49 Ir. L. T. 216.—**IR.**

6820 iii. —— ——.]—K., a manufacturing furrier, placed goods with a co., which could sell them as they pleased, paying on each sale, within twenty-four hours thereafter, the price mentioned in a list supplied by K. K. had the right to withdraw from the co. any or all such goods at any time, & all remaining unsold at the end of the season were to be returned. While still in possession of a quantity of K.'s goods, the co. made an assignment for the benefit of creditors:—*Held:* the property in & ownership of the goods never passed out of K.—LANGLEY *v.* KAHNERT (1905), 36 S. C. R. 397.—**CAN.**

C. L. R. 308; 156 E. R. 554; *sub nom.* BELL *v.* HAMILTON, 24 L. J. Ex. 45.

Annotations :—**Consd.** Reynolds *v.* Bowley (1866), L. R. 2 Q. B. 41. **Apprvd.** *Re* Couston, *Ex p.* Watkins (1873), 8 Ch. App. 520, L. C. & L. J. **Consd.** *Re* Bell, *Ex p.* Clarke (1877), 47 L. J. Bcy. 33. **Refd.** *Re* Sketchley, *Ex p.* Boulton (1857), 1 De G. & J. 163; Hornley *v.* Miller (1858), 32 L. T. O. S. 125; *Re* Couston, *Ex p.* Bolland (1872), 20 W. R. 981; Colonial Bank *v.* Whinney (1886), 11 App. Cas. 426; *Re* Watson, *Ex p.* Atkin, [1904] 2 K. B. 753, C. A.; *Re* Keller, *Ex p.* Rose (1913), 109 L. T. 880.

6825. —— Veneer cutter.]—R. & Co., timber merchants, deposited walnut logs with E. & Co., & arranged that A., a veneer cutter, to whom they gave a delivery order on E. & Co., should draw the logs & cut them into veneers to their order. Thirty-three logs had been so drawn & cut when A. became bkpt., & his trustee claimed the balance of the logs as in the possession, order, & disposition of bkpt. :—*Held :* as A. was employed to cut wood into veneers, no presumption of ownership could arise in respect of such wood found upon his premises, & no stronger presumption could be founded upon the fact that the property remained upon the premises of a third party until bkpt. was ready to work upon it.—*Re* KELLER, *Ex p.* ROSE BROTHERS (1913), 109 L. T. 880; 58 Sol. Jo. 155.

6826. Possession by bankrupt as bailee—Loan.]—If an inn-keeper borrow a chaise from a coach-maker while he has a new chaise making, & use it in the course of his trade, but does not have his name painted upon it, under 4 Geo. 4, c. 62, s. 11, this is not such a reputed ownership of the borrowed chaise, as will entitle the assignees of the inn-keeper to detain it from the coach-maker.—NEWPORT *v.* HOLLINGS (1827), 3 C. & P. 223, N. P.

6827. —— ——.]—A picture was lent by the owner of it to the artist who had painted it, for the purpose of being exhibited by him in a public gallery amongst other pictures painted by him & exhibited there for sale :—*Held :* such picture did not pass to the trustee in bkpcy. on the artist becoming bkpt., as being in his order & disposition within 1883 Act, s. 44 (iii).—*Re* COOK, *Ex p.* DUDGEON (1884), 1 Morr. 108.

6828. —— Hiring agreement.]—W., a horse contractor, let out a cart horse on hire to N. & Co., who had it in their possession more than a twelve-month & then became bkpt. :—*Held :* it did not pass to their assignees as being in their reputed ownership.—*Re* NICHOLLS, *Ex p.* WIGGINS (1832), 2 Deac. & Ch. 269; Mont. & B. 168; 1 L. J. Bcy. 90, Ct. of R.

6829. —— Hire-purchase agreement.]—W., a timber merchant, hired from X. & Y., manufacturers of engines, an engine upon the terms of an agreement of hiring & suspensory sale, the payment to be by monthly instalments, with liberty to the manufacturers to retake possession upon W.'s default, the name of the manufacturers to remain meanwhile on the engine as owners. W. became bkpt. before all the instalments were paid, & his trustees claimed to retain the engine as against the manufacturers :—*Held :* the manufacturers continued owners under the agreement, & there was no reputed ownership on the part of bkpt. as against them.—*Re* BAMPFIELD, *Ex p.* STOOKE, *Ex p.* NEWPORT CREDIT CO. (1872), 20 W. R. 925.

6830. Possession by bankrupt as lessee—Trade utensils.]—A., B., & C., partners & distillers, occupied premises leased to A. & another, & used in the trade the stills, vats, & utensils necessary for carrying it on, the property of which afterwards appeared to be in A. On the dissolution of the partnership, it was agreed that C. & J. should carry on the business on the premises, & by deed between the two last & A. it was agreed, that A. should withdraw from the business, & permit C. & J. to occupy the distill house & premises, paying the reserved rent, etc., & the several stills, vats, & utensils of trade specified & numbered in a schedule, in consideration of an annuity to be paid by C. & J. to A., & C. & J. covenanted to keep the stills, vats, & utensils in repair. C. & J. took possession of the premises, with the stills, vats, & utensils, & carried on the business until their bkpcy. :—*Held :* (1) the vats, etc., which were not fixed to the freehold, passed to the assignees, as being left by the true owner in the possession, order & disposition of bkpts., as reputed owners; (2) the case would have admitted of a different consideration if there had been a usage in the trade for the utensils of it to be let out to the traders, as that might have rebutted the presumption of ownership arising from the possession & apparent order & disposition of them.—HORN *v.* BAKER (1808), 9 East, 215; 103 E. R. 555.

Annotations :—**Folld.** Holroyd *v.* Gwynne (1809), 2 Taunt. 176; Clark *v.* Crownshaw (1832), 3 B. & Ad. 804. **Consd.** *Re* Stokes, *Ex p.* Pemberton, *Ex p.* Hancox (1835), 1 Deac. 421, Ct. of R.; *Re* Walsh, *Ex p.* King (1840), 4 Jur. 510, Ct. of R. **Folld.** Whitmore *v.* Empson (1857), 23 Beav. 313. **Refd.** Thackthwaite *v.* Cock (1811), 3 Taunt. 487; Oliver *v.* Bartlett (1819), 1 Brod. & Bing. 269; Steward *v.* Lombe (1820), 1 Brod. & Bing. 506; Storer *v.* Hunter (1824), 3 B. & C. 368; Hubbard *v.* Bagshaw (1831), 4 Sim. 326; Hare *v.* Horton (1833), 2 Nev. & M. K. B. 428; Trappes *v.* Harter (1833), 2 Cr. & M. 153; *Re* Ogden, *Ex p.* Loyd (1834), 3 Deac. & Ch. 765, Ct. of R.; Whitfield *v.* Brand (1847), 16 M. & W. 282; *Re* Gawan, *Ex p.* Barclay (1855), 5 De G. M. & G. 403, L. C. & L. JJ.; Horwich *v.* Symond (1914), 110 L. T. 1016. **Mentd.** Gibson *v.* Bray (1817), 1 Moore, C. P. 519; Lucas *v.* Dorrien (1817), 1 Moore, C. P. 29; Monkhouse *v.* Hay (1820), 4 Moore, C. P. 549, Ex. Ch.; Coombs *v.* Beaumont (1833), 5 B. & Ad. 72; Boydell *v.* M'Michael (1834), 1 Cr. M. & R. 177; Watson *v.* Peache (1834), 4 L. J. C. P. 49.

6831. —— Machinery.]—A steam engine erected for the purpose of working a colliery, to be used by the lessee of such colliery during his term, but to be held as the property of the landlord, subject to such use, will not pass to the assignees of the tenant on his bkpcy., for bkpt. had not

6829 i. *Possession by bankrupt as bailee—Hire-purchase agreement.*]—Pltf., a dealer in musical instruments, let to B. a piano on hire, at the rate of £4 10*s.* a month, & agreed that if B. wished at any time to purchase the piano for £84, all money, which he had paid for the hire, should go in part payment of the purchase-money. B. became a bkpt., having paid one month's rent only :—*Held :* the property in the piano had not so vested in B. as to pass to his trustee in bkpcy. by the order of adjudication.—HOFFMAN *v.* MACFARLANE, 2 J. R. 82.—**N.Z.**

6829 ii. —— ——.]—A power-driven ironing machine, used in the finishing of linen goods, which was in the possession of bkpt. at the time of his adjudication under an agreement for hire, with the option of purchasing on the fulfilment of certain conditions, is not within the reputed ownership of bkpt., it being proved that there existed a custom of letting such machinery out on the hire-purchase system.—*Re* M'ILWAINE, *Ex p.* KENNEDY & MORRISON (1898), 33 I. L. T. 96.—**IR.**

6829 iii. —— ——.]—Articles of household furniture in the private residence of an individual at the date of his being adjudicated a bkpt. will be regarded as in bkpt.'s possession, order, or disposition, & bkpt. will be regarded as the reputed owner of such articles, notwithstanding that he has obtained possession of them under an agreement of hiring & purchase, on foot of which instalments remained unpaid at the date of the adjudication.—*Re* WAUGH, [1908] 2 I. R. 612; 42 I. L. T. 262.—**IR.**

6831 i. *Possession by bankrupt as lessee—Machinery.*]—A., the tenant of a paper-mill & the owner of the machinery thereof, granted to B. & Co. a subtack & conveyance, which provided that at the expiry of the sublease, & upon all the rents of sub-tack duties thereby contracted to be paid being fully paid up & discharged, the whole movable machinery should be held to be the absolute & exclusive property of B. & Co. B. & Co. subsequently took in a new partner, assumed the title of B., C. & Co., &

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the actual or apparent ownership.—COOMBS *v.* BEAUMONT (1833), 5 B. & Ad. 72 ; 2 Nev. & M. K. B. 235 ; 2 L. J. K. B. 190 ; 110 E. R. 718.

Annotations :—**Consd.** *Re* Ogden, *Ex p.* Loyd (1834), 3 Deac. & Ch. 765, Ct. of R. **Refd.** *Re* Butterworth, *Ex p.* Wilson (1835), 2 Mont. & A. 61, Ct. of R. ; *Re* Maberly, *Ex p.* Belcher (1835), 4 Deac. & Ch. 703, Ct. of R. ; *Re* Gawan, *Ex p.* Barclay (1855), 5 De G. M. & G. 493, L. C. & L. JJ. ; Horwich *v.* Symond (1914), 110 L. T. 1016. **Mentd.** Minshall *v.* Lloyd (1837), 2 M. & W. 450 ; Wilde *v.* Waters. (1855), 24 L. J. C. P. 193.

6832. —— Furniture—Forfeiture clause.]—If A. let a house to B., with a covenant that the lease should determine on B. committing any act of bkpcy. on which a commission of bkpty. should issue, & by another deed of the same date, A. grants the use of the furniture to B. in like manner, & with a similar covenant, to allow A. to resume the possession of the furniture on the commission of an act of bkpcy., if B. become bkpt., & the jury find that B. was the reputed owner of the furniture, it will pass to the assignees notwithstanding the covenants.—HICKENBOTHAM *v.* GROVES (1826), 2 C. & P. 492, N. P.

Annotation :—**Mentd.** Watson *v.* Peache (1834), 1 Bing. N. C. 327.

6833. Possession by agent of bankrupt—Master of ship.]—By charter-party, the owner agreed to let, & the charterer to hire, a vessel for six months. The owner gave the charterer the power of appointing his own master, & required him to be responsible for his conduct, & the charterer appointed a master. The freight on the goods was to be paid, according to the bills of lading, to the master, without any stipulation that it should be applied in payment of the price of the hire of the vessel. The charterer agreed to pay at the rate of 22*s.* per ton per month, for so long as the vessel should be employed by him, such payments to be made from month to month, leaving one month's pay in abeyance, & the balance in cash on her final discharge. In an action upon the charter-party, by the assignees of the charterer, who had become bkpt., against the owner, for refusing to permit the master to deliver the cargo, deft. pleaded that bkpt., before his bkpcy. had agreed with C., the agent of deft., to deliver to him the bills of lading of the homeward cargo, & that C. should receive the proceeds thereof, for the purpose of paying the freight due to deft. on the charter-party :—*Held :* (1) the master was in possession of the cargo, as the agent of the charterer ; (2) as C. never had either constructive or actual possession of the goods till after the bkpcy. of the charterer, who remained, through his master of the vessel, the reputed owner of them, they passed to pltfs., as assignees, under 6 Geo. 4, c. 16, s. 72.—BELCHER *v.* CAPPER (1842), 4 Man. & G. 502 ; 5 Scott, N. R. 257 ; 11 L. J. C. P. 274 ; 134 E. R. 207.

6834. Proof of reputed ownership—What must be shown.]—To make out a case of reputed ownership it is not enough to prove continued possession by the assignor, if the real ownership appears to have been known to creditors, & for aught that appears to all creditors, & in such a case, there is no question of fact for the jury.

A claim to goods before insolvency, known to one of the creditors & to the attorney, & to the sheriff's officer, is notice to all the creditors, & the assignees, of the real ownership which prevents, as against them, at all events, any reputed ownership from arising.—HALL *v.* DAY (1861), 2 F. & F. 568, N. P. ; *subsequent proceedings*, 5 L. T. 398.

6835. —— How proved—Disposition by bankrupt as owner.]—Where the question was, whether bkpt. had possession of a stack of bark as reputed owner :—*Held :* evidence of his being reputed the owner of it was properly admitted, facts having been proved, which amounted to a disposition of the property by him as owner.—OLIVER *v.* BARTLETT (1819), 1 Brod. & Bing. 269 ; 3 Moore, C. P. 592 ; 129 E. R. 726.

6836. —— —— Want of notice of assignment not conclusive—Insurance policy.]—Bkpt., a shareholder in a joint stock banking co., carried on the separate trade of a banker under the firm of Y. & Co. & was indebted to the banking co. in a large balance on a running account. To secure such balance, bkpt. had deposited with the co. two policies of life assurance, & other securities, but no notice of the deposit had been given to the insurance office :—*Held :* the want of notice to the insurance office was not conclusive evidence of the policies being in the reputed ownership of bkpt., &, no evidence having been adduced of such reputed ownership, the banking co. were entitled to the policies in question.—*Re* YOUNG, *Ex p.* COOPER (1842), 2 Mont. D. & De G. 1 ; 11 L. J. Bcy. 29 ; 6 Jur. 467, Ct. of R.

Annotation :—**Refd.** West *v.* Reid (1843), 2 Hare, 249.

6837. —— —— —— ——.]—Reputed ownership of policies of assurance is a matter of fact to be proved, & not to be conclusively inferred from the want of notice to the insurance office of an assignment or incumbrance.—*Re* OGBOURNE, *Ex p.* HEATHCOATE (1842), 2 Mont. D. & De G. 711 ; 6 Jur. 1001, Ct. of R.

6838. —— —— —— Shares.]—A shareholder in a co., the settlement deed of which prescribed a specific mode for the transfer of shares, & excluded from being shareholders all who were not shippers of goods, deposited the certificates of his shares by way of mtge., with a person not of the prescribed description, & without following the prescribed mode of alienation :—*Semble :* reputed ownership of the shares must be proved to have existed, & was not conclusively to be inferred from the absence of a lien upon them.—*Re* ATKINSON, *Ex p.* POOLEY (1842), 2 Mont. D. & De G. 505 ; 6 Jur. 515, Ct. of R.

See, further, Nos. 6549, 6609, 6615 *et seq.*, 6667 *et seq.*, *ante*.

6839. —— Onus of proof.]—In an action by assignees to recover property pltfs. proved that bkpt. had once been the real owner of the goods, & that he continued in possession of them until he committed an act of bkpcy. :—*Held :* his was *primâ facie* evidence that he continued in possession as owner, & it then lay on deft. to prove that bkpt. had ceased to be the reputed owner.—LINGARD *v.* MESSITER (1823), 1 B. & C. 308 ; 2 Dow. & Ry. K. B. 495 ; 1 L. J. O. S. K. B. 121 ; 107 E. R. 115.

were sequestrated, & the trustee claimed the machinery for behoof of the creditors :—*Held :* there had been no actual transfer of the property, & as the machinery was to belong to B. & Co. only in the event of the rents, etc., being duly paid, & on the expiration of the lease, which period had not arrived, the machinery belonged to A. —COWAN *v.* SPENCE (1824), 3 Sh. (Ct. of Sess.) 42.—**SCOT.**

6834 i. *Proof of reputed ownership—What must be shown.*]—In order to bring a case within the operation of the reputed ownership clause the circumstances of bkpt.'s possession of the goods must be such that the owner, in allowing the goods to remain in bkpt.'s possession, must be taken to have consented to a state of things from which the inference of ownership in bkpt. must, not might or might not, arise.—MAXWELL *v.* GILLESPIE'S ASSIGNEE (1909), 8 C. L. R. 553.—**AUS.**

6835 i. —— *How proved—Want of notice of assignment not conclusive.*]—Reputed ownership is a matter of fact to be collected from all the circumstances & not to be inferred from want of notice alone.—*Re* HUGHES, *Ex p.* TERRY (1845), 1 Legge, 265.—**AUS.**

Annotations :—**Distd.** Storer *v.* Hunter (1824), 3 B. & C. 368. **Consd.** Watson *v.* Peache (1834), 1 Bing. N. C. 327; Hamilton *v.* Bell (1854), 10 Exch. 545; **Apld.** *Re* Jones, *Ex p.* Lovering (1874), 9 Ch. App. 621, L. J. **Folld.** *Re* Fowler, *Ex p.* Brooks (1883), 23 Ch. D. 261. **Consd.** Sharman *v.* Mason, [1899] 2 Q. B. 679. **Refd.** Leake *v.* Loveday (1842), 4 Man. & G. 972; *Re* Sketchley, *Ex p.* Boulton (1857), 1 De G. & J. 163; Vicarino *v.* Hollingsworth (1869), 20 L. T. 362.

6840. —— How rebutted—Contrary reputation.]—In an action by the assignee of bkpt., claiming property which bkpt. is alleged to have had in his possession, order, & disposition, as the reputed owner at the time of his bkpcy., it is competent for deft., who has paid a valid consideration for the property, to give evidence of a contrary reputation, & to resist the claim of pltf. upon those grounds.—GURR *v.* RUTTON (1816), Holt, N. P. 327, N. P.

Annotations :—**Apld.** Oliver *v.* Bartlett (1819), 3 Moore, C. P. 592. **Refd.** *Re* Baldwin, *Ex p.* Foss, *Ex p.* Baldwin (1858), 30 L. T. O. S. 354.

6841. —— —— Knowledge in district that bankrupt not owner.]—By agreement between B. & deft., B. agreed, on payment to him of a sum certain, to convey to deft. a dwelling-house, & to deliver possession of all the household furniture & stock, & that after formal possession delivered to deft., B. should be allowed to remain in possession for three months without paying rent. The agreement was notorious in the neighbourhood. The money was paid by deft., & a formal delivery made to him, & B. afterwards left in possession according to the agreement. B. became bkpt. whilst he so remained in possession, & before the expiration of the three months :—*Held :* this was not a possession by bkpt. within 21 Jac. 1, c. 19, s. 11, as the agreement was notorious & there was no reputation of ownership in bkpt.—MULLER *v.* MOSS (1813), 1 M. & S. 335; 2 Rose, 99; 105 E. R. 126.

Annotation :—**Folld.** Oliver *v.* Bartlett (1819), 1 Brod. & Bing. 269.

6842. —— —— ——.]—A., an innkeeper, being indebted to B., gave a bill of sale of all his effects in favour of B. B. sent a man to A.'s premises to paint out A.'s name, & took possession, leaving A. there to manage the concern on his behalf. A. was adjudged bkpt.—In an action by the assignees to recover the value of the goods thus conveyed, the jury found that the transaction was *bonâ fide*, & that possession was really & notoriously taken by B. prior to the bkpcy. :—*Held :* the goods were not in the order & disposition of A. at the time of his bkpcy. as reputed owner.—SHRUBSOLE *v.* SUSSAMS (1864), 16 C. B. N. S. 452; 143 E. R. 1204.

Annotations :—**Refd.** Topping *v.* Keysell (1864), 16 C. B. N. S. 258. **Mentd.** Allen *v.* Bonnett (1870), 5 Ch. App. 577, L. C. & L. J.

6843. —— —— Issuing handbills advertising sale.]—Goods remained in the possession of a party until his bkpcy., with the consent of the true owner :—*Held :* the issue of handbills a few days before the bkpcy., advertising a sale for the benefit of the true owner, was not such notice of actual ownership as to rebut the reputation of bkpt.'s ownership.—DAVIS *v.* DALE (1830), L. & Welsb. 291.

6844. —— —— Registration of ship—Notwithstanding acts of apparent ownership.]—The registry of a ship is conclusive evidence of the property, even against the claim of creditors, upon a joint purchase & various acts of apparent ownership, within 21 Jac. 1, c. 19, s. 11.—*Ex p.* YALLOP (1808), 15 Ves. 60; 33 E. R. 677, L. C.

Annotations :—**Refd.** Liverpool Borough Bank *v.* Turner (1860), 1 J. & H. 159. **Mentd.** Mestaer *v.* Atkins (1814), 1 Marsh. 76; Thompson *v.* Leake (1815), 1 Madd. 39; Thompson *v.* Smith (1815), 1 Madd. 395; Wedderburn *v.* Wedderburn (1838), 4 My. & Cr. 41; M'Calmont *v.* Rankin (1852), 2 De G. M. & G. 403, L. C.; De Wolf *v.* Pitcairn (1869), 17 W. R. 914; Barton *v.* Muir (1874), L. R. 6 P. C. 134; Chasteauneuf *v.* Capeyron (1882), 7 App. Cas. 127, P. C.

B. Possession, etc., of Firm or Partner.

6845. Bankrupt interested in property of true owner—True owner only dormant partner.]—The share of a secret partner in the joint stock-in-trade, being in the possession of an apparent partner, & the sole ostensible trader, is not liable to the bkpcy. of the latter, as being within 21 Jac. 1, c. 19, bkpt. having such an interest & qualified property in the secret partner's share, as to destroy the essential requisites of a true & independent ownership on the one hand, & of a fraudulent & reputed ownership on the other.—COLDWELL *v.* GREGORY (1814), 1 Price, 119; 2 Rose, 149; 145 E. R. 1350.

Annotations :—**Dbtd.** *Re* Moline, *Ex p.* Dyster (1815), 2 Rose, 256, L. C. **Distd.** Kirkley *v.* Hodgson (1823), 1 B. & C. 588. **Dbtd.** Smith *v.* Watson (1824), 2 B. & C. 401. We could not have certified as we did in *Re Gilpin, Ex p. Enderby* (1824), 2 B. & C. 309, unless we had thought that the case of *Coldwell v. Gregory* could not be supported (BEST, J.).; *Re* Starkey, *Ex p.* Chuck (1831), Mont. 364, L. C. The case of *Coldwell v. Gregory* must be considered as overruled by *Re Gilpin* (LORD BROUGHAM, L.C.). **Consd.** Reynolds *v.* Bowley (1867), L. R. 2 Q. B. 474, Ex. Ch. **Mentd.** Brickwood *v.* Miller (1817), 3 Mer. 279; *Re* Colbeck, *Ex p.* Wilson, *Ex p.* Todd (1817), Buck, 48, L. C.

6846. —— ——.]—*Qu. :* whether a dormant partner is within 21 Jac. 1, c. 19, s. 11, as regards his share of partnership property left in the ostensible possession of his co-partner.—*Re* MOLINE, *Ex p.* DYSTER (1815), 2 Rose, 256, L. C.

Annotations :—**Consd.** Reynolds *v.* Bowley (1867). L. R. 2 Q. B. 474, Ex. Ch. **Refd.** Smith *v.* Watson (1824), 2 B. & C. 401; *Re* Starkey, *Ex p.* Jennings (1830), Mont. 45; Reynolds *v.* Bowley (1866), L. R. 2 Q. B. 41.

6847. —— ——.]—*Qu. :* whether the property of a dormant partner in the possession of the visible partner is in the order & disposition of the latter.—*Re* COLBECK, *Ex p.* WILSON, *Ex p.* TODD (1817), Buck, 48, L. C.

6848. —— ——.]—Two partners admitted a dormant partner. By the deed it was stipulated that the stock & effects of the old firm, including the plant & book debts, should form part of the capital stock of the new partnership, & that the dormant partner should be paid 10 per cent. on the capital advanced by him, but should not otherwise interfere with the business, which was carried on as before in the names of the original

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6841 i.—*How rebutted—Knowledge of district of composition by bankrupt.*]—The lessor of an hotel, in which the lessee carried on business for some years, owned the furniture therein. The lessee failed, & paid his creditors a composition of 7*s.* 6*d.* in the pound. The furniture was then of sufficient value to pay double what he owed. The lessee continued to deal with the same & with other creditors, who knew his circumstances. He became bkpt. The assignees claimed the furniture as being in his reputed ownership at the date of the bkpcy. The furniture was the same which he had had at the date of the composition :—*Held :* the reputed ownership sect. did not apply, because it might be presumed that the lessee after his composition obtained no fresh credit on account of the possession of the furniture.—*Re* SHAW (1863), 15 Ir. Jur. 96.—IR.

PART XX. SECT. 9, SUB-SECT. 6.—B.

6845 i. *Bankrupt interested in property of true owner—True owner only dormant partner.*]—A. & B. agreed that A. should write a novel in monthly numbers, B. to pay all expenses of 11,000 copies, & also £100 per number to A., & to be entitled to the remaining profits of those copies. As to all copies above 11,000, there was to be a complete mutuality, the profits to be divided equally between A. & B. The 11,000 copies were sold. B. became bkpt., having a large number of copies unsold :—*Held :* even if A. was a partner as to the unsold stock, yet, as he was only a dormant partner, the whole of it belonged to the creditors of bkpt., under 6 Will. 4, c. 14, s. 86, as being in the order & disposition of bkpt.—*Re* CURRY & CO., *Ex p.* LEVER (1850), 15 L. T. O. S. 476; 12 I. Eq. R. 382.—IR.

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partners, until the new firm became bkpt. :—*Held:* the personal chattels of the new firm must be distributed as the joint estate of the two original partners, on the ground that they were in their order & disposition.—*Re* STARKEY, *Ex p.* CHUCK (1832), Mont. 364, 457; 8 Bing. 469; 1 Moo. & S. 615; 1 L. J. Ch. 197; 131 E. R. 473, L. C.

Annotation :—**Mentd.** Reynolds *v.* Bowley (1866), 7 B. & S. 67.

6849. —— ——.]—A brother & sister took to the business of their father, a farmer, & bought the stock. They then agreed to carry on business in partnership, but in the brother's name alone, the partnership of the sister being kept secret, but she lived on the farm, & helped in the business. The brother became bkpt. :—*Held:* the dormant partner having allowed bkpt. *bonâ fide* to carry on the business ostensibly as his own, the share of the dormant partner in the partnership stock-in-trade was not in the order & disposition of bkpt.—REYNOLDS *v.* BOWLEY (1867), L. R. 2 Q. B. 474; 8 B. & S. 406; 36 L. J. Q. B. 247; 16 L. T. 532; 15 W. R. 813, Ex. Ch.

Annotations :—**Distd.** *Re* Cook, *Ex p.* Moore (1877), 36 L. T. 560. **Consd.** *Re* Pulsford, *Ex p.* Hayman (1878), 8 Ch. D. 11, C. A.; *Re* Webber, *Ex p.* Slater (1891), 64 L. T. 426. **Refd.** Graham *v.* McCulloch (1875), L. R. 20 Eq. 397.

6850. —— —— **Broker employed to buy for share of profits.**]—A dormant partner is within 21 Jac. 1, c. 19, s. 11.

A merchant employed a broker to purchase goods on speculation, & agreed to allow him a portion of the profits on the sale, as his remuneration :—*Held:* the broker could not be considered such a partner with the merchant, as to vest in him a property in goods so purchased, or in the proceeds thereof, as against the assignees of the latter after he became bkpt., although as to third persons he might have been liable as partner.—SMITH *v.* WATSON (1824), 2 B. & C. 401; 3 Dow. & Ry. K. B. 751; 2 L. J. O. S. K. B. 63; 107 E. R. 434.

Annotations :—**Distd.** Reid *v.* Hollinshed (1825), 7 Dow. & Ry. K. B. 444. **Consd.** Reynolds *v.* Bowley (1866), L. R. 2 Q. B. 41. **Refd.** *Re* Starkey, *Ex p.* Jennings (1830), Mont. 45; Reynolds *v.* Bowley (1867), L. R. 2 Q. B. 474. **Mentd.** Potts *v.* Eyton & Jones (1846), 7 L. T. O. S. 281; Stocker *v.* Brockelbank (1851), 3 Mac. & G. 250, L. C.; Carpenter *v.* Churchill (1854), 2 W. R. 364; Alfaro *v.* De La Torre (1876), 34 L. T. 122.

6851. —— —— **Bankruptcy of continuing partner after dissolution.**]—A., the dormant partner of B. in a trading firm allowed the latter, on the dissolution of the partnership, to remain in the order & disposition of the partnership property, effects, & debts. B., after continuing in trade for about two years afterwards on his sole account, became bkpt. :—*Held:* A.'s share of the partnership property & effects, & of the debts due on the partnership account at the time of the dissolution, passed to B.'s assignees under 21 Jac. 1, c. 19, s. 11.—*Re* GILPIN, *Ex p.* ENDERBY (1824), 2 B. & C. 389; 3 Dow. & Ry. K. B. 636; 2 L. J. O. S. K. B. 57; 107 E. R. 429.

Annotations :—**Extd.** *Re* Starkey, *Ex p.* Chuck (1832), 8 Bing. 469, L. C. **Refd.** Smith *v.* Watson (1824), 2 B. & C. 401; Reynolds *v.* Bowley (1867), L. R. 2 Q. B. 474, Ex. Ch. **Mentd.** *Re* Starkey, *Ex p.* Chuck (1831), Mont. 364, L. C.

6852. —— —— —— **Dormant partner subsequently becoming bankrupt.**]—Two partners traded under the name of one only. Upon a dissolution that one continued the business, the other retiring, but no apparent change took place in the firm. By the agreement on dissolution, the stock-in-trade belonged to the continuing partner, who became bkpt., & was sold by his assignees as his separate property. The retired partner, though cognizant of the sale, made no objection or claim. On the retired partner becoming bkpt. :—*Held:* the stock-in-trade was not in the reputed ownership of the two, & ought to be administered as the separate estate of the continuing partner.—*Re* TODD & DEFLINNE, *Ex p.* WOOD (1845), De G. 134, Ct. of R.

6853. —— —— **Illegal partnership.**]—Where there was a secret partnership between A. & B. to underwrite policies in their separate names on their joint account, & A. died, & B. became bkpt. :—*Held:* premiums due on policies effected in A.'s name during his lifetime were not in the order & disposition of bkpt.—BRETT *v.* BECKWITH (1856), 26 L. J. Ch. 130; 28 L. T. O. S. 214; 3 Jur. N. S. 31; 5 W. R. 112.

6854. —— —— **Property employed for firm purpose.**]—The rule that the doctrine of reputed ownership does not apply as between a dormant & an ostensible partner, does not include a case where the real owner of property allows it to be employed in a business in which another person is a partner with himself. In such a case the property will, in the event of bkpcy., be, by virtue of the doctrine of reputed ownership, treated as joint estate of the two (JAMES, L.J.).—*Re* PULSFORD, *Ex p.* HAYMAN (1878), 8 Ch. D. 11; 47 L. J. Bcy. 54; 38 L. T. 238; 26 W. R. 597, C. A.

Annotation :—**Consd.** *Re* Webber, *Ex p.* Slater (1891), 64 L. T. 426.

See, further, Nos. 6558 *et seq.*, 6726 *et seq.*, *ante.*

SUB-SECT. 7.—"DEBTS DUE OR GROWING DUE TO BANKRUPT."

6855. Payments becoming due to bankrupt as agent for sale.]—If it be a matter of notoriety that a man is acting in the capacity of factor to another, & the factor becomes bkpt., the book debts owing to the factor on behalf of his principal will not pass to the trustee of bkpt.'s estate.—*Re* WOOD, *Ex p.* BODEN (1873), 28 L. T. 174.

Annotation :—**Distd.** *Re* Fawcus, *Ex p.* Buck (1876), 3 Ch. D. 795.

6856. Marginal notes—Contingent debts.]—Debtors were exporters, & drew on their consignees in respect of their consignments, & discounted the bills to bankers in London, who paid them a percentage of the amount of the bills & gave them marginal notes for the remainder, which was to be paid when the bills had been paid. Debtors assigned the marginal notes to third parties, who did not give notice to the bank, &

v. *Mortgage by firm—Further advances to two partners—Third partner outside jurisdiction.*]—In 1878 the members of the firm of A. & Co. mortgaged the live & dead stock, chattels, & effects belonging to the firm to B., the mtge.-deed containing a clause to the effect that, as long as there was anything due on the mtge., the mtge. property should be treated & considered as the property & in the order & disposition of the mtgee. A. & Co. subsequently obtained further advances from B., & at that time A. was residing out of the jurisdiction of the ct., & the instruments creating the further charges were signed by his attorney. C. & D., the two members of the firm residing in Calcutta, remained in possession of the mortgaged property up to May 10, 1880, when they became insolvent, & their property was vested in the official assignee, who entered into possession. On May 12, the mtgee. also entered into possession. On June 26, A., the remaining partner of the firm, returned to Calcutta & filed his petition of insolvency :—*Held:* the goods & chattels of the firm which were covered by the mtge. & further charges did not vest in the official assignee upon the insolvency of C. & D.—*Re* MORGAN, GUBBOY *v.* MILLER (1881), I. L. R. 6 Calc. 633; 7 C. L. R. 29; 9 C. L. R. 385.—**IND.**

afterwards went into liquidation :—*Held :* (1) the money due on the marginal notes was not a debt due to bkpts. in the course of their trade or business within 1869 Act, s. 15 (5); (2) the expression "debts due" in the above sect. was not confined to debts presently payable, but did not include debts which were only contingent at the commencement of the bkpcy.—*Re* FASTNEDGE, *Ex p.* KEMP (1874), 9 Ch. App. 383 ; 43 L. J. Bcy. 50 ; 30 L. T. 109 ; 22 W. R. 462, L. J.

Annotations :—**Refd.** *Re* Stockton Malleable Iron Co. (1875), 2 Ch. D. 101 ; Wilmot *v.* Alton (1896), 74 L. T. 813.

6857. Debentures.]—A trader deposited a debenture of a co., which he had indorsed in blank, with a creditor as a security for a debt. The trader became bkpt. :—*Held :* the debenture was not a debt "due to bkpt. in the course of his trade," those words not extending to all debts due to bkpt. during the period of his trading, but only to debts connected with the trade.—*Re* PRYCE, *Ex p.* RENSBURG (1877), 4 Ch. D. 685 ; 36 L. T. 117 ; 25 W. R. 432.

Annotation :—**Apld.** *Re* Jenkinson, *Ex p.* Nottingham & Nottinghamshire Bank (1885), 15 Q. B. D. 441, D. C.

6858. Payments becoming due to bankrupt under hire-purchase agreement.]—Debtors deposited with a creditor as security for his debt a hire-purchase agreement, by which they had agreed to let certain furniture on the hire-purchase system, to be paid for by half-yearly instalments, with the usual conditions in case of default, etc. No notice of the assignment was given to the hirer, &, before the second instalment became due, debtors were adjudicated bkpt. :—*Held :* the amount payable under the agreement was a debt growing due to bkpts. in the course of their trade, &, no notice having been given, the trustee in bkpcy. was entitled to the benefit of the agreement under 1883 Act, s. 44 (iii).—*Re* DAVIS & Co., *Ex p.* RAWLINGS *v.* DEWARS (1888), 60 L. T. 156 ; 37 W. R. 141.

SUB-SECT. 8.—EFFECT OF CUSTOM.

A. In General.

6859. Duty of court—To take notice of alleged custom.]—A trader hired household furniture under a written agreement, whereby he was to pay a weekly rent, & the owner was empowered to repossess himself of same upon the hirer becoming bkpt. The hirer became bkpt. At the time of the bkpcy. the furniture remained in his house, in his apparently uncontrolled possession. Although no evidence was adduced of the existence of a custom of hiring furniture :—*Held :* the ct. must take notice of such custom, & the goods were not in the order & disposition of bkpt.—*Re* HAWKINS, *Ex p.* EMERSON (1871), 41 L. J. Bcy. 20 ; *sub nom. Re* HAWKINS, EMERSON *v.* BARNETT, 20 W. R. 110.

Annotations :—**Refd.** *Re* Couston, *Ex p.* Watkins (1873), 8 Ch. App. 523, n. ; Chappell *v.* Harrison (1910), 103 L. T. 594.

6860. Remittal to registrar—To inquire as to custom.]—A trader hired furniture under an agreement, which provided that in the event of nonpayment of any instalment, the upholsterer might seize & retake possession of the furniture as in & for his first & former estate, & any money already paid to him was to be forfeited, & that on payment of the full sum, the furniture should become & be the property of the hirer, but till payment of the whole sum it should remain the sole & absolute property of the upholsterer, & that it was only lent on hire to the hirer. The hirer, after paying £15, under the agreement, filed a liquidation petition, & afterwards two instalments being in arrear, the upholsterer took possession of the furniture :—*Held :* the case must be remitted to the registrar to decide whether the furniture was in the reputed ownership of debtor, or whether the custom of hiring furniture was so well-known as to exclude the operation of 1869 Act, s. 15 (5).—*Re* ROBERTSON, *Ex p.* CRAWCOUR (1878), 9 Ch. D. 419 ; 39 L. T. 2 ; 26 W. R. 733, C. A.

Annotations :—**Refd.** *Re* Gelder, *Ex p.* Whittaker, [1880] W. N. 171 ; Crawcour *v.* Salter (1881), 18 Ch. D. 30, C. A.

6861. How question tried—By judge & jury—On vivâ voce evidence.]—When property is claimed as being in the reputed ownership of bkpt., it is convenient that the question of the existence of a custom notorious in a particular trade should be tried by a judge & jury on *vivâ voce* evidence, & not upon affidavit alone.—*Re* JENSEN, *Ex p.* CALLOW (1886), 4 Morr. 1, D. C.

6862. Onus of proof—Conflicting evidence.]—Where assignees rely upon the custom of the country to raise a title by order & disposition, but the evidence as to usage is both ways, this will not entitle the assignees, it being upon them to prove the reputed ownership.—*Re* ASHTON, *Ex p.* SCARTH (1840), 1 Mont. D. & De G. 240 ; 9 L. J. Bcy. 35 ; 4 Jur. 826, Ct. of R.

6863. What must be shown—Whether custom is known in particular trade—Need not be known to public generally.]—In order to establish a custom it is sufficient to prove that it is known to the whole trade, & it need not be proved that the custom is notorious to the public generally.—*Re* COUSTON, *Ex p.* WATKINS (1873), 5 Ch. App. 520 ; 42 L. J. Bcy. 50 ; 28 L. T. 793 ; 21 W. R. 530, L. C. & L. J.

Annotations :—**Apld.** *Re* Couston, *Ex p.* Vaux (1874), 9 Ch. App. 602, L. JJ. **Consd.** *Re* Hill (1875), 1 Ch. D. 503, n., L. J. ; Colonial Bank *v.* Whinney (1886), 11 App. Cas. 426, H. L. **Refd.** *Re* Jones, *Ex p.* Lovering (1874), 9 Ch. App. 621, L. JJ. ; *Re* Matthews, *Ex p.* Powell (1875), 1 Ch. D. 501, C. A. **Mentd.** *Re* Cohn, *Ex p.* Cohen (1878), 38 L. T. 884 ; Harris *v.* Truman (1881), 7 Q. B. D. 340 ; *Re* Parker, *Ex p.* Turquand (1885), 14 Q. B. D. 636, C. A. ; *Re* Goetz, Jonas, *Ex p.* The Trustee, [1898] 1 Q. B. 787, C. A. ; Sharman *v.* Mason, [1899] 2 Q. B. 679, D. C. ; *Re* Watson, *Ex p.* Atkin, [1904] 2 K. B. 753, C. A. ; Hollinshead *v.* Egan, [1913] A. C. 564, H. L.

6864. —— —— Must be known to others likely to be creditors.]—A custom must be well proved & shown to be known not only to persons in the same trade, but to others who are likely to be creditors. A man could not make a custom for himself.—*Re* HILL (1875), 1 Ch. D. 503, n. ; 58 L. T. Jo. 397, L. JJ.

Annotations :—**Consd.** *Re* Matthews, *Ex p.* Powell (1875), 1 Ch. D. 501, C. A. ; *Re* Rose, *Ex p.* Linnell (1888), 4 T. L. R. 255, C. A.

6865. —— —— ——.]—A lathe with overhead motions was let on hire to R., a machinist to be used in his business. The lathe rested on its own weight on the ground in R.'s shop without being in any way fixed to the freehold, but the overhead working was, though slightly, affixed to the freehold. R. became a bkpt. & the lathe & overhead

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PART XX. SECT. 9, SUB-SECT. 7.

w. *Payments becoming due to bankrupt under sewerage contract.*]—Bkpt. entered into a sewerage contract, the benefit of which he assigned to M., who continued the work in the place of bkpt. M. received vouchers for work done, & orders for payment, from bkpt. signed by him. The contract having been put an end to, & the bkpcy. having supervened the official assignee claimed the amount due up to the commencement of the bkpcy. under the contract as "debts due to bkpt. in the course of his trade or business being at the commencement of the bkpcy. in the order or disposition of bkpt." :—*Held :* M. was so entitled to the amount as against the official assignee, the debt not being within the exception to the proviso in 1887 Act, s. 52 (iii.).—*Re* SUTTON & SUTTON, *Ex p.* MILLER, OFFICIAL ASSIGNEE (1893), 14 N. S. W. B. 31.—**AUS.**

Sect. 9.—Property in reputed ownership of bankrupt: Sub-sect. 8, A. & B.]

working were claimed by the official receiver as being chattels in the order & disposition of bkpt. with the consent of the true owner. Evidence was given to show that there was a trade custom to let lathes upon hire, which would prevent the machine from being in the order & disposition of bkpt. :—*Held :* the custom relied upon failed, as there was no evidence of a custom so general that it must or ought to be known to those who were likely to be the creditors of the person in whose possession the chattel was.—*Re* ROSE, *Ex p.* LINNELL & Co. (1888), 4 T. L. R. 255, C. A.

6866. —— —— Must be known in business generally.]—A custom of trade by which goods are left in the possession of persons to whom they do not belong, must, in order to exclude the doctrine of reputed ownership, be a custom known in business generally, & not merely to persons dealing in a particular market.—*Re* GOETZ, JONAS & Co., *Ex p.* THE TRUSTEE, [1898] 1 Q. B. 787 ; 67 L. J. Q. B. 577 ; 78 L. T. 399 ; 46 W. R. 469 ; 14 T. L. R. 327 ; *sub nom. Re* GOETZ, JONAS & Co., *Ex p.* ARMSTRONG & Co., 5 Mans. 76, C. A.

6867. —— Must be known to ordinary creditors.]—Where a custom of holding certain goods on hire is relied on to take the goods out of the order & disposition of bkpt., the custom must be one which the ordinary creditors of bkpt. may be reasonably presumed to have known.—*Re* MATTHEWS, *Ex p.* POWELL (1875), 1 Ch. D. 501 ; 45 L. J. Bcy. 100 ; 34 L. T. 224 ; 24 W. R. 378, C. A.

Annotations :—**Refd.** *Re* Blanshard, *Ex p.* Hattersley (1878), 8 Ch. D. 601 ; Crawcour *v.* Salter (1881), 18 Ch. D. 30, C. A. **Mentd.** Moult *v.* Halliday (1897), 46 W. R. 318, D. C.

6868. How proved.]—Where a custom of holding certain goods on hire is relied on to take the goods out of the order & disposition of bkpt., the custom may be proved either by reported cases, or by evidence of the custom as on a question of fact.—*Re* MATTHEWS, *Ex p.* POWELL (1875), 1 Ch. D. 501 ; 45 L. J. Bcy. 100 ; 34 L. T. 224 ; 24 W. R. 378, C. A.

Annotations :—**Refd.** *Re* Blanshard, *Ex p.* Hattersley (1878), 8 Ch. D. 601 ; Crawcour *v.* Salter (1881), 18 Ch. D. 30, C. A. ; Moult *v.* Halliday (1897), 46 W. R. 318, D. C.

6869. Sufficiency of evidence—Trial by jury declined.]—On the bkpcy. of an hotel keeper a custom was alleged of hiring furniture for hotels. The custom was on slight, but uncontradicted, evidence considered to be sufficiently established, applicant having declined an offer to have the custom tried by a jury.—*Re* MATTHEWS, *Ex p.* POWELL (1875), 1 Ch. D. 501 ; 45 L. J. Bcy. 100 ; 34 L. T. 224 ; 24 W. R. 378, C. A.

Annotations :—**Consd.** Crawcour *v* Salter (1881), 18 Ch. D. 30, C. A. **Refd.** *Re* Blanshard, *Ex p.* Hattersley (1878), 8 Ch. D. 601. **Mentd.** Moult *v.* Halliday (1897), 46 W. R. 318, D. C.

6870. Proper question for jury.]—A coal merchant, at the time of his bkpcy., had in his possession barges, which bore his own name & number, & were registered in his name. He had hired the barges of deft., it being the custom for coal merchants to hire barges, & to paint on them the name of the hirer. Upon a question whether the barges passed to the coal merchant's assignees under his bkpcy. :—*Held :* the jury having found the custom proved, it was properly left to them to find whether the custom to hire was generally notorious in the coal trade & known to those likely to have dealings with bkpt. ; & it was unnecessary to direct them to inquire whether the custom was notorious to the world at large.—WATSON *v.* PEACHE (1834), 1 Bing. N. C. 327 ; 1 Scott, 149 ; 4 L. J. C. P. 49 ; 131 E. R. 1143.

Annotations :—**Refd.** Marner *v.* Bankes (1867), 16 W. R. 62. **Mentd.** Leake *v.* Loveday (1842), 4 Man. & G. 972 ; Priestley *v.* Pratt (1867), 36 L. J. Ex. 89 ; Cooke *v.* Hemming (1868), L. R. 3 C. P. 334 ; *Re* Couston, *Ex p.* Watkins (1873), 8 Ch. App. 520, L. C. & L. J.

6871. ——.]—In an action by the owner of furniture let on hire to an hotel-keeper, who has become bkpt. while in his possession, to recover damages from his assignees for seizing & selling it, if pltf. rely on a custom for hotel keepers to hire a portion of their furniture, the question for the jury will be, whether the custom is so general as to raise a fair doubt & suspicion in the minds of persons trusting him, that the goods were not actually the goods of bkpt., or, in other words, whether it is so general that persons must be supposed to have known that the goods, though in the possession, were not the property of bkpt.—MULLETT *v.* GREEN (1838), 8 C. & P. 382, N. P.

6872. Effect of custom when proved.]—Where the owner of chattels can show a well-known custom of letting such chattels, they will be taken out of the order & disposition of bkpt.—*Re* HILL (1875), 1 Ch. D. 503, n. ; 58 L. T. Jo. 397, L. JJ.

Annotations :—**Refd.** *Re* Rose, *Ex p.* Linnell (1888), 4 T. L. R. 255, C. A. **Mentd.** *Re* Matthews, *Ex p.* Powell (1875), 1 Ch. D. 501, C. A.

6873. ——.]—When a particular custom is established in a case & is clearly proved, the order & disposition clause does not apply.—*Re* FOWLER, *Ex p.* BROOKS (1883), 23 Ch. D. 261 ; 48 L. T. 32 ; 47 J. P. 470 ; *affd.* on another point, 23 Ch. D. 265, C. A.

Annotation :—**Mentd.** Chappell *v.* Harrison (1910), 103 L. T. 594.

B. In Particular Trade.

6874. Agricultural custom—To allow property to remain on land after sale—Crops.]—Where farm-

PART XX. SECT. 9, SUB-SECT. 8.—A.

6866 i. *What must be shown—Whether enough that custom known in particular trade—Must be known in business generally.*]—It is essential, in order to exclude the application of the provisions of 1908 Act, s. 61 (*c*), as to the reputed ownership of goods in the possession of bkpt., that the custom of usage relied upon as preventing the operation of that sect. be a custom or usage known in business generally, & not merely to persons dealing in a particular market.—WYLIE'S OFFICIAL ASSIGNEE *v.* MASSEY-HARRIS CO., LTD. (1913), 32 N. Z. L. R. 363.—**N.Z.**

6867 i. —— *Must be known to ordinary creditors.*]—Where a custom of trade is relied on to take goods out of the operation of the order & disposition clause, it is not enough to show the custom has prevailed in the dealings of the particular trader, amongst certain others, who seeks to rely on it, but it must be shown that it is a well-recognised custom existing in the trade generally, & so long & extensively acted upon that the ordinary creditors of bkpt. who has had a dealing of that nature, & in whose possession goods have been left accordingly, must have known, if they chose to make any inquiry, in the legitimate exercise of their reason & judgment, of the existence of such custom. *Qu. :* whether such a custom must be a reasonable one.—*Re* BLACKWELL, *Ex p.* SINGER SEWING MACHINE CO. (1878), 12 I. L. T. 57.—**IR.**

6867 ii. —— ——.]—A custom, to be sufficient to take a case out of the reputed ownership clause, must be known to creditors generally, & not merely to persons engaged in a particular trade.—CAMPBELL *v.* BUCKMAN'S OFFICIAL ASSIGNEE (1909), 28 N. Z. L. R. 875.—**N.Z.**

6869 i. *Sufficiency of evidence—Admissions by official assignee.*]—*Semble :* admissions made by the official assignee after vesting of the estate in him as to the notoriety of a system, by which the farmer held the stock under a lease from the owner, were admissible to prove the existence of that system.—MAXWELL *v.* GILLESPIE'S ASSIGNEE (1909), 8 C. L. R. 553.—**AUS.**

a. *No distinction between articles of luxury & of commerce.*]—In construing hire-purchase agreements, & applying to them the notoriety of trade custom in excluding reputation of ownership, there is no distinction between agreements for the hire of articles of luxury & articles of commerce.—*Re* PEEL, *Ex p.* CROSSLEY, [1894] 1 I. R. 240 ; 28 I. L. T. 45 ; *affd.* on other grounds, [1895] A. C. 457, H. L.—**IR.**

ing produce has been purchased & the price paid before bkpcy., but it appears to be the custom of farmers to leave such produce upon the farm of the seller until it suits the convenience of the buyer to take it away, the custom exempts such produce from passing to the assignees under the law of reputed ownership.—*Re* TERRY, *Ex p.* VIDLER (1862), 7 L. T. 370; 11 W. R. 113.

Annotation:—**Mentd.** Priestley *v.* Pratt (1867), L. R. 2 Exch. 101.

6875. —— —— Cattle.]—Pltf. purchased live stock from G., who became bkpt. within a week afterwards. Some of the animals were taken away by pltf. at the time of the purchase; the remainder were left on the vendor's premises, & were taken possession of by his assignees. In an action of trover against the assignees, the jury found that it was a notorious custom in the trade to leave purchased cattle, on the vendor's premises for the vendee's convenience, for such time as might be agreed upon between them:—*Held:* the animals were not at the time of the bkpcy. within the order & disposition of bkpt.—PRIESTLEY *v.* PRATT (1867), L. R. 2 Ex. 101; 36 L. J. Ex. 89; 16 L. T. 64; 15 W. R. 639.

Annotation:—**Apld.** *Re* Couston, *Ex p.* Watkins (1873), 8 Ch. App. 520.

6876. —— Agistment.]—H. placed stock upon the lands of W. upon an agreement, whereby the stock remained the property of H., who at the end of a fixed period, was to sell the stock, &, after deducting the original price & a percentage for profit, to hand over the balance to W. W. became bkpt.:—*Held:* the custom of agistment was notorious, &, no reputation of ownership could arise in the case of stock upon the lands of a farmer.—*Re* WOODWARD, *Ex p.* HUGGINS (1886), 54 L. T. 683; 3 Morr. 75, D. C.

6877. —— ——.]—The custom of farmers to take in stock for agistment is well established, & stock of third parties on the farm of bkpt. is not in his order & disposition, even where it is not there under a contract of agistment.—*Re* JAMES, *Ex p.* SWANSEA MERCANTILE BANK, LTD. (1907), 24 T. L. R. 15, C. A.

6878. Cab owner—Custom to let out cabs on deferred payments.]—A coachbuilder let out cabs upon deferred payments. The hirer paid a deposit & a certain sum for hire every month, having for a time the option of purchase, when the deposit & payments for hire were taken as part of the price. Bkpt. hired cabs on those terms, & his name was painted on them:—*Held:* to preserve his right the coachbuilder ought to have notified the fact that the cabs were his by a legible inscription, & no custom being proved, they passed to the trustee as in the order & disposition of bkpt.—*Re* HILL (1875), 1 Ch. D. 503, n.; 58 L. T. Jo. 397, L. JJ.

Annotations:—**Refd.** *Re* Matthews, *Ex p.* Powell (1875), 1 Ch. D. 501, C. A.; *Re* Rose, *Ex p.* Linnell (1888), 4 T. L. R. 255, C. A.

6879. Clockmaker—Custom to take in clocks for cleaning.]—B., was a clockmaker & kept clocks in his shop for sale & also clocks belonging to other people for repair. In July, 1853, pltf. bought a clock which was in B.'s shop, but desired it to be kept until he had removed into a new house. In Mar., 1854, he bought two other clocks & left them with bkpt. to be cleaned, which might have been done in two or three days. On Apr. 7 a petition in bkpcy. was filed against B., at which time the three clocks were in his shop. The comr. having made an order for the sale of the clocks as being in the reputed ownership of bkpt.:—*Held:* they were not liable to seizure by the assignees.—HAMILTON *v.* BELL (1854), 10 Exch. 545; 24 L. T. O. S. 118; 18 Jur. 1109; 3 W. R. 62; 3 C. L. R. 308; 156 E. R. 554; *sub nom.* BELL *v.* HAMILTON, 24 L. J. Ex. 45.

Annotations:—**Apld.** *Re* Couston, *Ex p.* Watkins (1873), 8 Ch. App. 520, L. C. & L. J. **Refd.** *Re* Sketchley, *Ex p.* Boulton (1857), 1 De G. & J. 163; Hornley *v.* Miller (1858), 32 L. T. O. S. 125; *Re* Couston, *Ex p.* Bolland (1872), 20 W. R. 981; *Re* Bell, *Ex p.* Clarke (1877), 47 L. J. Bcy. 33; *Re* Keller, *Ex p.* Rose (1913), 109 L. T. 880. **Mentd.** Reynolds *v.* Bowley (1867), 36 L. J. Q. B. 247, Ex. Ch.; Colonial Bank *v.* Whinney (1886), 11 App. Cas. 426, H. L.; *Re* Watson, *Ex p.* Atkin, [1904] 2 K. B. 753, C. A.

6880. Dealer in safes—Custom to have safes for sale or return.]—A custom exists amongst manufacturers of iron safes to send safes to retail ironmongers upon sale or return or to sell as agents, so as to exclude the doctrine of reputed ownership.—*Re* LOCK, *Ex p.* POPPLETON (1891), 63 L. T. 839; 39 W. R. 384; 8 Morr. 51.

6881. Furniture trade—Custom to let furniture—Limits of application.]—The custom of furniture dealers to let out furniture on a three years' hiring & purchase agreement does not disentitle the general public to assume that an ordinary householder is the real owner of the furniture in his house.

The furniture in the dwelling-house of a trader having been seized under an execution, a friend bought it from the sheriff at a valuation & then verbally agreed that debtor should continue in possession of it & use it as before, paying, by way of rent, interest at 5 per cent., on the purchase-money, until he should repurchase it at the price

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PART XX. SECT. 9, SUB-SECT. 8.—B.

6876 i. *Agricultural custom—Agistment.*]—The custom of agistment is notorious, & no reputation of ownership can arise in the case of stock upon the lands of a farmer.—*Re* BURKE (1887), 19 L. R. Ir. 564.—**IR.**

6876 ii. —— ——.]—*Held:* (1) the practice of agisting cattle was common & well known; (2) the existence of several common systems of dairy farming, in which the farmer carried on business with cattle of which he was not the owner was notorious to persons conversant with the industry over the whole state; (3) the cattle in the possession of & used by bkpt. were not in his reputed ownership.—MAXWELL *v.* GILLESPIE'S ASSIGNEE (1909), 8 C. L. R. 553.—**AUS.**

b. —— *To hire machinery.*]—Bkpt. obtained from a co. a plough & a hoe-drill under hire-&-purchase agreements, which provided that the property in the goods should not vest in bkpt. until the full purchase-money had been paid. The agreements provided for payment by instalments. At the date of the bkpcy. only one instalment had been paid. Nothing had been done by the co. prior to the bkpcy. to take the goods out of the possession, order, or disposition of bkpt., but after the bkpcy. proceedings were commenced the co. took possession of & removed the goods. The official assignee moved for an order, declaring that the goods formed part of bkpt.'s property passing to the official assignee. At the hearing numerous affidavits were put in by the co. for the purpose of proving that a custom existed in the Dominion as to hire-&-purchase agreements in respect of agricultural machinery & implements which prevented the operation of 1908 Act, s. 6 1(c):—*Held:* the affidavits failed to do more than supply *primâ facie* evidence of the existence of the custom of usage in the South Island, &, there being no evidence of the custom or usage in the North Island, the official assignee was entitled to recover the goods claimed or their value.—WYLIE'S OFFICIAL ASSIGNEE *v.* MASSEY-HARRIS CO., LTD. (1913), 32 N. Z. L. R. 363.—**N.Z.**

c. *Banking business—Custom to lend money on machinery.*]—A practice of banks lending mill-owners money upon mtge. of their machinery & premises cannot be deemed a custom of trade, that is to exempt the machinery so mortgaged from the operation of the reputed ownership clause in bkpcy.—*Re* M'KIBBON (1855), 25 L. T. O. S. 148.—**IR.**

d. *Cycle trade—Custom to let cycles on hire-purchase.*]—Applt. let a bicycle to H. under a contract for hire & sale, the agreement describing H. as the hirer & making him liable to pay the agreed value by monthly instalments. If H. continued the monthly instalments until the whole agreed value was paid, the machine was to become his absolute property, but until such agreed value was paid the machine was to continue the sole property of

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given for it. Debtor remained in possession as before, until he filed his petition. He had not repurchased it. The trustee claimed it under 1869 Act, s. 15 (5). It was admitted that there was a custom for furniture dealers to let out furniture on a three years' hiring & purchase agreement, but there was no other evidence as to the existence of any custom of hiring furniture :—*Held :* the trustee was entitled to the furniture.—*Re* FOWLER, *Ex p.* BROOKS (1883), 23 Ch. D. 261 ; 48 L. T. 453 ; 47 J. P. 470 ; 31 W. R. 833, C. A.

Annotation :—**Refd.** Chappell *v.* Harrison (1910), 27 T. L. R. 85.

—— —— **To hotel proprietor.**]—*See* Nos. 6888 *et seq., post.*

6882. —— Custom to take goods on sale or return.]—The custom in the furniture trade for dealers to be supplied with goods on sale or return is not so established & notorious as to exclude the operation of the doctrine of reputed ownership.—*Re* HORN, *Ex p.* NASSAU (1886), 2 T. L. R. 339 ; 3 Morr. 51.

Annotation :—**Mentd.** *Re* Watson, *Ex p.* Atkin (1904), 73 L. J. K. B. 854, C. A.

6883. Hop trade—Custom to leave goods purchased with merchant for resale.]—A custom that purchasers of hops from hop-merchants shall leave them in the merchant's warehouse for the purpose of resale, upon rent, undistinguished from the merchant's stock, is not such a custom of trade as will prevent the hops from becoming the property of the merchant's assignees, in case of bkpcy., as being in his possession, order, & disposition.—THACKTHWAITE *v.* COCK (1811), 3 Taunt. 487 ; 2 Rose, 105 ; 128 E. R. 193.

Annotations :—**Consd.** Lucas *v.* Dorrien (1817), 7 Taunt. 278. **Apld.** Knowles *v.* Horsfall (1821), 5 B. & Ald. 134. **Consd. & Distd.** Watson *v.* Peache (1834), 1 Bing. N. C. 327. **Consd.** Priestley *v.* Pratt (1867), L. R. 2 Exch. 101 ; *Re* Couston, *Ex p.* Watkins (1873), 8 Ch. App. 520, L. C. & L. J. **Refd.** Sharman *v.* Mason, [1899] 2 Q. B. 679, D. C.

6884. —— ——.]—Eleven pockets of hops having been purchased from T. in Oct., 1884, nine of them were left in T.'s possession, &, although they had been paid for, remained on his premises until Jan., 1885, when he filed his petition in bkpcy. The trustee claimed the goods in question as having been in the order & disposition of bkpt., & the purchaser alleged a custom of hop merchants to retain hops on their premises after purchase :—*Held :* (1) the custom was established ; (2) the mere fact of seeing hops in a merchant's warehouse could not be an inducement for any prudent man to give credit to the merchant, & the purchaser's claim was good.—*Re* TAYLOR, *Ex p.* DYER (1885), 53 L. T. 768 ; 34 W. R. 108 ; 2 T. L. R. 7 ; 2 Morr. 268.

6885. Horsedealer—Custom to take horses for sale or return.]—Goods which have been sent to a dealer on sale or return, in accordance with a well-known custom of trade, & which are, at the commencement of the bkpcy., in the possession of bkpt., do not pass to the trustee as being goods of which bkpt. is reputed owner, or of which he has taken upon himself the sale or disposition as owner within 1869 Act, s. 15 (5).

A horse was sent to a dealer on sale or return, in accordance with a well-known custom of the horse-dealing trade. The dealer was adjudicated a bkpt., the horse being in his possession :—*Held :* the custom of the trade excluded the reputation of ownership, & bkpt. had not taken upon himself the sale or disposition of the horse as owner, & the horse must be delivered up to the true owner.—*Re* FLORENCE, *Ex p.* WINGFIELD (1879), 10 Ch. D. 591 ; 40 L. T. 15 ; 27 W. R. 346, C. A.

Annotations :—**Mentd.** *Re* Crumlin Viaduct Works Co. (1879), 11 Ch. D. 755 ; *Re* Watson, *Ex p.* Atkin, [1904] 2 K. B. 753, C. A. ; Janesich *v.* Attenborough (1910), 102 L. T. 605.

6886. Horse owner—Custom to let horses to coal merchants, brewers, etc.]—There is a custom in London to let horses to coal merchants, brewers, & ironmongers, etc., on hire, which will rebut the reputation of ownership.—*Re* NICHOLLS, *Ex p.* WIGGINS (1832), 2 Deac. & Ch. 269 ; Mont. & B. 168 ; 1 L. J. Bcy. 90, Ct. of R.

6887. —— ——.]—A horse was purchased from a firm of brewers, coal merchants, & general contractors, & was at the same time let to hire by the purchaser to the firm at a weekly sum. The horse remained upon the premises of the firm until the time of their bkpcy., & it was sworn that in the trade it was customary to hire horses for business purposes :—*Held :* the horse did not pass to the assignees as being within the order & disposition of bkpts. at the time of the bkpcy.—*Re* COLSON & MILES, *Ex p.* ELMER (1865), 13 W. R. 476.

6888. Hotel-keeper—Custom to hire furniture.]—The custom of hiring furniture for hotels is so well known that no person giving credit to an hotel-keeper is entitled to rely upon the hotel-keeper's apparent possession of the furniture.

Upon the bkpcy. of an hotel-keeper furniture held by him under a hiring agreement, not registered as a bill of sale :—*Held :* not to be in the order & disposition of bkpt.—CRAWCOUR *v.* SALTER (1881), 18 Ch. D. 30 ; 51 L. J. Ch. 495 ; 45 L. T. 62 ; 30 W. R. 21, C. A.

Annotations :—**Distd.** *Re* Fowler, *Ex p.* Brooks (1883), 23 Ch. D. 261, C. A. **Apld.** *Re* Parker, *Ex p.* Turquand (1885),

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applt. If H. made default in any monthly payment, applt. was at liberty to retake possession of the machine as if the contract had not been made. H., after paying some instalments, made default in successive instalments, including the last. H. became bkpt. H. was in actual possession of the bicycle until the bkpcy. :—*Held :* the terms of such agreements were so notorious that the bicycle could not be held to be in the order & disposition of bkpt.—WOODS *v.* LATHAM (1907), 27 N. Z. L. R. 50.—N.Z.

f. *Horse racing—Custom to lease horse in consideration of receiving proportion of winnings.*]—L. was the owner of a racehorse, & on Sept. 9, 1916, leased it to bkpt. for three years, on the terms that he should stable & keep the horse, & pay all expenses of running him, & that L. should receive half the stakes won. The lease was registered in accordance with Racing & Hunt Rules to that effect, & the details of such registration appeared in the Irish Racing Calendar for the information of parties interested in turf matters. The practice of leasing racehorses was common & well known to persons concerned in or interested in horse racing. The horse, whose winnings were considerable, had been raced by bkpt. in his own name, & was in his actual possession at the date of his bkpcy., & during the currency of the lease :—*Held :* bkpt. was not the reputed owner of the horse.—*Re* MAHON, [1918] 2 I. R. 578.—IR.

6888 i. *Hotel keeper—Custom to hire billiard tables—On hire-purchase.*]—A billiard table was lent on hire to an hotel-keeper, on an agreement that, upon payment of certain instalments, it was to become his absolute property, but until such payment it should continue the property of the other party to the agreement, who, on default of payment of any instalment, might resume the possession. The hotel-keeper paid one instalment, & before any other accrued due was adjudged bkpt., while the billiard table still remained in his possession at the hotel. No general trade custom with respect to such hirings having been established in evidence :—*Held :* the billiard table passed to bkpt.'s assignees, under the order & disposition clause. *Qu. :* whether a general trade custom, if proved, for the hire of such goods under the "three years' system" would, in such case, suffice to prevent the operation of that clause.—*Re* SHAW (1877), 11 I. L. T. 167 ; I. R. 11 Eq. 632.—IR.

6888 ii. —— *Custom to give bill of sale over furniture.*]—In an action brought by the assignee of an insolvent hotel-keeper, seeking a declaration that he was entitled to hold certain furniture seized by him in the hotel of insolvent, on the ground that insolvent was the reputed owner of such furniture, it was proved that in Victoria, in 80 per cent. of the cases, hotel-keepers gave

14 Q. B. D. 636, C. A. **Refd.** Chappell *v.* Harrison (1910), 27 T. L. R. 85. **Mentd.** Moult *v.* Halliday (1897), 46 W. R. 318, D. C.

6889. ——— ———.]—The custom for hotel-keepers to hire the furniture of their hotels is so notorious, & has been so often proved, that it need not now be proved, but the ct. will take judicial notice of it; & the custom extends, not only to furniture in the strictest sense of the word, but to all the articles which are necessary for the furnishing of an hotel for the purpose of using it as an hotel. The effect of the custom is absolutely to exclude the reputation of ownership by the hotel-keeper of all those articles in the hotel, at the time of his bkpcy., which are within the scope of the custom, without regard to the question whether the particular articles are or are not in fact hired by him. —*Re* PARKER, *Ex p.* TURQUAND (1885), 14 Q. B. D. 636; 54 L. J. Q. B. 242; 33 W. R. 437; 1 T. L. R. 284, C. A.; *sub nom. Re* PARKER & PARKER, *Ex p.* TURQUAND & WHINNEY, WESTGATE HOTEL CASE, 53 L. T. 579.

Annotations:—**Consd.** *Re* James, *Ex p.* Swansea Mercantile Bank (1907), 24 T. L. R. 15, C. A.; Chappell *v.* Harrison (1910), 103 L. T. 594. **Mentd.** Moult *v.* Halliday (1897), 46 W. R. 318, D. C.

6890. ——— ———.]—*Re* MATTHEWS, *Ex p.* POWELL, No. 6869, *ante*.

6891. ——— ——— **Application to boarding-house keeper.**]—A boarding-house keeper, who has no licence for the sale of intoxicating liquor, is an hotel-keeper, within the custom which protects his hired furniture from being within his order & disposition.—*Re* CHAPMAN, *Ex p.* WHITELEY (1894), 11 T. L. R. 92; 1 Mans. 415.

6892. Iron trade—Custom for landlord to furnish machinery.]—Machinery affixed to the freehold of iron-works is not considered to be within the order & disposition of bkpt. trader, where, by the custom of the country, when iron-works are let, such articles are furnished by & continue to be the property of the lessor.—RUFFORD *v.* BISHOP, BISHOP *v.* RUFFORD (1829), 5 Russ. 346; 7 L. J. O. S. Ch. 108; 38 E. R. 1058.

Annotations:—**Refd.** *Re* Maberly, *Ex p.* Belcher (1835), 4 Deac. & Ch. 703, Ct. of R. **Mentd.** Thomas *v.* Cooper (1854), 2 Eq. Rep. 1185; *Re* Gawan, *Ex p.* Barclay (1855), 5 De G. M. & G. 403, L. C. & L. JJ.; Crosskill *v.* Bower, Bower *v.* Turner (1863), 32 Beav. 86; Mosse *v.* Salt (1863), 32 Beav. 269.

6893. Malting agency.]—Barley & malt in the hands of a malting agent is not in his order & disposition as reputed owner, it being notorious that malting agents are not usually the owners.—HARRIS *v.* TRUMAN (1882), 9 Q. B. D. 264; 51 L. J. Q. B. 338; 46 L. T. 844; 30 W. R. 533, C. A.

Annotation:—**Mentd.** *Re* Van Laun, *Ex p.* Chatterton (1907), 76 L. J. K. B. 644, C. A.

6894. Piano trade—Custom to let pianos.]—Four months previously to his bkpcy. debtor hired a piano from H. & Co., upon the following written terms:—"£15 a year for three years by equal monthly payments of 25*s*.," at the expiration of which term the piano became the absolute property of the hirer, but in case the instalments were not paid, or in the event of the death, bkpcy. or insolvency of the hirer before the expiration of the term H. & Co. were to be at liberty to determine the hiring & take possession of the instrument. There was no special mark or label on the piano to show that it was not the property of debtor. Upon the bkpcy., H. & Co. removed the piano from debtor's premises. The trustee claimed the piano as being within the order & disposition of debtor. There was evidence of a custom of letting pianos on such terms:—*Held:* the custom was sufficiently established, & one which the ordinary creditors of bkpt. must be reasonably presumed to have known, & the agreement for hire was valid, & did not come within the mischief contemplated by 1869 Act, s. 15 (5).—*Re* BLANSHARD, *Ex p.* HATTERSLEY (1878), 8 Ch. D. 601; 47 L. J. Bcy. 113; 38 L. T. 619; 26 W. R. 636.

Annotation:—**Consd.** Chappell *v.* Harrison (1910), 103 L. T. 594.

6895. ——— ——— **On hire-purchase.**]—The ct. will not take judicial notice of the custom of letting pianos on hire-purchase agreements, so as to exclude the doctrine of reputed ownership; & pianos cannot be regarded by the cts., without any custom being proved, as articles so continuously let on hire-purchase agreements that they cannot be considered as being within the order & disposition of tenants, so that under the doctrine in *Re Parker, Ex p. Turquand*, No. 6889, *ante*, pianos merely lent would be placed outside the reputed ownership of tenants.—CHAPPELL & CO., LTD. *v.* HARRISON (1910), 103 L. T. 594; 75 J. P. 20; 27 T. L. R. 85.

6896. Printing trade—Custom to hire machines.] —Printing machines, other than type, are by a well-established custom of the printing trade let on hire by the owners to printers, & do not pass to the trustee in bkpcy. of the hirer as being in bkpt.'s order & disposition.—*Re* THACKRAH, *Ex p.* HUGHES & KIMBER, LTD. (1888), 4 T. L. R. 659; 5 Morr. 235.

bills of sale over the furniture in the hotel, in most instances to secure amounts larger than the value of the furniture:—*Held:* hotel-keepers could not be the reputed owners of furniture in the hotel.—DANBY *v.* COLONIAL BANK OF AUSTRALASIA (1893), 19 V. L. R. 586.—**AUS.**

h. *Manufacturing cooper — Custom to hire engines.*]—A gas engine was in possession of a manufacturing cooper, under a hiring agreement providing for payments by instalments. A plate with the lessors' name was affixed to the engine, but, in the position which the engine occupied in bkpt.'s premises, the plate could not be seen. Only one instalment was paid by the lessee, & after several others became due he was adjudicated a bkpt., the engine being in his possession at the time of such adjudication. On motion by the lessors to have the engine delivered up to them, the ct. being satisfied upon the evidence that there was a notorious custom of hiring such engines to persons in the trade of bkpt.:—*Held:* the property in the engine had not passed to bkpt.—*Re* PEEL, *Ex p.* CROSSLEY, [1894] 1 I. R. 240; 28 I. L. T. 45; *affd.* on other grounds, [1895] A. C. 457, H. L.—**IR.**

j. *Milling trade—Custom to set aside flour sold & paid for.*]—Where flour in a mill, the property in which has passed from the miller to a baker by sale, is placed in a heap by itself apart from the bulk of the miller's flour, each bag of the flour sold to the baker having a mark on it, the miller's flour having no such mark, it is a reasonable inference, in view of a custom in the milling trade, to sell for forward delivery & to pay in advance, that the flour sold to the baker has been paid for, & has been appropriated to fulfil a particular order, & is not in the reputed ownership of the miller on his bkpcy. *Semble:* apart from such a custom, the setting-aside & marking of the flour is in itself sufficient to prevent reputed ownership.—*Re* RYLEY, *Ex p.* SWANWICK (1896), 15 N. Z. L. R. 325.—**N. Z.**

6895 i. *Piano trade—Custom to let pianos—On hire-purchase.*]—Pltf., a dealer in musical instruments, let to B. a piano on hire, at the rate of £4 10*s*. a month, & agreed that if B. wished at any time to purchase the piano for £84, all money, which he had paid for the hire, should go in part payment of the purchase-money. B. became a bkpt., having paid one month's rent only:—*Held:* in the absence of any allegation of custom, the piano was in the order & disposition of bkpt. as reputed owner thereof.—HOFFMAN *v.* MACFARLANE, 2 J. R. 82. —**N.Z.**

6896 i. *Printing trade—Custom to hire machines.*]—A printing machine was let by a firm on hire to a trader for the purpose of his carrying on business as an operative printer, under an agreement, which provided for payment by instalments. From the date of delivery in Feb., 1890, to Apr., 1891, when the trader was adjudged a bkpt., he paid only £10. On a claim by the firm to have the machine restored to their possession, it was established that there existed in the printing trade a general & well-recognised custom of letting such machines on hire, with power to resume possession on the bkpcy. of the hirer:—*Held:* the custom took the machine out of the reputed ownership of bkpt.—*Re* DUNNE, *Ex p.* PALLESTER & SON (1891), 25 I. L. T. 85.—**IR.**

Sect. 9.—*Property in reputed ownership of bankrupt: Sub-sect.* 8, *B. Sect.* 10: *Sub-sects.* 1, 2 *&* 3, *A. & B.*]

6897. Shipbuilding trade—Custom to build ships for others.]—The world has no right to assume that every ship in a shipbuilder's yard is his own. The contrary is perfectly notorious. Shipbuilders very rarely build for themselves; they build for others under orders given them.—HOLDERNESS *v.* RANKIN (1860), 2 De G. F. & J. 258; 29 L. J. Ch. 753; 3 L. T. 203; 6 Jur. N. S. 903; 8 W. R. 713; 45 E. R. 621, L. JJ.

Annotations:—**Apprvd.** M'Bain *v.* Wallace (1881), 6 App. Cas. 588, H. L. **Refd.** Swainston *v.* Clay (1863), 3 De G. J. & Sm. 558, L. JJ. **Mentd.** Holderness *v.* Lamport (1861), 29 Beav. 129.

6898. Spirit trade—Custom in regard to goods sold in bond.]—At the time of the presentation of a petition there were lying in the bonded warehouse of debtors, wine & spirit merchants in Liverpool, butts of whisky which they had sold to applt. The goods were left there for the convenience of the purchaser, to whom a delivery warrant had been given by the vendors, in which they stated that they held the goods to his order as warehousemen. The vendors did not carry on business as general warehousemen, but it was proved to be the usual custom of the wine & spirit trade, in Liverpool, for goods sold in bond to remain in the possession or under the control of the vendors, in the bonded warehouse in which they were at the time of sale, until they were required by the purchaser for use:—*Held:* the existence of a custom of that nature, shown to be well known among persons in the wine & spirit trade, excluded the doctrine of reputed ownership, & the goods did not pass to the trustee.—*Re* COUSTON, *Ex p.* WATKINS (1873), 8 Ch. App. 520; 42 L. J. Bcy. 50; 28 L. T. 793; 21 W. R. 530, L. C. & L. J.

Annotations:—**Apld.** *Re* Couston, *Ex p.* Vaux (1874), 9 Ch. App. 602, L. JJ. **Distd.** *Re* Jones, *Ex p.* Lovering (1874), 9 Ch. App. 621, L. JJ. **Consd.** *Re* Hill (1875), 1 Ch. D. 503, n., L. JJ.; *Re* Cohn, *Ex p.* Cohen (1878), 38 L. T. 884; Colonial Bank *v.* Whinney (1886), 11 App. Cas. 426, H. L. **Refd.** *Re* Goetz, Jonas, *Ex p.* The Trustee, [1898] 1 Q. B. 787, C. A.; Sharman *v.* Mason, [1899] 2 Q. B. 679; *Re* Watson, *Ex p.* Atkin, [1904] 2 K. B. 753, C. A. **Mentd.** *Re* Matthews, *Ex p.* Powell (1875), 1 Ch. D. 501, C. A.; Harris *v.* Truman (1881), 7 Q. B. D. 340; *Re* Parker, *Ex p.* Turquand (1885), 14 Q. B. D. 636, C. A.; Hollinshead *v.* Egan, [1913] A. C. 564, H. L.

6899. —— ——.]—At the time of the presentation of a petition for liquidation by arrangement certain butts of whisky which had been sold by debtors to applts. was lying in the bonded warehouse of a third party, in the name of debtors. No delivery order had been given to the purchasers before the filing of the petition, & they were ignorant in what warehouse the whisky was lying:—*Held:* the custom of the spirit trade excluded the reputation of ownership, although the whisky was in the warehouse of a third party, & not in that of the vendors, & the fact of the delivery order not having been given to the purchasers before the commencement of the liquidation did not raise a reputation of ownership in the vendors.—*Re* COUSTON, *Ex p.* VAUX (1874), 9 Ch. App. 602; 30 L. T. 738; 22 W. R. 811; *sub nom. Re* CONSTON, *Ex p.* VAUX, 43 L. J. Bcy. 113, L. JJ.

Annotation:—**Distd.** *Re* Keller, *Ex p.* Rose (1913), 109 L. T. 880.

6900. Tea trade—Custom for country dealers to leave warrants with London dealers.]—Where the custom of country tea-dealers in purchasing teas from wholesale houses in London was to leave the warrants after payment in the hands of the London dealers, to pass the entries & make the necessary arrangements with the dock authorities for the delivery of the teas so purchased, & to deliver the teas in portions as the country dealers required them, & teas were purchased in the usual course from bkpts., who credited the purchasers in their books with the money so paid to them, & indorsed the names of the purchasers upon the warrants:—*Held:* the teas so purchased were not the subject of reputed ownership.—*Re* BIRT, *Re* CUNNINGHAM, *Ex p.* THE ASSIGNEES (1866), 15 L. T. 368; 15 W. R. 261.

6901. Upholstering trade—Custom to have wholesale manufacturer's patterns.]—There is a custom in the upholstering trade for an upholsterer to have in his possession patterns belonging to the wholesale manufacturer, & such patterns are not in the reputed ownership of the trader.—*Re* LAY, *Ex p.* WOODWARD (1886), 54 L. T. 683, D. C.

See, generally, CUSTOM & USAGES.

SECT. 10.—RIGHTS OF EXECUTION CREDITORS AND RESTRICTIONS THEREON.

SUB-SECT. 1.—EXECUTION AS ACT OF BANKRUPTCY.

See Part II., Sect. 2, sub-sect. 8, *ante.*

SUB-SECT. 2.—EXECUTION CREDITORS AS SECURED CREDITORS.

See Part IX., Sect. 2, *ante.*

SUB-SECT. 3.—RESTRICTION OF RIGHTS OF EXECUTION CREDITORS.

See 1914 Act, ss. 40, 41.

A. "*Execution.*"

6902. "Execution"—Charging order under Judgments Act, 1838 (c. 110).]—A judgment creditor obtained a charging order *nisi* upon shares standing in the name of the judgment debtor, who filed his petition in bkpcy. on the day before the charging order *nisi* was returnable:—*Held:* a charging order under the above Act was not an "execution" within 1883 Act, s. 45, & the official receiver was not entitled to an order restraining the judgment creditor from having it made absolute.—*Re* HUTCHINSON, *Ex p.* HUTCHINSON (1885), 16 Q. B. D. 515; 55 L. J. Q. B. 582; 54 L. T. 302; 34 W. R. 475; 3 Morr. 19, D. C.

k. *Sewing machine trade—Custom to let machines—On hire-purchase.*]—A sewing machine was let on hire to a trader by a co. of manufacturers, on a hire-purchase agreement. The trader paid two months' hire, & became in arrears for nine months' hire, & the owners took no steps to resume possession of the machine under the powers given to them by the agreement. While the machine remained in the possession of the trader, he was adjudged bkpt. An issue was tried by a jury, who found that there was a general well-recognised custom or usage on the sale in Ireland of sewing machines by manufacturers, that such machines should not become the property of the purchaser until the instalments as agreed upon had been paid. No grounds were shown to the satisfaction of the ct. for holding that, in the particular circumstances, the custom was unreasonable:—*Held:* the custom took the machine out of the reputed ownership of bkpt., & the laches of the co. in allowing the instalments to remain overdue, without resuming possession of the machine, did not disentitle them to reclaim it from the assignees.—*Re* BLACKWELL, *Ex p.* SINGER SEWING MACHINE CO. (1878), 12 I. L. T. 57.—IR.

m. *Timber trade—Custom to allow goods to remain on the premises after sale.*]—The fact that certain timber merchants sometimes allow goods sold to remain on their premises after sale, does not establish the existence of a general & notorious custom of trade sufficient to rebut the presumption, arising from possession, that the goods were within the order & disposition of the occupier of the timber-yard upon his bkpcy.—GEE *v.* LATTER (1885), 3 N. Z. L. R. 378.—N.Z.

—— Writ of sequestration.]—*See* Nos. 6932, 6933, *post*.

Whether execution is "contract, dealing, or transaction."]—*See* No. 7467, *post*.

B. Completion of Execution or Attachment.

6903. Execution against goods under writ of fieri facias—Sale before act of bankruptcy—Partly for cash & partly on credit—Writ not returnable till after act of bankruptcy.]—Pltf. in execution upon a judgment by confession appointed a special bailiff, who seized & sold goods during two days, for part of which he received the money, & for the rest gave credit, before an act of bkpcy. was committed by deft. :—*Held :* pltf. was entitled to retain the proceeds of those sales against the

PART XX. SECT. 10, SUB-SECT. 3.—B.

a. *Execution against goods under writ of fi. fa.—Delivery of writ.*]—Delivery of a writ of execution to the sheriff for execution creates a lien or "charge" on the property of the execution debtor in favour of the execution creditor, & seizure, though creating a special property in the sheriff, does not enlarge the lien of the execution creditor.—DEERING *v.* GIBBON (1907), 7 W. L. R. 178; 1 Alta. L. R. 7. —**CAN.**

b. —— —— *Before issue of attachment.*]—On Jan. 30, 1865, W. executed an instrument which purported to be an assignment under 1864 Act. On Feb. 24 deft. issued execution against the goods of W. & gave it to the sheriff. On Mar. 10 pltfs. issued an attachment under Insolvent Act, & on the same day the sheriff seized the goods of W., after the issue of the attachment; but under deft.'s execution :—*Held :* the execution being in the sheriff's hands before the issuing of the attachment, bound the goods.—ROSE *v.* BROWN (1866), 16 C. P. 477.—**CAN.**

c. —— —— *Before assignment & meeting of creditors.*]—Deft.'s execution was handed to the sheriff on June 28, the assignment to pltf. was made on July 16, & the meeting of creditors was held on Aug. 28 following :—*Held :* even if the creditors had adopted pltf. as their assignee, it would not have divested deft. of his rights under the execution.—MCWHIRTER *v.* LEARMOUTH (1868), 18 C. P. 136.—**CAN.**

d. —— —— *Before vesting order.*]—Where movable property of defts. had been attached before judgment & so continued until decrees & orders for execution had been made & warrants for such execution had been lodged with the Nazir of the ct. :—*Held :* the execution creditors were entitled to preference as regarded the attached goods over the official assignee, in whom the estate of defts. had become vested by orders made before sale by the Nazir of the attached property, but subsequently to the delivery to him of the warrants for execution.—GAMBLE *v.* BHOLAGIR (1866), 2 Bom. 146.—**IND.**

e. —— —— *On same day as petition for arrangement filed—Seizure same day as protection order—Petition dismissed.*]—A *fi. fa.* was lodged with the sheriff on Nov. 25, & on the same day deft. filed a petition as an arranging trader. On the next day goods were seized under the *fi. fa.*, & a protection order was granted, which was served on the sheriff after seizure, but before the sale, & the petition for arrangement was dismissed after the service, but before hearing of notice of motion to set aside the execution :—*Held :* the motion should be refused.—PERRY *v.* FARRELL (1873), I. R. 7 C. L. 27; 7 I. L. T. Jo. 55.—**IR.**

g. —— —— *Before protection order.*]—An execution creditor obtained judgment in the usual way, issued execution, & delivered the writ to the sheriff's officer before debtor obtained a protection order under 20 & 21 Vict. c. 60, s. 343 :—*Held :* the protection order should be set aside.—*Re* ARRANGING TRADER (1868), 2 I. L. T. Jo. 453.—**IR.**

h. —— —— ——.]—A petition for arrangement having been presented after judgment had been marked in three several actions, & after execution had been issued on foot of two of the judgments, a protection order was granted under 20 & 21 Vict. c. 60, s. 343. The sheriff seized debtor's goods notwithstanding the protection of the ct., on the ground that it was not granted till after the issue of two of the writs of execution. The ct. made an absolute order restraining the judgment creditors by name from further proceedings upon the several judgments.—*Re* ARRANGING DEBTOR (1873), 7 I. L. T. 17.—**IR.**

i. —— —— *Before but on same day as protection order.*]—At 1.5 p.m. a writ of *fi. fa.* against the goods of arranging debtor, at the suit of H., a creditor, was lodged at the Dublin office of the returning officer of the sheriff of Cork. At 2.30 p.m. the same day notice of a protection order was served at the office of H.'s solr., & at 4 p.m. the same day a similar notice was served on the sub-sheriff of Cork, in his Cork office :—*Held :* H. was entitled to proceed with the execution of the *fi. fa.*—*Re* R. C. (1888), 21 L. R. Ir. 546.—**IR.**

k. —— —— *Before commission sealed but on same day as commission delivered.*]—A *fi. fa.* placed in the sheriff's hands before a commission of bkpcy. against debtor was sealed, but on the same day on which it was completed & delivered to the sheriff, has priority over the commission.—BEEKMAN *v.* JARVIS (1847), 3 U. C. R. 280.—**CAN.**

l. —— —— *No seizure.*]—*Held :* there being no seizure under the execution, it did not bind the property.—EMPIRE SASH & DOOR CO. *v.* MARANDA (1911), 19 W. L. R. 78.—**CAN.**

m. —— *Seizure before bankruptcy.*]—The estate of deft. had been sequestrated in New South Wales. Before such order of sequestration, creditors of deft., had seized under executions on judgments obtained in Victoria :—*Held :* the retrospective operation of such order did not divest the title of the execution creditors in Victoria.—UNION BANK *v.* TUTTLE, D'ALBA *v.* TUTTLE (1889), 15 V. L. R. 258.—**AUS.**

n. —— ——.]—Property attached in Jersey being by the laws of that island vested in the creditor attaching, upon confirmation by the Ct. of the Island :—*Held :* the creditors were entitled to hold the property attached & to prove for the residue, where the act of bkpcy. was subsequent to the completion of the judicial act, whether on the same or any other day, but where the act of bkpcy. was previous, they could not hold against the assignees.—*Ex p.* D'OBREE, *Ex p.* LE MESURIER (1802), 8 Ves. 82 · 32 E. R. 283 —**CHANNEL ISLANDS.**

o. —— ——.]—An attachment made by a decree-holder prior to a vesting order in favour of the official assignee must have preference to the claim of the official assignee.—SHEW NARAIN SINGH *v.* MILLER (1871), 17 W. R. 234.—**IND.**

p. —— ——.]—The official assignee of the Insolvent Ct. is entitled, under the vesting order, to possession of insolvents' estate, even when that estate has been attached in execution of a decree, & an order directing the sale of it has been passed.—SARKIES *v.* BUNDHO BAEE (1869), 1 N. W. 172.—**IND.**

q. —— ——.]—A vesting order made under Insolvency Act has not the effect of giving the official assignee priority over the claim of a judgment creditor in respect of property attached, at his instance, previous to the passing of such order.—MILLER *v.* LUKHIMANI DEBI (1901), I. L. R. 28 Calc. 419; 5 C. W. N. 761.—**IND.**

r. —— ——.]—On July 23 property belonging to B. & Co. was seized by a bailiff of the ct. in execution of a decree. On July 26 the members of the firm of B. & Co. were adjudicated insolvents, & a vesting order made. On July 30 the official assignee gave notice to the seizing bailiff of his claim to the property seized :—*Held :* the official assignee was entitled to the property.—COCHRANE *v.* GLADSTONE, WYLLIE & Co. (1867), 2 Ind. Jur. N. S. 337.—**IND.**

s. —— ——.]—In execution of a decree goods belonging to the judgment-debtor, together with a sum of R227 in cash, were seized on Nov. 22, & on the 30th, the R227, together with the proceeds of sale of some of the goods, were placed to the credit of the decree-holder in the books of the ct. On Nov. 25, the judgment-debtor was declared an insolvent, & by a vesting order of the same date his estate was transferred to the official assignee :—*Held :* the execution was complete by the seizure of the money, & the official assignee was not entitled to the sum of R227 as against the execution-creditor. —GRISH CHANDRA ROY *v.* PRASANNA KUMAR CHINA (1870), 4 B. L. R. 94.—**IND.**

t. —— ——.]—A judgment-creditor has no priority over the official assignee in respect of property attached by him previous to the passing of the vesting order.—PEACOCK *v.* MADAN GOPAL (1902), I. L. R. 29 Calc. 428; 6 C. W. N. 577.—**IND.**

u. —— ——.]—Deft. obtained a warrant of attorney to confess judgment against A., but did not file the warrant pursuant to 20 & 21 Vict. c. 60, s. 334. Deft. marked judgment within twenty-one days after the execution of the warrant, duly registered the judgment, & levied the amount of his debt by writ of *fi. fa.* Subsequently A. became a bkpt. :—*Held :* the assignees could not recover the goods from deft.—SKELLY (ASSIGNEES OF) *v.* KEEFE (1865), 17 I. C. L. R. 266.—**IR.**

v. —— ——.]—Arrestments used prior to an English commission :—*Held :* preferable to the right of the assignees, notwithstanding prior acts of bkpcy., which, it was alleged, would have rendered them ineffectual in England.—PALMER *v.* HUNTER & CO. (1825), 21 Fac. Coll. 723.—**SCOT.**

w. —— —— *But on same day as attachment in insolvency.*]—M. issued a *fi. fa.* against R. The writ was given to the sheriff at 10.30 a.m. & a levy made about 11 a.m. On the same day, but after the levy, C. sued out against R. an attachment in insolvency, which the sheriff received at 11.30 a.m. On the same day, also, Insolvent Act 1865 came into force (the Royal assent being given thereto on the same day, but not till the afternoon) :—*Held :* the attachment prevailed over the execution.—CONVERSE *v.* MICHIE (1865), 16 C. P. 167.—**CAN.**

Sect. 10.—Rights of execution creditors & restrictions thereon: Sub-sect. 3, B.]

assignees, although the *fi. fa.* was not returnable before the act of bkpcy.—HIGGINS *v.* M'ADAM (1829), 3 Y. & J. 1; 7 L. J. O. S. K. B. 97; 148 E. R. 1068.

Annotations:—**Consd.** Giles *v.* Grover (1832), 9 Bing. 128. **Mentd.** Moser *v.* Newman (1830), 6 Bing. 556; Belcher *v.* Gummow (1847), 9 Q. B. 873.

6904. —— Sale without seizure.]—On Nov. 22, 1842, a *fi. fa.* issued upon a judgment obtained against A., the partner of B., & on the same day was lodged with the sheriff. On the following day the officer entered under a warrant granted thereon, & seized the whole of the partnership effects. On Dec. 2, another writ of *fi. fa.* issued upon a joint judgment against A. & B., directed to the same sheriff, who thereupon granted a warrant to different officers. No actual seizure was made under the second writ. On Dec. 7 each of the partners committed an act of bkpcy., & on the 9th a fiat issued against them, under which they were duly declared bkpts. The sheriff afterwards sold the whole of the partnership effects in satisfaction of the two writs:—*Held:* the sheriff was not justified in selling any part of the goods to satisfy the second writ, such writ not having been served or levied by seizure upon the property of the bkpts. before the issuing of the fiat, within 6 Geo. 4, c. 16, s. 108.—JOHNSON *v.* EVANS (1844), 7 Man. & G. 240; 7 Scott, N. R. 1035; 13 L. J. C. P. 117; 2 L. T. O. S. 459; 8 Jur. 341; 135 E. R. 102.

6905. —— Sale inchoate at time of fiat.]—A. gave B. a warrant of attorney, under which judgment was entered up. The sheriff, on Aug. 26, seized A.'s goods, consisting of machinery, iron, etc. On Sept. 3, A. committed an act of bkpcy. On Sept. 8, the sheriff sold part of the goods by auction, in lots, & received a deposit on each lot, but the lots were not separated from the mass. On Sept. 11, a fiat in bkpcy. was granted against A. On Sept. 19 the goods were weighed out & delivered to the purchasers. The sheriff sub-

x. —— —— *Sale suspended by interpleader order—Right to money paid into court.*]—H. obtained a judgment against S. & proceeded to execution. The sheriff having gone into possession, the goods were claimed by trustees under a deed of assignment executed by S. The sheriff interpleaded, & an issue was directed, claimants either to execute a bond or to pay an amount of the judgment into ct. S. afterwards became insolvent, & claimants gave notice that they did not intend to go on, & paid the money into ct.:—*Held:* H. & not the official assignee was entitled to the money in ct.—HARRIS *v.* SOLOMAN (1879), 2 N. S. W. S. C. R. N. S. 207.—**AUS.**

y. —— —— *Sale after.*]—In an action by an assignee for money levied under executions against insolvent, or received by deft., the clerk of a division ct., it was objected that deft. received the money only as clerk of the ct. The sale had taken place after the assignment:—*Held:* there being no lien created by the mere seizure, which took place before the assignment, the assignee was entitled to the money as part of insolvent's estate, no matter in whose hands it might be.—PATTERSON *v.* MCCARTHY (1874), 35 U. C. R. 14.—**CAN.**

z. —— —— ——.]—Goods seized by the sheriff under a writ of *fi. fa.* at the suit of a judgment creditor, but not sold before the date of the vesting order:—*Held:* bound by the writ of *fi. fa.*—MACPHERSON *v.* CARROLL (1908), 9 Nfld. L. R. 397.—**NFLD.**

a. —— —— ——.]—*Held:* the assignees of bkpt., on a commission issued after the seizure, but before the sale, could not recover the proceeds.—MAULSON *v.* COMMERCIAL BANK (1845), 2 U. C. R. 338.—**CAN.**

b. —— —— ——.]—The sheriff seized goods under execution. Debtor made an assignment for benefit of creditors:—*Held:* execution creditors entitled to proceeds of sale against the assignee.—*Re* HENDERSON ROLLER BEARINGS LTD. (1910), 17 O. W. R. 515; 2 O. W. N. 273.—**CAN.**

c. —— —— ——.]—In pursuance of an order of Sept. 8, the sheriff attached property belonging to B., & by an order of Sept. 14 the sale was fixed for Dec. 1. On Nov. 30, B. filed his petition, & the usual vesting order was made. On Dec. 1, the property was sold, & the proceeds were paid into ct.:—*Held:* the execution-creditor was entitled as against the official assignee to be paid out of the proceeds.—AGA MAHOMED ALI SHIRAJI *v.* JUDAH (1871), 7 B. L. R. 50; 17 W. R. 234, n.—**IND.**

d. —— —— ——.]—Debtor, against whom several decrees had been passed, filed his petition in the Insolvent Ct. at Madras, & the usual vesting order was made. One of the decree-holders had already attached property of insolvent, & had obtained an order for sale in a district ct., & another decree-holder applied for ratable distribution of the proceeds of sale to be held in execution of the attachment already made:—*Held:* an order rejecting the application for ratable distribution was wrong.—VIRARAGHAVA *v.* PARASURAMA (1891), I. L. R. 15 Mad. 372.—**IND.**

e. —— —— *Sale after secret act of bankruptcy.*]—When the goods of a trader were seized by the sheriff under an execution issued upon a judgment obtained by confession on a warrant of attorney, & after the seizure, but before the sale, the trader committed a secret act of bkpcy.:—*Held:* trover lay, at the suit of the assignee, for the recovery of the value of the goods, against the execution creditor, to whom the sheriff had paid over the proceeds of the sale without notice of the bkpcy.—HUDSON *v.* M'ALLEN (1841), 4 I. L. R. 438; Long. & T. 299; 2 Leg. Rep. 96.—**IR.**

f. —— *Seizure after assignment—Assignment not acted upon until after seizure.*]—Deft., a division ct. bailiff, received an execution against K. on May 12, 1873, on a judgment recovered on that day, under which, on the 14th, he seized two horses. On the 10th K. executed a voluntary assignment under Insolvent Act, but the assignee advised a private settlement, & did not receive & act on the assignment until June 7. The bailiff, who had left the horses in K.'s possession, took them again & advertised them for sale on June 2, but on being notified by the official assignee, he delivered them over to him on the 9th:—*Held:* the horses passed to the assignee on the execution of the assignment, which was before the judgment.—BROWN *v.* WRIGHT (1874), 35 U. C. R. 378.—**CAN.**

6903 i. —— *Seizure & sale before bankruptcy.*]—Where a sale has been made under an execution against judgment debtor, who after the sale makes an assignment in insolvency, the proceeds of the sale are not vested in the official assignee, but go to the judgment creditors.—BRAND *v.* BICKLE (1868), 4 P. R. 191.—**CAN.**

6903 ii. —— ——.]—In bkpcy. the execution must be levied by seizure & sale before the date of the fiat or the filing of the petition for adjudication; otherwise the execution-creditor is entitled only to a ratable part of his debt with the other creditors.—FINANCIAL ASSOCN. OF INDIA *v.* PRANJIVANDAS HARJIVANDAS (1866), 3 Bom. O. C. 25.—**IND.**

6903 iii. —— —— *But on same day.*]—An execution was placed in the sheriff's hands on Mar. 15, & on the 26th a sale thereunder, commenced at 10 a.m., was completed at 11 a.m., at which hour a writ of attachment was placed in the sheriff's hands against deft.:—*Held:* the attachment could not prevail over the execution.—WHYTE *v.* TREADWELL (1867), 17 C. P. 488.—**CAN.**

6903 iv. —— —— *After warning by creditors of pending application in bankruptcy.*]—A *fi. fa.* having issued against the goods & chattels of A., was lodged with deft. on Oct. 27, & on the 28th deft. seized. On the 29th, two notices were served on deft. by creditors of A., cautioning him against seizing or selling the goods, except on behalf of assignees to be thereafter appointed in the Ct. of Bkpcy., but the sale proceeded, the goods were sold, & an Nov. 5 a commission issued, & on Nov. 24 an assignee was appointed, who required deft. to pay him the proceeds of the sale:—*Held:* the goods were not the property of the assignee, because no commission of bkpcy. had issued at the time of the sale.—GILL *v.* WILSON (1853), 3 I. C. L. R. 544; 6 Ir. Jur. 132.—**IR.**

6903 v. —— —— *Fraudulent execution.*]—A. & B. being partners in trade, fraudulently concurred in the issuing of an execution against A., under which the goods of both were sold by the sheriff to C. B. subsequently to the sale committed an act of bkpcy. In an action of trover, by the assignees of A. & B., under a joint commission:—*Held:* nothing passed by the sale to the vendee.—JOHNSON & REEVES' ASSIGNEES *v.* HAMILL (1832), Alc. & N. 86.—**IR.**

6903 vi. —— *Seizure & sale but proceeds not paid over.*]—*Semble:* the official assignee has priority over the execution creditor, unless the latter has actually sold under the attachment & received the proceeds from the officer of the ct.—RAMPERSAUD *v.* CALLACHUND DOSS (1866), 1 Ind. Jur. N. S. 325, 373.—**IND.**

6903 vii. —— ——.]—A. attached property of B. in execution in Jan., 1868, which was sold on Mar. 19. In the meantime B. had been adjudicated an insolvent, & a vesting order was made on Mar. 6. Notice of the order reached the judge after the sale, but before the proceeds had been handed over:—*Held:* the official assignee was entitled to the proceeds of the sale.—INDRA CHANDRA DOGAR *v.* TARACHAND DOGAR (1868), 2 B. L. R. A. C. 61; 10 W. R. 353.—**IND.**

sequently paid over the whole of the proceeds of the sale to B. :—*Held :* the assignees of A. were entitled to recover the whole of the proceeds, including the deposits, as there had been no perfect sale, but only an inchoate sale, at the time of the fiat, & B. still remained a creditor of A. having security, within 6 Geo. 4, c. 16, s. 108.—WARD *v.* DALTON (1849), 7 C. B. 643 ; 18 L. J. C. P. 236 ; 13 L. T. O. S. 97 ; 13 Jur. 734 ; 137 E. R. 254.

6906. —— Petition for adjudication filed before sale.]—Where debtor commits an act of bkpcy. after his goods are seized by a sheriff under a *fi. fa.*, the execution is not valid, as against the assignees, unless it has been perfected by sale of the goods before the filing of the petition for adjudication of bkpcy.—YOUNG *v.* ROEBUCK (1863), 2 H. & C. 296 ; 2 New Rep. 362 ; 32 L. J. Ex. 260 ; 8 L. T. 543 ; 159 E. R. 123.

Annotations :—**Consd.** *Re* Gwynne, *Ex p.* Veness (1870), 18 W. R. 979 ; Slater *v.* Pinder (1871), L. R. 6 Exch. 228. **Refd.** Birmingham Gas Co. *v.* Adams (1870), 19 W. R. 123 ; *Re* Norton, *Ex p.* Todhunter (1870), L. R. 10 Eq. 425.

6907. —— Liquidation petition filed before sale.]—On Feb. 8 a creditor levied execution upon the goods of his debtor upon a judgment for less than £50. On Feb. 10, the sheriff not having sold, debtor filed a liquidation petition, & a receiver was appointed. Debtor had, on Jan. 16, executed a bill of sale assigning all his property to secure a past debt :—*Held :* the title of the trustee under the liquidation related back to the execution of the bill of sale, & he was entitled to the goods seized by the execution creditor.—*Re* EDWARDS, *Ex p.* EYLES (1873), L. R. 16 Eq. 99 ; 42 L. J. Bcy. 55 ; 37 J. P. 596 ; 21 W. R. 574.

Annotation :—**Apprvd.** *Re* Matanle, *Ex p.* Schulte (1874), 30 L. T. 478, L. J.

See, further, Part XXIII., *post.*

6908. —— Bill of sale of goods by sheriff to execution creditor before notice—Creditor executing bill of sale after notice—Bill of sale containing indemnity clause.]—The sheriff being in possession of the goods of T. under a *fi. fa.*, on the evening of Saturday, Dec. 20, executed a bill of sale of the goods seized to L., the execution creditor, containing a clause of indemnity by L. to the sheriff. T. had previously committed an act of bkpcy., upon which he was afterwards made a bkpt. Notice of such act of bkpcy. was sent to L.'s residence, but in consequence of his absence from home, was not received by him until Sunday. L. did not execute the bill of sale until Monday, the 22nd, when the goods were delivered to him :—*Held :* the property passed upon the execution of the bill of sale by the sheriff, & the execution was " executed & levied by seizure & sale " within 1849 Act, s. 133.—CHRISTIE *v.* WINNINGTON (1853), 8 Exch. 287 ; 22 L. J. Ex. 212 ; 155 E. R. 1355.

6909. —— Bill of sale to execution creditor—Amount actually paid over.]—An execution is *bonâ fide* completed by sale if there is a bill of sale to the execution creditor for the full value, & the amount is actually paid over.—LOADER *v.* HISCOCK (1858), 1 F. & F. 132, N. P.

6910. —— When objection to completeness of levy must be taken.]—*Semble :* if the assignees wished to deny the efficacy of a levy as a " seizure " within 6 Geo. 4, c. 16, s. 108, they must make the objection when before the judge under interpleader proceedings.—BELCHER *v.* PATTEN (1848), 6 C. B. 608 ; 6 Dow. & L. 370 ; 18 L. J. C. P. 69 ; 12 L. T. O. S. 220 ; 12 Jur. 1028 ; 136 E. R. 1387.

Annotation :—**Mentd.** Richards *v.* Jenkins (1886), 17 Q. B. D. 544, D. C.

6911. —— Sale suspended by interpleader order—Petition filed before sale.]—When an execution is levied by seizure, but the sale is suspended by an interpleader order, & before sale a petition is filed against the execution debtor, on which he is afterwards adjudged bkpt., the execution creditor is deprived of the benefit of his execution.—O'BRIEN *v.* BRODIE (1866), L. R. 1 Exch. 302 ; 4 H. & C. 544 ; 35 L. J. Exch. 188 ; 14 L. T. 559 ; 12 Jur. N. S. 527 ; 14 W. R. 840.

Annotations :—**Consd.** *Re* Gwynn, *Ex p.* Veness (1870), L. R. 10 Eq. 419 ; *Re* Norton, *Ex p.* Todhunter (1870), L. R. 10 Eq. 425. **Mentd.** Rogers *v.* Roberts (1866), 4 H. & C. 609 ; *Re* Haydon, *Ex p.* Halling (1877), 7 Ch. D. 157, C. A.

6912. —— —— ——.]—A judgment creditor issued execution on the goods of a trader for a debt over £50. A prior claim was put in by a bill of sale holder, & on an interpleader summons an order was made for the payment of the debt of the bill of sale holder into ct., & for the payment of the balance to the execution creditor. Before sale debtor filed his petition. The execution creditor claimed the goods, as against the trustee, under the judge's order :—*Held :* the order on the interpleader summons could not affect the rights of the general creditors, & the trustee was entitled to the goods, subject to the claim of the holder of the bill of sale.—*Re* HAYDON, *Ex p.* HALLING (1877), 7 Ch. D. 157 ; 47 L. J. Bcy. 25 ; 37 L. T. 809 ; 26 W. R. 182, C. A.

6913. —— Sheriff ordered to withdraw in favour of receiver appointed in Chancery action.]—Where a sheriff has seized goods on behalf of an execution creditor, but is ordered, before sale, to withdraw in favour of the receiver in an action in the Ch. Div., the execution has not been " completed," & the goods seized pass to the trustee of debtor.—MACKAY *v.* MERRITT (1886), 34 W. R. 433.

6914. —— Appointment of receiver—No sale before receiving order.]—A judgment creditor obtained an order appointing a receiver of the stock-in-trade & effects of the judgment debtor, without prejudice to certain rights, all further questions being reserved until the further order of the ct. The receiver took possession of the goods under the order, & continued in possession until a receiving order was made against debtor. No part of the goods had been then sold. Debtor was afterwards adjudicated bkpt. :—*Held :* the execution, not having been completed by sale before the date of the receiving order, could not prevail as against the title of the trustee.—*Re* DICKINSON, *Ex p.* CHARRINGTON & CO. (1888),

i. —— *Money paid to or seized by sheriff before bankruptcy.*]—Where proceedings for compulsory liquidation are taken under Insolvent Act 1869, & an attachment is issued, money which had been levied by the sheriff under an execution against debtor, but which has not been paid over to the judgment creditor, passes to the assignee.—BULLEN *v.* HARDING (1871), N. B. Dig. 714 (5).—**CAN.**

j. —— ——.]—Where before the assignment the money had been made by the sheriff under a *fi. fa.* against insolvent :—*Held :* the execution creditor was entitled to it.—SINCLAIR *v.* MCDOUGALL (1869), 29 U. C. R. 388.—**CAN.**

l. —— ——.]—The words " completely executed by payment " in Assignments Act, R. S. M. 1902 (c. 8), s. 8, giving precedence to an assignment for the general benefit of creditors over all executions not completely executed by payment, mean executed by payment to the sheriff, not to the execution creditor, & the assignee has no right, under that sect., to any money collected by a sheriff under an execution against the assignor.—NEWTON *v.* FOLEY (1911), 20 Man. L. R. 519.—**CAN.**

m. —— ——.]—Money seized by a sheriff becomes the property of the judgment creditor procuring the seizure & such other judgment creditors as become entitled to share therein under Creditors Relief Act, & is not caught by an assignment for the benefit of creditors executed subsequently to the seizure.—ADAM *v.* RICHARDS (1915), 8 W. W. R. 401 ; 21 B. C. R. 212.—**CAN.**

Sect. 10.—*Rights of execution creditors & restrictions thereon: Sub-sect.* 3, *B.*]

22 Q. B. D. 187; 58 L. J. Q. B. 1; 60 L. T. 138; 37 W. R. 130; 5 T. L. R. 82; 6 Morr. 1, C. A.

Annotations:—**Distd.** Mason & Barry *v.* La Société Industrielle et Commerciale des Métaux (1889), 5 T. L. R. 582, C. A. **Folld.** *Re* Tillett, *Ex p.* Kingscote (1889), 5 T. L. R. 269. **Consd.** Levasseur *v.* Mason & Barry (1890), 63 L. T. 700; *Re* Hastings, *Ex p.* Brown (1892), 61 L. J. Q. B. 654, D. C. **Refd.** *Re* Potts, *Ex p.* Taylor, [1893] 1 Q. B. 648, C. A.; *Re* Anglesey, De Galve *v.* Gardner, [1903] 2 Ch. 727; *Re* Pearce, *Ex p.* Official Receiver, The Trustee, [1919] 1 K. B. 354, C. A. **Mentd.** *Re* Detmold, Detmold *v.* Detmold (1889), 58 L. J. Ch. 495.

6915. —— No sale within twenty-one days—Execution invalid as act of bankruptcy.]—The sheriff was paid out after he had been in possession for twenty-one days:—*Held:* the execution creditor must refund the money to the trustee under the subsequent bkpcy. of debtor, since the execution & possession for twenty-one days constituted an act of bkpcy.—FIGG *v.* MOORE BROTHERS, [1894] 2 Q. B. 690; 63 L. J. Q. B. 709; 71 L. T. 232; 10 T. L. R. 490; 1 Mans. 404; 10 R. 549.

Annotations:—**Apprvd.** Burns-Burns' Trustee *v.* Brown, [1895] 1 Q. B. 324, C. A. **Consd.** *Re* Godding, *Ex p.* Trustee, [1914] 2 K. B. 70. **Refd.** *Re* Pollock & Pendle, *Ex p.* Wilson & Mathieson (1902), 87 L. T. 238, D. C.

6916. —— —— ——.]—*Held:* the act of bkpcy. committed by reason of the sheriff's holding for twenty-one days the goods seized by him under an execution operated under 1883 Act, s. 45, to make the execution itself void as against the trustee of debtor.—BURNS-BURNS' TRUSTEE *v.* BROWN, [1895] 1 Q. B. 324; 64 L. J. Q. B. 248; 71 L. T. 825; 43 W. R. 195; 11 T. L. R. 114; 39 Sol. Jo. 152; 2 Mans. 23; 14 R. 119, C. A.

Annotations:—**Consd.** *Re* Godding, *Ex p.* Trustee, [1914] 2 K. B. 70. **Mentd.** *Re* Pollock & Pendle, *Ex p.* Wilson & Mathieson (1902), 87 L. T. 238.

6917. —— Death of debtor before seizure.]—The goods of a judgment debtor at his house were seized under a *fi. fa.* While the sheriff was in possession at the house, the judgment debtor, without the knowledge of the sheriff, placed a sum of money which he had received in a drawer in his bedroom there. Some days afterwards he died, & his widow, having found the money, removed it & deposited it with her solrs., the sheriff remaining in ignorance of its existence. Subsequently an order was made under 1883 Act, s. 125, for the administration of judgment debtor's estate in bkpcy. The sheriff, having learned of the existence of the above sum, claimed it from the solrs.:—*Held:* there was no seizure by the sheriff before the death of the judgment debtor, &, after his death, the sheriff could not seize the money, & it belonged to the trustee under the administration order as against the execution creditor.—JOHNSON *v.* PICKERING, [1908] 1 K. B. 1; 77 L. J. K. B. 13; 98 L. T. 68; 24 T. L. R. 1; 51 Sol. Jo. 810; 14 Mans. 263, C. A.

See, also, Nos. 7047 *et seq., post.*

6918. —— Sheriff withdrawing & reserving right to re-enter.]—Execution having been issued upon a judgment for £80 & costs, the sheriff on Dec. 31, 1898, levied under a writ of *fi. fa.* On Jan. 5, 1899, debtor, under an arrangement with the solrs. of the execution creditors, paid the solrs. a sum of £40 on account, & gave to the sheriff authority to re-enter under the writ of *fi. fa.* upon default in payment of any of the instalments of the balance at the agreed dates for payment. The sheriff thereupon withdrew. On Jan. 14 a receiving order was made against debtor on his own petition; at that date the sheriff had not re-entered under the writ of *fi. fa.*:—*Held:* the execution had not been completed as to the £40 at the date of the receiving order, & the execution creditors were not entitled to retain the benefit of the execution, but the trustee in bkpcy. was entitled to the £40 as part of debtors' estate.—*Re* FORD, *Ex p.* OFFICIAL RECEIVER, [1900] 1 Q. B. 264; 69 L. J. Q. B. 74; 81 L. T. 648; 48 W. R. 173; 44 Sol. Jo. 75; 7 Mans. 14, D. C.

Annotations:—**Consd.** *Re* Pollock & Pendle, *Ex p.* Wilson & Mathieson (1902), 87 L. T. 238. **Apld.** *Re* Jenkins, *Ex p.* Trustee (1904), 90 L. T. 65, D. C. **Consd.** *Re* Godding, *Ex p.* Trustee, [1914] 2 K. B. 70.

6919. —— Sheriff withdrawing on payment of debt direct to creditor.]—The goods of a judgment debtor were seized by the sheriff, but before the sale the amount due was paid to the creditor, & the sheriff withdrew. A week later a receiving order was made against the judgment debtor, on which he was adjudicated bkpt.:—*Held:* payment direct to the execution creditor was not a completion of the execution by seizure & sale, & the trustee was entitled to the amount paid.—*Re* POLLOCK & PENDLE, *Ex p.* WILSON & MATHIESON, LTD. (1902), 87 L. T. 238; 18 T. L. R. 794; 46 Sol. Jo. 701, D. C.

Annotations:—**Distd.** *Re* Jenkins, *Ex p.* Trustee (1904), 90 L. T. 65, D. C. **Folld.** *Re* Godding, *Ex p.* Trustee, [1914] 2 K. B. 70.

6920. —— ——.]—The goods of debtor were seized in execution, &, to avoid a sale, he paid the full amount of the levy directly to the execution creditor & also paid the charges of the sheriff, who withdrew by direction of the execution creditor. Nine days afterwards debtor became bkpt.:—*Held:* (1) for the purposes of 1883 Act, s. 45, & 1890 Act, s. 11, an execution levied on the goods of a judgment debtor was not completed except by seizure & sale or payment of the full amount of the levy to the sheriff, & the retention by the sheriff of the money received for fourteen days without notice of a bkpcy. petition against debtor; (2) the execution had not been completed & the creditor could not, as against the trustee, retain the money which had been paid to him.—*Re* GODDING, *Ex p.* TRUSTEE, [1914] 2 K. B. 70; 110 L. T. 207; 58 Sol. Jo. 221; *sub nom. Re* GODDING, *Ex p.* PARTRIDGE, 83 L. J. K. B. 1222; 21 Mans. 137.

6921. —— Sale by agreement of certain articles withdrawn from execution.]—A judgment creditor issued execution against debtor's goods on June 26. Debtor's wife claimed the goods, acting on debtor's instructions, he being the real owner. The creditor, on the faith of the representation that the goods belonged to the wife, entered into an arrangement between July 10 & 17, whereby certain pictures were to be withdrawn from the execution & sold, & the proceeds paid to the creditor. The sale took place on July 17, & on 21st the creditor had notice of an available act of bkpcy., on which the receiving order was subsequently made. The proceeds of sale were paid to the creditor, partly before & partly after the date of the receiving order:—*Held:* the execution had not been completed within 1914 Act, ss. 40 & 41, & the trustee was entitled to the money paid to the creditor.—*Re* EVANS, *Ex p.* SALAMAN, [1916] H. B. R. 111.

6922. Execution against goods under writ of elegit—No seizure till after petition—Premises kept closed.]—Pltfs. signed judgment against defts. on July 12, & on the same day delivered a writ of *elegit* to the sheriff. On July 11 defts. closed their place of business in order to prevent executions being levied, & kept them closed until July 16, when they filed a petition under 1869 Act, & at a meeting of creditors on Aug. 27 it was resolved that a composition of 7*s.* 6*d.* in the pound should be accepted & secured

by an assignment of the whole of the assets of defts. to claimants as trustees, & that a proper deed of assignment should be executed by defts. On Sept. 11 claimants received a written notice from pltfs. that the writ of *elegit* had been lodged with the sheriff, & on Sept. 17 defts. executed the deed of assignment to claimants in pursuance of the resolution of the creditors. The sheriff seized the goods on Sept. 20 :—*Held :* pltfs. were entitled to the goods.—EHLERS SEEL & CO. *v.* KAUFFMAN & GATES, WENDT & CHARLES, CLAIMANTS (1883), 49 L. T. 806.

6923. —— Possession taken before 1883 Act—Adjudication after Act came into force.]—Possession of the goods of debtor was taken by the sheriff under a writ of *elegit* on Dec. 22, 1883, but no delivery was made to the judgment creditor prior to debtor being adjudicated a bkpt. under the above Act, which came into operation on Jan. 1, 1884 :—*Held :* the judgment creditor was not deprived of his right to delivery of the goods seized.—*Re* WINDAS & DUNSMORE, *Ex p.* HOUGH (1884), 50 L. T. 212 ; 32 W. R. 540 ; 1 Morr. 22.

6924. Attachment of debt—Sum paid into court.]—A judgment creditor having obtained a garnishee order in respect of a debt due to his judgment debtor, a third party intervened claiming the debt, & the garnishee under an order of the ct., paid the amount into ct. to abide further order. A receiving order having been subsequently made against the judgment debtor, the third party withdrew his claim :—*Held :* there had been no "receipt of the debt" by the creditor within 1883 Act, s. 45, so as to entitle him to retain it against the trustee.—BUTLER *v.* WEARING (1885), 17 Q. B. D. 182 ; 3 Morr. 5.

Annotation :—**Folld.** *Re* Trehearne, *Ex p.* Chief Official Receiver *v.* Ealing L. B. (1890), 63 L. T. 323.

6925. —— Payment before act of bankruptcy—Failure to file before bankruptcy consent order for judgment.]—A judge's order made by consent was given by deft. in a personal action to pltfs. authorising them to sign judgment, & judgment was signed. The consent order was not filed within twenty-one days after the making of the order, as required by Debtors Act, 1869 (c. 62), s. 27. The judgment creditors subsequently obtained payment under a garnishee order of money owed to the judgment debtor, & after such payment had been made debtor was adjudged bkpt. :—*Held :* as the consent order had not been filed within twenty-one days, & the bkpcy. of debtor had intervened, both the order & the judgment upon which the garnishee order was based were void under s. 27, & the trustee was entitled to recover from the judgment creditors the money received by them under the garnishee order as money paid to the use of the trustee, although it had been paid before the act of bkpcy.

In the absence of fraud payment by the garnishee discharges him, although the judgment is afterwards set aside.—*Re* SMITH, *Ex p.* BROWN (1888), 20 Q. B. D. 321 ; 57 L. J. Q. B. 212 ; 36 W. R. 403 ; 4 T. L. R. 259, C. A.

6926. —— Payment postponed by agreement.]—A judgment creditor, who had attached a debt due to the judgment debtor, arranged with the garnishee not to enforce the order before a specified date, & the garnishee undertook to hold the amount of the debt on behalf of the judgment creditor, & on the day named paid it over to him. A receiving order having in the meantime been made against the judgment debtor, upon which he had been adjudicated bkpt. :—*Held :* the judgment creditor had no claim to the debt as against the trustee, & the garnishee was liable to pay the amount to the trustee, the attachment not having been "completed by receipt of the debt" before the date of the receiving order.—*Re* TREHEARNE, *Ex p.* EALING LOCAL BOARD (1890), 60 L. J. Q. B. 50 ; 63 L. T. 798 ; 39 W. R. 116 ; 7 T. L. R. 16 ; 7 Morr. 261, C. A.

Annotation :—**Mentd.** *Re* National United Investment Corpn., [1901] 1 Ch. 950.

6927. —— Payment without order absolute.]—A. sold goods to B., to be paid for by bills of exchange at certain future periods. Before the bills were due C. recovered a judgment against A., & obtained a judge's order under 1854 Act, s. 61, for attachment of the debt due from B. to A., & to show cause why B. should not pay C. the debt due from B. to A. Upon the order being served on B., he gave C. a promissory note payable by instalments for the amount of the debt due to A. No further proceedings were taken under the attachment. A. afterwards became bkpt. :—*Held :* the debt due from B. to A. was not discharged by the promissory note given by B. to C., & A.'s assignees were entitled to recover it from B. :—*Semble :* payment by the garnishee to the judgment creditor upon notice of the attachment, is no discharge of the debt due from the garnishee to the judgment debtor, but there must be a judge's order for payment.—TURNER *v.* JONES (1857), 1 H. & N. 878 ; 26 L. J. Ex. 262 ; 28 L. T. O. S. 341 ; 5 W. R. 318 ; 156 E. R. 1457.

Annotations :—**Consd.** Wood *v.* Dunn (1866), L. R. 2 Q. B. 73, Ex. Ch. **Mentd.** Lowe *v.* Blakemore (1875), L. R. 10 Q. B. 485.

6928. —— ——.]—Where debtor commits an act of bkpcy. & judgment is subsequently obtained against him by a creditor who obtains a garnishee order *nisi* attaching a debt due to the judgment debtor, the garnishee order *nisi* does not justify the garnishee in forthwith paying the debt to the judgment creditor, & if he does so the debt will still form part of the judgment debtor's estate by virtue of the relation back of the title of the trustee in bkpcy. to the act of bkpcy. The ct. will, in

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6922 i. *Execution against goods under writ of elegit—Inquisition & return before bankruptcy—Return not filed until after.*]—Where an *elegit*, issued on a judgment, & an inquisition & return had been made thereon two months prior to the issuing of a commission, but such return had not been filed until after the bkpcy. :—*Held :* there was, at that time, an execution, within 6 Will. 4, c. 14, s. 95. although no actual possession was thereby given.—O'BRIEN *v.* BERNARD (1843), 6 I. L. R. 6.—IR.

6924 i. *Attachment of debt—Service of garnishee order before petition of insolvency.*]—Pltf., on Mar. 3, 1871, obtained & served a garnishee order to attach debts due to deft., who on Apr. 20, filed a petition in insolvency : —*Held :* against the assignees pltf. was entitled to be paid all the debts which had been attached by the garnishee order.—CARROLL *v.* MURPHY (1871), I. R. 6 C. L. 114.—IR.

o. —— *Conditional order for payment before bankruptcy—Not made absolute until after.*]—After an absolute order attaching a debt, & a conditional order to pay, the judgment debtor was adjudicated a bkpt. before the conditional order was made absolute :—*Held :* the garnishee order was levelled by the bkpcy.—RYLANDS *v.* REARDON (1880), 8 L. R. Ir. 1.—IR.

p. —— *Before bankruptcy.*]—Pltf. attached a debt due from S. to deft. Subsequently, & while the debt due from S. remained unpaid, deft. went into liquidation The assignee claimed the debt due from S. vested in him as part of the estate :—*Held :* the garnishment created a charge on the debt due from S. as against the assignee. —HARRISON *v.* AITON (1880), 20 N. B. R. 371.—CAN.

6928 i. —— *Payment to sheriff before petition of insolvency filed.*]—N., on an attachment under a garnishee order, handed over R1,200, a sum largely exceeding the amount due by him to the judgment debtor, together with R83-9-0, the costs of the execution, to the sheriff. On the following day, the judgment debtor filed his petition in the Insolvent Ct. Upon the official assignee claiming R399-12-9, that portion of the sum in the hands of the sheriff, which was admittedly owing to the attaching creditor :—*Held :* the

Sect. 10.—Rights of execution creditors & restrictions thereon: Sub-sect. 3, B.; sub-sect. 4, A.]

such a case, order the garnishee, upon an application by the trustee, to pay the amount of the attached debt to the trustee.—*Re* WEBSTER, *Ex p.* OFFICIAL RECEIVER, [1907] 1 K. B. 623; 76 L. J. K. B. 380; 96 L. T. 332; 51 Sol. Jo. 230; 14 Mans. 20, D. C.

See, further, Part IX., Sect. 2, *ante*, & Sub-sect. 5, *post*.

6929. Execution against land—No decree in Chancery vesting estate in creditor.]—A judgment creditor sued out an *elegit* against his debtor, who had no other interest in land than an equity of redemption, & the sheriff returned nil. Debtor became bkpt. The creditor then filed a bill for a declaration that he had a charge on debtor's equity of redemption at the time of the bkpcy.:—*Held:* the creditor, not having obtained a decree of the Ct. of Ch. vesting in him the estate of debtor, had no charge on the land.—HATTON *v.* HAYWOOD (1874), 9 Ch. App. 229; 43 L. J. Ch. 372; 30 L. T. 279; 22 W. R. 356, L. C. & L. JJ.

Annotations:—**Apld.** *Re* South (1874), 9 Ch. App. 369, L. JJ. **Consd.** Backhouse *v.* Siddle (1878), 38 L. T. 487; *Re* Watkins, *Ex p.* Evans (1879), 11 Ch. D. 691; **Foll.** *Re* Watkins, *Ex p.* Evans (1879), 13 Ch. D. 252, C. A. **Consd.** *Re* Hastings, *Ex p.* Brown (1892), 61 L. J. Q. B. 654; *Re* Jones (1895), 39 Sol. Jo. 671. **Refd.** Beckett *v.* Buckley (1874), L. R. 17 Eq. 435; Anglo-Italian Bank *v.* Davies (1878), 9 Ch. D. 275, C. A.; *Re* Pope (1886), 17 Q. B. D. 743, C. A.; Thompson *v.* Gill, [1903] 1 K. B. 760, C. A.; R. *v.* Selfe (1908), 77 L. J. K. B. 697, D. C. **Mentd.** Smith *v.* Cowell (1880), 50 L. J. Q. B. 38, C. A.; *Re* Anthony, Anthony *v.* Anthony, [1892] 1 Ch. 450; Blackman *v.* Fysh, [1892] 3 Ch. 209; Cadogan *v.* Lyric Theatre, [1894] 3 Ch. 338, C. A.

See, further, Nos. 3356 *et seq.*, *ante*.

6930. —— Delivery in execution before receiving order—Return of writ after.]—A judgment creditor sued out a writ of *elegit*. An inquisition was held & the jury found that debtor was possessed of certain lands, & the sheriff delivered same in execution to the creditor until the debt was satisfied. The proceedings before the sheriff terminated at 12.30 p.m. At four o'clock on same day, debtor filed his petition & a receiving order was at once made. On the next day the sheriff returned the writ. The creditor had no notice of the presentation of any petition or of the commission of any available act of bkpcy. by debtor:—*Held:* the delivery in execution of the lands by the sheriff was a "seizure" within 1883 Act, s. 45, & the execution was complete before the receiving order was made, as the return of the writ was a mere matter of procedure, & the making of the receiving order before the return did not oust the right of the judgment creditor.—*Re* HOBSON (1886), 33 Ch. D. 493; 55 L. J. Ch. 754; 55 L. T. 255; 34 W. R. 786; 2 T. L. R. 884.

6931. Equitable execution—Appointment of receiver later in same day as petition presented.]—A judgment creditor obtained the appointment of a receiver of the equitable property of debtor. On the same day, but shortly prior in time, a petition in bkpcy. was presented, & a receiver in bkpcy. appointed:—*Held:* there must be a lawful seizure of the property before possession had been taken by the ct. to give priority against the receiver in bkpcy., & the receiver on behalf of the execution creditor could not lawfully seize when a receiver in bkpcy. had been appointed.—SALT

title of the official assignee must prevail.—JITMAND *v.* RAMCHAND (1905), I. L. R. 29 Bom. 405.—**IND.**

q. —— *After but without notice of bankruptcy.*]—J. died possessed of a fund, which he devised to trustees. The original devises in the will having failed, it was ordered that a portion of the fund should be distributed & paid by the trustees in certain proportions among the next of kin of J. M. being entitled as one of the next of kin, with S. her husband executed a power of attorney to A., empowering him to receive the money coming to her by virtue of the will. On Apr. 3, 1868, A. received $1,927, which, on the same day, was attached in his hands by B. on process issued against S., the husband, as an absent or absconding debtor. On Feb. 23 previously, S. had been adjudicated a bkpt. in England, & a creditors' assignee appointed. No notice of the bkpcy. had been received by B. at the time of the attachment process:—*Held:* the creditors' assignee was entitled to the fund as against B.—ROPER *v.* SHANNON (1871), 8 N. S. R. 146.—**CAN.**

6930 i. *Execution against land—Seizure before bankruptcy—Sale after.*]—Under a writ of *fi. fa.* a sheriff seized the interest of a judgment debtor in lands, & advertised the interest for sale. Three days prior to the time fixed for the sale the judgment debtor made an assignment for the benefit of his creditors pursuant to R. S. O. 1897 (c. 147). The assignee gave notice to the sheriff of the assignment & asked for a statement of the costs incurred to that time. No tender of the costs was made or undertaking given to pay them, & the sheriff proceeded with the sale, & sold the land. The assignee, notwithstanding the sheriff's sale, assumed to sell the land:—*Held:* the assignment for the benefit of creditors did not stand in the way of the sheriff proceeding to sell under the writ of execution, & the sale by the assignee was nugatory & void.—ELLIOTT *v.* HAMILTON (1902), 22 C. L. T. Occ. N. 412; 4 O. L. R. 585; 1 O. W. R. 705; 2 O. W. R. 141.—**CAN.**

6930 ii. —— —— ——.]—In Sept., 1867, A. obtained a decree against B., & on Jan. 12, 1868, caused a piece of land to be attached in execution. On Apr. 17, it was sold by order of the Zillah Judge, & bought by C., but before that B. had filed his petition in the Insolvent Ct., & on Mar. 6, a vesting order was made. On July 24 the official assignee sold the premises by order of the Insolvent Ct.:—*Held:* the sale by order of the Zillah Judge was legal, notwithstanding the vesting order, & the purchaser at the sale by order of the Insolvent Ct. had no right to recover it from him.—ANAND CHANDRA PAL *v.* PANCHILAL SARMA (1870), 5 B. L. R. 691; 14 W. R. 33.—**IND.**

6930 iii. —— *Seizure & sale before bankruptcy.*]—In 1887 the sheriff sold land of H. under a writ of *fi. fa.* & received the purchase money. Afterwards, & before payment over by the sheriff to the execution creditors, H. assigned for the benefit of his creditors under R. S. O. 1887 (c. 124):—*Held:* the assignee was not entitled to the money in the sheriff's hands.—CLARKSON *v.* SEVERS (1889), 17 O. R. 592.—**CAN.**

6930 iv. —— ——.]—A trader, at a time when he was unable to meet his engagements, & within two months before his bkpcy., executed, *bonâ fide*, to secure an antecedent debt, a bond & warrant of attorney to confess judgment, upon which judgment was entered & execution issued, under which the sheriff, before the bkpcy., seized, sold & conveyed to deft., a chattel real of the cognizor:—*Held:* the assignees were not entitled to recover from deft. the possession of the chattel real so seized, sold, & conveyed to him by the sheriff.—JAMES *v.* MAGENNIS (1869), I. R. 3 C. L. 100; I. R. 5 C. L. 253; 3 I. L. T. Jo. 157.—**IR.**

r. —— *Memorial registered before insolvency.*]—A registered memorial is a charge upon the real estate of debtor who afterwards becomes insolvent & makes assignment under Insolvent Act.—DE VEBER *v.* AUSTIN (1875), 3 Pug. 55.—**CAN.**

s. —— *Judgment registered as mortgage before commission.*]—A judgment obtained against bkpt., & registered as a mtge., under 13 & 14 Vict., c. 29, ss. 6, 7, before the issuing of the commission, is a charge on bkpt.'s lands, in priority to his simple contract debts.—*Re* RYAN (1853), 3 I. Ch. R. 33.—**IR.**

6931 i. *Equitable execution—Appointment of receiver before bankruptcy.*]—P., a trader, passed his bond & warrant of attorney, etc., to secure £450 to B., who entered judgment under the warrant & obtained an order for a receiver. A commission of bkpcy. issued against P., whose assignee moved to remove the receiver, & for payment of the rents:—*Held:* the appointment, having been obtained on a judgment on a warrant, etc., was over-reached by the bkpcy. & the receiver should be removed.—BAKER *v.* PETTIGRUE (1839), 2 I. Eq. R. 144.—**IR.**

6931 ii. —— ——.]—A creditor by judgment, entered pursuant to warrant of attorney, obtained an order for a receiver under 5 & 6 Will. 4, c. 55, more than two calendar months before the issuing of a commission of bkpcy. against resp., the conusor:—*Held:* the execution was protected by s. 95 from the operation of s. 126 of 6 Will. 4, c. 14.—READ *v.* DAVIS (1840), 3 I. Eq. R. 153.—**IR.**

6931 iii. —— ——.]—The appointment of a receiver, by way of equitable execution on foot of a judgment, over a fund to which the judgment debtor is entitled does not, when the judgment

v. COOPER (1880), 16 Ch. D. 544 ; 50 L. J. Ch. 529 ; 43 L. T. 682 ; 29 W. R. 553, C. A.

Annotations :—**Mentd.** Leggott *v.* Western (1884), 12 Q. B. D. 287 ; Walmsley *v.* Mundy, *Ex p.* Goodenough (1884), 50 L. T. 317, C. A. ; *Re* Whiteley, Whiteley *v.* Learoyd (1887), 56 L. T. 846 ; Brereton *v.* Edwards (1888), 21 Q. B. D. 226 ; Wills *v.* Luff (1888), 38 Ch. D. 197 ; Holmes *v.* Millage, [1893] 1 Q. B. 551, C. A. ; Harris *v.* Beauchamp, [1894] 1 Q. B. 801, C. A. ; Ponnamma *v.* Arumogam, [1905] A. C. 383, P. C. ; *Re* Hearn, De Bertodano *v.* Hearn (1913), 108 L. T. 452.

6932. Writ of sequestration—Adjudication before sale.]—An order was made in the Ch. Div. directing debtor to pay into ct. a sum of money. A writ of sequestration was subsequently issued to enforce the order, & debtor's property, both real & personal, was seized under the writ. Before sale debtor was adjudicated a bkpt. :—*Held :* the sequestrator was not an execution creditor who had completed an execution or attachment, & the ct. had jurisdiction to restrain the proceedings in the Ch. action.—*Re* HASTINGS, *Ex p.* BROWN (1892), 61 L. J. Q. B. 654 ; 67 L. T. 234 ; 8 T. L. R. 683 ; 36 Sol. Jo. 733 ; 9 Morr. 234, D. C.

Annotation :—**Apprvd.** *Re* Pollard, *Ex p.* Pollard, [1903] 2 K. B. 41, C. A.

6933. —— Payment into court on same day as receiving order made.]—An exor., who was indebted to his testatrix, was made deft. to an administration action in the Ch. Div. An order was made that deft. should pay into ct. to the credit of the action the amount which had been found due from him. He failed to obey the order, & a writ of sequestration was issued against him. The order was served upon a bank with which he had an account, & an order was afterwards made directing the bank to pay into ct. to the credit of the action, " the sequestrator's account," the balance standing in their books to the credit of deft. The payment was made on Aug. 6, & the same day a receiving order in bkpcy. was made against deft. upon a creditor's petition presented on the previous July 13. He was afterwards adjudicated a bkpt. :—*Held :* pltfs. did not by virtue of the sequestration, or by the subsequent payment into ct., become secured creditors of bkpt., but the money in ct. had passed to the trustee as part of the property of bkpt. divisible among his creditors. *Semble :* if an order had been made that the balance of the fund, after payment of the sequestrator's costs, should be carried to the general credit of the action, pltfs. would have been in the position of secured creditors of bkpt.—*Re* POLLARD, *Ex p.* POLLARD, [1903] 2 K. B. 41 ; 72 L. J. K. B. 509 ; 88 L. T. 652 ; 51 W. R. 483 ; 10 Mans. 152, C. A.

See, further, Nos. 3356 *et seq.*, *ante*, & No. 7068, *post*.

SUB-SECT. 4.—DUTIES AND LIABILITIES OF SHERIFF AND EFFECT OF BANKRUPTCY WHILE EXECUTION OR ATTACHMENT PENDING.

See, now, 1914 Act, s. 41.

A. In General.

6934. General effect—1890 Act, s. 11 (2).]—Apart from the above sub-sect., money in the hands of the sheriff can be attached by a garnishee order. The effect of the sub-sect. is to place a temporary stop on the money in the hands of the sheriff. The right of the execution creditor to the money is not a contingent right ; it is a vested right, liable to be divested in the event of bkpcy. supervening within the fourteen days mentioned in the sub-sect.—*Re* GREER, NAPPER *v.* FANSHAWE, [1895] 2 Ch. 217 ; 64 L. J. Ch. 620 ; 72 L. T. 865 ; 59 J. P. 441 ; 43 W. R. 547 ; 2 Mans. 350 ; 39 Sol. Jo. 503 ; 13 R. 598.

Annotations :—**Mentd.** *Re* Turnbull, Turnbull *v.* Nicholas, [1900] 1 Ch. 180 ; White, Son & Pill *v.* Stennings, [1911] 2 K. B. 418, C. A.]

6935. " Shall on request deliver "—Where no request made.]—Debtor gave a bill of sale of goods as security for a loan. The sheriff having taken the goods in execution on behalf of a judgment creditor of the grantor, the grantee gave the sheriff notice of his claim. The sheriff took out an interpleader summons, & on the same day a receiving order was made against the grantor, & he was afterwards adjudged bkpt. The official receiver did not claim the goods under 1890 Act, s. 11, but appeared on the hearing of the interpleader summons & concurred with the judgment creditor in asking for a sale under R. S. C. Ord. 57, r. 12, & an order for sale was made. *Semble :* if the official receiver had asked for the delivery of the goods to him under the above sect. the operation of the above rule would have been excluded, but

debtor is subsequently adjudicated a bkpt., constitute a charge on outstanding portions of the fund as against the assignees in bkpcy.—*Re* O'NEILL (1888), 21 L. R. Ir. 211.—IR.

6931 iv. ——.]—Pltfs. in 1911 recovered judgment against Mrs. W., who had a furnished flat, which was let to deft. Pltfs. obtained the appointment of a receiver of Mrs. W.'s interest in the flat, & notice of the receivership order was served upon deft. with a request to pay the rent to pltfs., but nothing further was done to enforce the order. In 1913 Mrs. W. became bkpt. in Scotland. Both the trustee & the receiver claimed the rent due from deft. to Mrs. W. in respect of the flat : —*Held :* the title of pltfs. under the receivership order was preferable to that of the trustee.—SINGER & CO. *v.* FRY (1915), 84 L. J. K. B. 2025 ; 113 L. T. 552 ; [1915] H. B. R. 115.—SCOT.

t. —— *Conditional order for receiver before act of bankruptcy—Order made absolute after.*]—In 1828 a judgment was obtained against a trader upon a bond & warrant of attorney collateral. On Mar. 3, 1841, the judgment creditor having presented a petition for the appointment of a receiver under 5 & 6 Will. 4, c. 55, obtained a conditional order for the purpose which was subsequently made absolute on Apr. 23. On Mar. 17 the trader had committed an act of bkpcy. & on May 17 a commission issued, under which he was duly found a bkpt. :—*Held :* it was the absolute & not the conditional order that attached the rents, & the receiver should be discharged.—BURT *v.* BERNARD (1843), 4 I. Eq. R. 328 ; Fl. & K. 414 ; *affd.* 5 I. Eq. R. 425 ; 3 Dr. & War. 464 ; 2 Con. & Law. 271.—IR.

v. *Writ of attachment against absconding debtor—Seizure & sale before bankruptcy—Judgment after.*]—Pltf., on Aug. 16, issued a writ of attachment against deft., an absconding debtor, deft.'s goods were attached Aug. 30, & were sold on Sept. 15, & the money paid into ct. on Oct. 7, to respond pltf.'s judgment, after which, on Oct. 19, proceedings were taken under Insolvent Act, 1875, to put deft.'s estate in compulsory liquidation, & the estate passed into the hands of the assignee. Pltf. claimed a lien under his attachment :—*Held :* the assignee was entitled to the money paid into ct.—RUMSEY *v.* HARE (1877), 3 R. & C. 4.—CAN.

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6934 i. *General effect—Assignments Act R. S. M.* 1902 (*c.* 8).]—Money paid to the sheriff by an execut'on debtor, whose goods have been seized under the execution but have not been sold thereunder, are the property of the execution creditor, & the sheriff is not required by the above sect. to pay it over to the assignee under an assignment by the execution debtor for the benefit of his creditors, unless such money is the proceeds of an actual sale by the sheriff.—NEWTON *v.* FOLEY (1911), 20 Man. L. R. 519.—CAN.

x. " *Goods* "—*Irish* 1872 *Act, s.* 54—*Includes chattels real as well as chattels personal.*]—*Re* MORRIS (1879), 3 L. R. Ir. 451.—IR.

6935 i. " *Shall on request deliver* "—*Duty of sheriff.*]—When an assignment is made under Insolvent Act, 1869, it is the duty of a sheriff, who has seized goods under a *fi. fa.* against insolvent, to surrender the goods to the assignee, leaving execution pltf. to assert his privilege for costs, if he has any in the proceedings in insolvency.—BLAKELY *v.* HALL (1870), 21 C. P. 138.—CAN.

6935 ii. —— *Where no request made.*]—The goods of a trader were taken in execution in respect of two several judgments, each for sums exceeding £20. The same attorney acted for the two execution creditors, & handed the writs simultaneously to the sheriff. The sheriff sold under both executions.

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as he had not so done, but asked for a sale, that rule could be applied.—STERN *v.* TEGNER, [1898] 1 Q. B. 37; 66 L. J. Q. B. 859; 77 L. T. 347; 46 W. R. 82; 42 Sol. Jo. 31; 4 Mans. 328, C. A.

Annotation:—**Mentd.** *Re* Davies, *Ex p.* Equitable Investment Co. (1897), 4 Mans. 358.

6936. —— —— Sale where no request.]—After goods had been taken in execution under a writ of *fi. fa.*, but before sale, a receiving order was made against the execution debtor, & notice thereof given to the sheriff. The official receiver made no request for delivery of the goods, but informed the sheriff that he would leave him to realise the goods, & account for them in due course. The sheriff sold the goods. Afterwards the execution debtor was adjudicated bkpt., & a trustee appointed. In an action by the trustee against the sheriff, to recover damages for a wrongful & illegal sale:—*Held:* in the absence of a request to the sheriff to deliver the goods to the official receiver or trustee, there was nothing in 1883 Act, ss. 9, 45, 46 to alter the authority of the sheriff to sell in pursuance of the writ of *fi. fa.*, & he was justified in selling the goods, notwithstanding the making of the receiving order.—WOOLFORD'S ESTATE TRUSTEE *v.* LEVY, [1892] 1 Q. B. 772; 61 L. J. Q. B. 546; 66 L. T. 812; 56 J. P. 694; 40 W. R. 483; 8 T. L. R. 492, C. A.

Annotations:—**Apld.** Lee *v.* Dangar, Grant, [1892] 1 Q. B. 231. **Refd.** *Re* Thomas, *Ex p.* Middlesex, [1899] 1 Q. B. 460, C. A. **Mentd.** Lee *v.* Dangar, Grant, [1892] 2 Q. B. 337, C. A.

6937. "Under an execution"—Payment by debtor's father to high bailiff—To prevent possession being taken.]—A warrant of execution having been issued to the high bailiff upon a judgment exceeding £20, debtor's father paid the high bailiff the amount of the judgment, in order to prevent possession being taken under the warrant. Notice of a bkpcy. petition against debtor was given to the high bailiff within fourteen days. The high bailiff paid the money to the official receiver:—*Held:* the money was not paid "under an execution," within 1890 Act, s. 11 (2), & the execution creditor was entitled to recover the amount from the high bailiff. *Qu.:* whether it made any difference that the money was not paid by debtor himself.—BOWER *v.* HETT, [1895] 2 Q. B. 337; 64 L. J. Q. B. 772; 73 L. T. 176; 44 W. R. 4; 11 T. L. R. 540; 39 Sol. Jo. 669; 14 R. 710, C. A.

"Exceeding £20."]—*See* Nos. 6969 *et seq.*, *post.*

6938. "In order to avoid sale"—Payment of sum on account—With approval of judgment creditor.]—A judgment debtor, expecting an execution to be issued against him, called on the sheriff, requested him to forbear, &, when the writ was delivered to the sheriff, paid him part of the amount due in cash, notes, cheques, & bills, the remainder being afterwards paid by another person. The sheriff informed the judgment creditor of the fact, but before the money was handed over to the creditor, debtor filed a petition for liquidation, notice of which was served on the sheriff, who nevertheless paid the judgment creditor the money, etc., he had received. The trustee under the liquidation claimed the money:—*Held:* the creditor having ratified the action of the sheriff before the petition was filed, was entitled to retain the money, notes, cheque, & bills.—*Re* HASSALL, *Ex p.* BROOKE (1874), 9 Ch. App. 301; 43 L. J. Bcy. 49; 30 L. T. 103; 22 W. R. 395, L. C. & L. JJ.

Annotations:—**Folld.** Stock *v.* Holland (1874), L. R. 9 Exch. 147. **Refd.** *Re* Pearson, *Ex p.* West Cannock Colliery Co. (1886), 3 Morr. 187, D. C.

6939. —— —— ——.]—The sheriff having seized the goods of a trader debtor under an execution for more than £50, debtor, before sale, paid him, on Nov. 18 & Nov. 21, two sums of £100 & £32 respectively on account of the debt. The judgment creditors knew of & assented to the payments. Debtor on Nov. 24, filed a petition for liquidation, & a restraining order was served on the sheriff, who continued to hold the sums so paid on account. Subsequently on Dec. 20, trustees were appointed, who claimed the £132:—*Held:* the judgment creditors, having assented to the payments, were entitled to the money as against the trustees.—STOCK *v.* HOLLAND (1874), L. R. 9 Exch. 147; 43 L. J. Ex. 112; 31 L. T. 121; 22 W. R. 661.

Annotations:—**Expld.** Bird *v.* Mathews (1882), 46 L. T. 512, C. A. **Consd.** *Re* Evans, *Ex p.* Salaman, [1916] H. B. R. 111. **Refd.** *Re* Pearson, *Ex p.* West Cannock Colliery Co. (1886), 3 Morr. 187, D. C. **Mentd.** Bower *v.* Hett (1895), 64 L. J. Q. B. 483.

See, now, 1914 Act, s. 41.

6940. —— Payment of sum due for certain selected articles.]—Debtor, against whom a writ of *fi. fa.* was out, with the sheriff's assent, made an arrangement with a third party that he should have certain selected articles of debtor's, & pay for them sufficient to satisfy the execution. Afterwards the sheriff seized debtor's goods, & debtor filed his petition. The third party having paid the amount of the levy to the sheriff, he retired, & possession was obtained by the trustee, who sold the selected articles for double the amount paid by the third party:—*Held:* (1) there had been no good contract of sale of the goods, & the sheriff could not have sold before seizing; (2) the arrangement between debtor & the third party was a fraudulent attempt to keep some of the goods out of the liquidation, & the trusteee was entitled to them; (3) the third party, having entered into a fraudulent arrangement with debtor with the knowledge that he was about to commit an act of bkpcy., had no equity to be allowed to stand in the place of the execution creditor, although by paying the execution debt he had *pro tanto* relieved debtor's estate.—*Re* TOWNSEND, *Ex p.* HALL (1880), 14 Ch. D. 132; 42 L. T. 162; 28 W. R. 556, C. A.

6941. —— Payment out by debtor not "sale."]—On Feb. 3, 1886, the sheriff having seized the goods of debtor under an execution for more than £20, debtor on Feb. 4, before sale, paid him the amount of the debt & costs. Notice was given of the payment to the judgment creditors, who on

A petition in bkpcy. was presented against debtor within fourteen days after the sale:—*Held:* the costs of both actions were properly paid by the sheriff to the attorney, no notice of an act of bkpcy. having been brought home to either of the execution creditors.—*Re* HACKETT (1876), 10 I. L. T. 96.—**IR.**

6936 i. —— —— *Sale where no request.*]—The sheriff, who was about to sell goods seized under an execution against the tenant, on the morning of the sale received a notice of the tenant having committed an act of bkpcy.; he sold them nevertheless, & paid a year's rent to the landlord. The tenant was afterwards adjudicated a bkpt.:—*Held:* the sheriff should have declined to sell till he saw the result of the notice, & he must bring the purchase money to the assignees.—*Re* KENIREY (1874), 8 I. L. T. Jo. 449.—**IR.**

6936 ii. —— —— —— *Costs.*]—*Re* NOLAN (1860), 13 Ir. Jur. 71.—**IR.**

6938 i. "*In order to avoid sale*"—*Payment of sum on account—With approval of judgment creditor.*]—Money paid to a sheriff's officer, in part discharge of a judgment debt, as an inducement to delay sale, is not relieved from the operation of 1872 Act, s. 54, unless the payment has been made with the consent of the execution creditor.—*Re* BEST (1892), 27 I. L. T. 15.—**IR.**

Feb. 11 assented to the payment & wrote to the sheriff for the money. On Feb. 13 a bkpcy. petition was presented against debtor, who was adjudicated bkpt. thereon, & the trustee laid claim to the money so paid :—*Held :* the payment out by debtor of an execution upon his goods was not a "sale" within 1883 Act, s. 46 (2), & the money was received by the sheriff for the judgment creditors, who were entitled to it as against the trustee, & an order directing the sheriff to pay over the money to such trustee was wrong.—*Re* PEARSON, *Ex p.* WEST CANNOCK COLLIERY CO. (1886), 3 Morr. 187, D. C.

Annotation :—**Consd.** *Re* Evans, *Ex p.* Salaman, [1916] H. B. R. 111.

See, now, 1914 Act, s. 41.

6942. —— Payment into court by adverse claimant.]—Pltf. recovered judgment against deft., & issued execution thereon for £130. The goods, which were seized by the sheriff, were claimed by A. under a bill of sale. The sheriff thereupon interpleaded, & on Nov. 6 an order for an interpleader issue was made, the sheriff being ordered to withdraw, A. to pay £130 into ct., otherwise the goods to be sold. On Nov. 17 deft. filed his petition in bkpcy., & a receiving order was made, & on Nov. 20 A. paid £130 into ct. The official receiver claimed the £130 paid into ct., & applied, with the assent of A., for an order directing payment of that sum out to him, contending that such sum represented the proceeds of the goods :—*Held :* the money never was debtor's, & the official receiver could not be entitled to the money, which he had no right to at all.—SHUCKBURGH *v.* DUTHOIT, PIKE, CLAIMANT (1892), 8 T. L. R. 710, C. A.

6943. —— Payment by debtor's father to high bailiff—To prevent possession being taken.]—A warrant of execution having been issued to the high bailiff upon a judgment exceeding £20, debtor's father paid the high bailiff the amount of the judgment in order to prevent possession being taken under the warrant. Notice of a bkpcy. petition against debtor was given to the high bailiff, within fourteen days. The high bailiff paid the money to the official receiver :—*Held :* the money was not paid "in order to avoid sale," within 1890 Act, s. 11 (2), & the execution creditor was entitled to recover the amount from the high bailiff. *Qu. :* whether it made any difference that the money was not paid by debtor himself.—BOWER *v.* HETT, [1895] 2 Q. B. 337 ; 64 L. J. Q. B. 772 ; 73 L. T. 176 ; 44 W. R. 4 ; 11 T. L. R. 540 ; 39 Sol. Jo. 669 ; 14 R. 710, C. A.

6944. —— Payment to release goods not belonging to debtor.]—Under a writ of *fi. fa.* the sheriff seized scenery & theatrical costumes lying at a railway station in the name of a judgment debtor, but not being in fact his property. Debtor had a few days previously been adjudicated bkpt., although the sheriff had no notice of the fact at the time. To release the property for a performance, which bkpt. was under a contract to present, a sum of money was paid over to the sheriff by a third party, who took a receipt from bkpt. & deducted the amount so paid from a share of the takings at the theatre, to which bkpt. became entitled under the contract at the end of the week : —*Held :* the money was paid for the specific purpose of releasing goods, which were not the property of bkpt., & the official receiver was not entitled to the goods seized or the money.—*Re* WATSON, *Ex p.* SCHIPPER (1912), 107 L. T. 783, C. A.

"Costs of the execution."]—*See* Nos. 6981 *et seq.*, *post.*

6945. Duty to retain—"Fourteen days"—From time at which sale was complete.]—An execution was issued against defts. upon a judgment. The sheriff seized goods & sold them on Jan. 10. On Jan. 12 other goods upon other premises were sold. On Jan. 24 a petition was presented against defts., under which they were adjudicated on Feb. 19. The sheriff had notice of the petition on Jan. 25 :—*Held :* the trustee was entitled to the whole proceeds, as the "sale" contemplated by 1869 Act, s. 87 was not completed until Jan. 12, within fourteen days from the receipt by the sheriff of notice of the filing of the petition.—JONES *v.* PARCELL (1883), 11 Q. B. D. 430 ; 52 L. J. Q. B. 672 ; 49 L. T. 197 ; 47 J. P. 614.

6946. —— —— Calculated from date of sale—Not from receipt of proceeds.]—The period of fourteen days during which the sheriff is required by 1883 Act, s. 46 (2), to retain in his hands the proceeds of goods sold under an execution commences to run from the date of the sale, & not from the date when the proceeds of the sale are received by him.

The general notion of the Act seems to be that a creditor shall not have the benefit of his execution if, before sale, notice is given to the sheriff, or if, the amount being over £20, notice is given to the sheriff within fourteen days after the date of the sale. That seems to give fair notice to creditors of the time within which a petition in bkpcy. must be presented ; &, if fourteen days are allowed to pass without the presentation of a petition, the legislature seems to consider that the execution creditor should reap the benefit of his diligence. Therefore, the fourteen days must run from the date of the sale, & not from the time when the proceeds are received by the sheriff (CAVE, J.).—*Re* CRIPPS, ROSS & CO., *Ex p.* ROSS (1888), 21 Q. B. D. 472 ; 58 L. J. Q. B. 19 ; 59 L. T. 341 ; 36 W. R. 845 ; 5 Morr. 226.

6947. Notice—When it may be served.]—Where the fourteen days limited by 1890 Act, s. 11 (2), during which the sheriff is required to hold the proceeds of an execution for a sum exceeding £20 in his hands, expire on a Saturday, notice of a receiving order may be served upon the sheriff after two in the afternoon on that day, so as to entitle the official receiver to the proceeds of the execution as against the execution creditor.—LOLE *v.* BETTERIDGE, [1898] 1 Q. B. 256 ; 67 L. J. Q. B. 215 ; 77 L. T. 548 ; 46 W. R. 161 ; 14 T. L. R. 147 ; 42 Sol. Jo. 133 ; 5 Mans. 1, C. A.

6946 i. *Duty to retain—"Fourteen days"—Calculated from date of sale—Not from receipt of proceeds.*]—The fourteen days prescribed by 1872 Act, s. 54, within which notice should be served on the sheriff of a bkpcy. petition having been presented by or against a trader whose goods have been taken in execution, in order to entitle the trader's assignees to the proceeds of the sale, commence to run, not from the date of the actual receipt of such proceeds, but from the date of the sale under the execution.—*Re* O'CALLAGHAN (1875), 9 I. L. T. 96.—**IR.**

y. —— *"Seven days"—From moment of receipt by sheriff's officer—Fractions of day.*]—*Held :* the period of seven days in 1887 Act, s. 54 (2), commenced to run from the moment the purchase money was received by the sheriff's officer, who conducted the sale, & fractions of a day must be taken into account.—REID *v.* GOULD (1889), 10 N. S. W. L. R. 175.—**AUS.**

z. —— *"Three months"—Jurisdiction of court to order payment within that time.*]—Under Executions Act, R. S. M. 1902 (c. 58), s. 25, a sheriff, who realises any money under a writ of execution, is bound to keep the money for three months, & then to distribute it ratably among all persons having unsatisfied executions in force in his hands at that time, & it makes no difference that the execution is for costs only. A judge has no jurisdiction to make an order for the sheriff to pay over the money without waiting for the expiration of the three months.—THOMPSON *v.* BRETHOUR (1913), 25 W. L. R. 615 ; 23 Man. L. R. 590.—**CAN.**

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6948. —— On whom it may be served.]—A man in possession, who seizes, keeps possession of, & sells the goods of a judgment debtor by direction of the sheriff, is not an "officer charged with the execution of a writ or other process," & is not a "sheriff" within 1883 Act, s. 168, & notice to him within fourteen days after sale, of a bkpcy. petition against debtor, is not notice to the sheriff, & does not entitle the official receiver or trustee to the balance of the proceeds of sale.—BELLYSE *v.* M'GINN, [1891] 2 Q. B. 227; 65 L. T. 318, D. C.

6949. —— Onus of proof.]—A tenant having committed an act of bkpcy. in Oct., upon which a commission issued on Jan. 21, & the sheriff having, on Jan. 7, levied an execution for a judgment debt, under which he sold the goods on Jan. 21 & 22:—*Held:* the property in the goods being changed by the act of bkpcy. & commission, & transferred to the assignees, it lay upon the sheriff to prove that he had paid over the money to the execution creditor before he had notice of the commission issued.—LEE *v.* LOPES (1812), 15 East, 230; 1 Rose, 342; 104 E. R. 831.

Annotations:—**Consd.** Garland *v.* Carlisle (1833), 2 Cr. & M. 31, Ex. Ch. **Expld.** *Re* Mackenzie, *Ex p.* Hertfordshire, [1899] 2 Q. B. 566, C. A. **Refd.** Duck *v.* Braddyll (1824), M'Cle. 217; Balme *v.* Hutton (1833), 9 Bing. 471, Ex. Ch.; Garland *v.* Carlisle (1837), 11 Bli. N. S. 421, H. L. **Mentd.** Balme *v.* Hutton (1831), 2 Cr. & J. 19; *Re* Craig, *Ex p.* Hinchcliffe (1916), 115 L. T. 157.

6950. —— When presumed.]—A creditor issued execution against a trader for a debt above £50. After the goods seized by the sheriff had been sold, the same creditor issued another execution against debtor for another debt above £50. The goods seized under the second execution were sold, & the money produced by the sale was paid over to the creditor, the sheriff having had no notice within fourteen days from the sale of any bkpcy. petition against debtor. Afterwards debtor was adjudicated a bkpt. upon the act of bkpcy. committed by the seizure & sale under the first execution. The money produced by the first sale was not paid to the creditor till after the sale under the second execution:—*Held:* though it was not proved that the creditor had, when the sale took place under the second execution, any actual knowledge that the sale had been made under the first, he must be deemed to have had notice of the proceeding under his own execution, & must refund the money produced by the second execution.—*Re* HUSBAND, *Ex p.* DAWES (1875), L. R. 19 Eq. 438; 44 L. J. Bcy. 62; 32 L. T. 103; 23 W. R. 384.

6951. —— Sufficiency of.]—The notice of an act of bkpcy., in order to invalidate an execution, under 1869 Act, s. 95 (3), ought to convey specific information as to the acts constituting the act of bkpcy., & ought not to leave room for doubt. A notice stating circumstances, which may or may not amount to an act of bkpcy., is insufficient.

H. obtained judgment against B., a non-trader, & issued a writ of *fi. fa.* The sheriff seized thereunder certain goods of B. Prior to the seizure, B. had executed a deed of assignment of all his estate & effects to W. for the benefit of B.'s creditors, & thereby committed an act of bkpcy. On the day after the seizure, the attorneys of B. wrote to the attorney of the execution creditor a letter as follows:—"B. made an assignment of what goods he had, & it was arranged that his daughter should raise the money, but this we find was never finally arrived at." The sheriff sold the goods under the execution, & B. was adjudicated a bkpt. on the next day:—*Held:* the letter of the attorneys was insufficient as a notice of the act of bkpcy., & the execution creditor was entitled to the proceeds of the sale.—EVANS *v.* HALLAM (1871), L. R. 6 Q. B. 713; 40 L. J. Q. B. 229; 24 L. T. 939; 19 W. R. 1158.

Annotations:—**Consd.** Lucas *v.* Dicker (1880), 5 C. P. D. 150. **Refd.** *Re* Boocock, [1916] 1 K. B. 816.

6952. —— ——.]—Where a sheriff has sold under an execution the goods of a person, who is not evidently a trader, & notice of the filing of a liquidation petition is given to the sheriff under 1869 Act, s. 87, it should give such information to the sheriff that he may identify debtor with the person whose goods have been sold, & may infer that he is a trader.—*Re* SMITH, *Ex p.* SPOONER (1874), 10 Ch. App. 168; 44 L. J. Bcy. 24; 31 L. T. 494; 23 W. R. 204, L. JJ.

6953. —— Effect of.]—Where a sheriff sells under an execution for more than £20, notice of a petition within fourteen days does not render the sale void, but deprives the execution creditor of its fruits & transfer them to the trustee.—*Re* PEARCE, *Ex p.* CROSSTHWAITE (1885), 14 Q. B. D. 966; 54 L. J. Q. B. 316; 52 L. T. 518; 33 W. R. 614; 1 T. L. R. 373; 2 Morr. 105.

6954. —— ——.]—Goods of debtor were taken in execution by pltf. under a judgment for a sum exceeding £20. The goods having been claimed by a third party an interpleader order was made, directing that, unless payment were made or security given by claimant, the sheriff should sell the goods & pay the proceeds into ct. Claimant did not comply with the order & ultimately withdrew his claim. The goods were sold & the proceeds paid into ct. After payment into ct. & within fourteen days of the sale notice of a bkpcy. petition having been presented against debtor was served on the sheriff, & debtor was adjudged bkpt. on such petition:—*Held:* the trustee of debtor was entitled as against pltf. to the money in ct.—HEATHCOTE *v.* LIVESLEY (1887), 19 Q. B. D. 285; 56 L. J. Q. B. 645; 36 W. R. 127; *sub nom. Re* LIVESEY, HEATHCOTE *v.* LIVESEY, 51 J. P. 471.

6955. —— ——.]—On July 22, 1903, the sheriff levied on the goods of debtor at the A. & B. hotels. On July 27 he withdrew, on the instructions of the judgment creditor, from the A. hotel on part payment. On July 28 debtor sold to the execution creditor goods at the A. hotel which had been seized, & on July 29 he also sold to the execution creditor goods at the same place which had not been seized. On the same day an arrangement was made, by which debtor received credit for the amount in the hands of the sheriff & for the goods sold, & he paid the balance direct to the execution creditor. The sheriff, on Aug. 12, paid over the amount in his hands to the execution creditor, having received no notice of a bkpcy. petition. On Aug. 20 a receiving order was made against debtor on his own petition:—*Held:* the trustee had no title against the execution creditor to the money or the goods.—*Re* JENKINS, *Ex p.* TRUSTEE (1904), 90 L. T. 65; 20 T. L. R. 187, D. C.

Annotation:—**Consd.** *Re* Godding, *Ex p.* Trustee, [1914] 2 K. B. 70.

6956. —— —— Adjudication subsequently annulled.]—The goods of deft. were seized on June 16 under a *fi. fa.*, issued on a judgment for a debt above £50, & were sold by the sheriff on July 8.

6948 i. *Notice—On whom it may be served.*]—The service on the sheriff's returning officer of notice of a bkpcy. petition having been presented is not a sufficient service upon the sheriff within 1872 Act, s. 54, in order to entitle the assignees to the proceeds of the seizure & sale.—*Re* O'CALLAGHAN (1875), 9 I. L. T. 96.—IR.

On the same day deft. executed an inspectorship-deed of his estate under 1861 Act, & on the following day, July 9, filed a petition in bkpcy., & thereupon an adjudication in bkpcy. was, on that day, made against him as a trader-debtor on a judgment-debt above £50. The proceedings in bkpcy. were stayed from time to time, under s. 199, until the registration of the inspector-ship-deed which took place on Aug. 5, & immediately afterwards, on Aug. 9, the petition was dismissed & the bkpcy. annulled. The sheriff, being in doubt as to the proper disposal by him, under s. 73, of the proceeds of the sale of deft's. goods under the *fi. fa.* paid the amount into ct., & on a rule to show cause why same should not be paid out to the inspectors under the deed, or to deft. himself :—*Held :* the money belonged to pltf., the execution-creditor, from July 15, seven days after the sale of the goods under the *fi. fa.* on the 8th, & he, & he alone, was entitled to it, & on the bkpcy. being annulled, the assignees ceased to have any title, & the sheriff held the money for the benefit of the execution creditor.—DIGGLES *v.* AUSTIN (1868), 18 L. T. 890.

6957. —— —— Successive writs.]—The sheriff having levied execution under five writs of *fi. fa.*, the second & fifth of which, in order of priority, were for sums less than £20, retained the proceeds of the sale in his hands for fourteen days, & upon receiving notice of a receiving order having been made against debtor, paid the second judgment creditor, & handed the balance to the trustee. The amount realised would not have sufficed to pay the first four creditors in full. The fifth creditor claimed to be paid in full :—*Held :* where there was a succession of writs, some for more & some for less than £20, & the sheriff sold, the writs were payable in order of priority so long as there were funds, & if he received notice of a bkpcy. petition within fourteen days of the sale, only those writs were entitled to be paid which were for less than £20, & which would have been paid had not bkpcy. supervened.—*Re* PEARCE, *Ex p.* CROSSTHWAITE (1885), 14 Q. B. D. 966 ; 54 L. J. Q. B. 316 ; 52 L. T. 518 ; 33 W. R. 614 ; 1 T. L. R. 373 ; 2 Morr. 105.

6958. "Bankruptcy petition"—"Petition for adjudication of bankruptcy against debtor."]—Where a sale by auction by the sheriff under a *fi. fa.* for a debt exceeding £50 took place on the 19th, & a petition by debtor against himself was filed on the 26th, & was followed by adjudication :—*Held :* (1) the words of 1861 Act, s. 73, "petition for adjudication of bkpcy. against the debtor," applied to a petition presented by debtor ; (2) the assignees were entitled, as against the execution creditor, to the balance of the proceeds of the sale, after payment of the costs & expenses of the action & execution.—*Re* RICHARDS, *Ex p.* ASSIGNEES (1864), 11 L. T. 576.

6959. —— 1869 Act, s. 87—Liquidation petition.]—Where the sheriff seized & sold the goods of a trader on a judgment for more than £50, & after the sale a petition for liquidation was presented, of which the sheriff had notice within fourteen days :—*Held :* the words in 1869 Act, s. 87, "bkpcy. petition" included a petition for liquidation, & an order restraining the sheriff from paying the proceeds to the execution creditor, & directing payment to the trustee when appointed, should be affirmed.—*Re* SKINNER, *Ex p.* KEY (1870), L. R. 10 Eq. 432 ; 39 L. J. Bcy. 28 ; 25 L. T. 315 ; 18 W. R. 918.

Annotations :—**Consd.** *Re* Johnson, *Ex p.* Rayner (1872), 41 L. J. Bcy. 26. I am now bound to admit that the views I entertained in *Re Skinner, Ex p. Key,* & other cases have been decided to be erroneous ; it has been decided by the cts. of common law that a judgment creditor who levies an execution by seizure without notice of an act of bkpcy. has a right to complete that seizure by sale notwithstanding a subsequent act of bkpcy. & an adjudication (BACON, V.-C.). **Refd.** *Re* Adams, *Ex p.* Birmingham Gaslight & Coke Co. (1870), L. R. 11 Eq. 204.

6960. —— —— ——.]—The sheriff seized in execution under a judgment for more than £50 goods of a trader. Before sale, & whilst the sheriff was in possession, debtor presented a petition for liquidation by arrangement, & the trustee appointed under the liquidation obtained an order restraining further proceedings in the execution :—*Held :* the trustee was entitled to the goods as part of debtor's estate, & the sheriff must give up possession to him.—*Re* JOHNSON, *Ex p.* RAYNER (1872), 7 Ch. App. 325 ; 41 L. J. Bcy. 26 ; 26 L. T. 306 ; 20 W. R. 456, L. JJ.

Annotations :—**Expld.** *Re* Gourlay, *Ex p.* Abbott (1880), 15 Ch. D. 447, C. A. **Refd.** *Re* Bremner, *Ex p.* Harper (1875), 44 L. J. Bcy. 57, L. JJ. ; Howes *v.* Young, Howes *v.* Stone (1876), 34 L. T. 739 ; Sneary *v.* Abdy (1876), 1 Ex. D. 299, C. A. ; *Re* Curtoys, *Ex p.* Pillers (1881), 17 Ch. D. 653, C. A.

6961. —— —— —— Debtor adjudicated bankrupt on subsequent creditor's petition.]—A creditor levied execution on his debtor's goods for a debt exceeding £50, & the sheriff seized & sold them. Debtor filed a petition for liquidation, & served notice of it on the sheriff before the sale. Before the expiration of fourteen days after the sale the first meeting of the creditors was held, but no resolution was passed. The sheriff, after the expiration of the fourteen days, paid the proceeds of the sale to the execution creditor. Afterwards a bkpcy. petition was filed by another creditor, which stated the filing of the petition for liquidation & the failure of the proceedings, & debtor was adjudicated bkpt. under such petition :—*Held :* the liquidation proceedings entirely came to an end on the failure of the meeting to pass a resolution, & as debtor was not adjudged a bkpt. on the liquidation petition within 1869 Act, s. 87, the sheriff was justified in paying the proceeds of the sale to the execution creditor.—*Re* CONDON, *Ex p.* JAMES (1874), 9 Ch. App. 609 ; 43 L. J. Bcy. 107 ; 30 L. T. 773 ; 22 W. R. 937, L. JJ.

Annotations :—**Consd.** *Re* McHenry, *Ex p.* McHenry (1883), 24 Ch. D. 35, C. A. ; *Re* Opera, [1891] 2 Ch. 154. **Distd.** *Re* Hall, *Ex p.* Official Receiver, [1907] 1 K. B. 875, C. A. **Consd.** *Re* Thellusson, *Ex p.* Abdy, [1919] 2 K. B. 735, C. A. **Refd.** Crew *v.* Terry (1877), 2 C. P. D. 403. **Mentd.** *Re* Shackleton, *Ex p.* Whittaker (1875), 10 Ch. App. 447, n. ; *Re* Collie, *Ex p.* Adamson (1878), 8 Ch. D. 807, C. A. ; *Re* Carnac, *Ex p.* Simmonds (1885), 16 Q. B. D. 308, C. A. ; *Re* Brown, Dixon *v.* Brown (1886), 32 Ch. D. 597 ; Mercer *v.* Vans Colina (1897), 4 Mans. 363 ; *Re* Rhoades, *Ex p.* Rhoades, [1899] 1 Q. B. 905 ; *Re* Griffiths Cycle Corpn. (1901), 85 L. T. 675 ; Hand *v.* Blow, [1901] 2 Ch. 721, C. A. ; *Re* Tyler, *Ex p.* Official Receiver, [1907] 1 K. B. 865, C. A. ; Tapster *v.* Ward (1909), 101 L. T. 25 ; *Re* Ash (1913), 110 L. T. 48, D. C. ; Wells *v.* Wells, [1914] P. 157, C. A. ; *Re* Craig, *Ex p.* Hinchcliffe, [1916] 2 K. B. 497 ; *Re* Stokes, *Ex p.* Mellish, [1919] 2 K. B. 256.

6962. —— —— Bankruptcy supervening.]—An execution levied by seizure & sale of a trader's goods for a debt exceeding £50, although an act

6959 i. "*Bankruptcy petition*"—*Arrangement petition.*]—A sheriff seized & sold the goods of a trader under an execution in respect of a sum of more than £20. The trader filed a petition for arrangement, & on the same day a creditor filed a petition for adjudication against him. Notice of both petitions were given to the sheriff within fourteen days after the sale. The petition for adjudication was from time to time adjourned, & ultimately, at the first meeting for arrangement, an order was pronounced turning the case into bkpcy. The assignees claimed the proceeds of the sale in the hands of the sheriff :—*Held :* notice of an arrangement petition was not included under the words "any other petition of which the sheriff has notice" in 1872 Act, s. 54, & the petition for adjudication having been dismissed by force of law, the execution creditor was entitled to the proceeds of the sale. —*Re* M'CAMMON (1875), 9 I. L. T. 223. —IR.

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of bkpcy., is not for that reason necessarily a void proceeding, & if the execution creditor had no notice of a prior act of bkpcy., & no notice of a petition for adjudication is given to the sheriff under 1869 Act, s. 87, within fourteen days after the sale, the execution creditor is entitled to the proceeds of the sale notwithstanding a supervening bkpcy.—*Re* ROGERS, *Ex p.* VILLARS (1874), 9 Ch. App. 432; 43 L. J. Bcy. 76; 30 L. T. 348; 38 J. P. 533; 22 W. R. 603, L. C. & L. JJ.

Annotations:—**Folld.** *Re* Condon, *Ex p.* James (1874), 9 Ch. App. 609, L. JJ. **Consd. & Distd.** *Re* Husband, *Ex p.* Dawes (1875), L. R. 19 Eq. 438. **Folld.** *Re* McHenry, *Ex p.* McHenry (1883), 24 Ch. D. 35, C. A. **Distd.** Figg *v.* Moore, [1894] 2 Q. B. 690; Burns-Burns' Trustee *v.* Brown, [1895] 1 Q. B. 324, C. A. **Consd.** *Re* Thellusson, *Ex p.* Abdy, [1919] 2 K. B. 735, C. A. **Refd.** Crew *v.* Terry (1877), 2 C. P. D. 403.

6963. "Receiving order"—Against one partner—Partnership goods seized & sold.]—Execution in respect of a sum exceeding £20 was levied against a firm by seizure & sale of the partnership goods. Within fourteen days from the sale one of the partners presented his petition in bkpcy. & a receiving order was made against him, due notice of the petition being given to the sheriff:—*Held:* 1890 Act, s. 11 (2), did not apply, & the official receiver was not entitled, as against the execution creditors, to the net proceeds of sale in the hands of the sheriff.—DIBB *v.* BROOKE & SONS, [1894] 2 Q. B. 338; 63 L. J. Q. B. 665; 71 L. T. 234; 42 W. R. 495; 38 Sol. Jo. 493; 1 Mans. 245; 10 R. 352, D. C.

Annotation:—**Mentd.** Peake *v.* Carter, [1916] 1 K. B. 652, C. A.

6964. —— Administration order.]—The sheriff sold under an execution levied for more than £20, & within the fourteen days limited by 1890 Act, s. 11 (2), received notice of a bkpcy. petition against the judgment debtor, who died shortly afterwards. After the fourteen days the sheriff received notice of a petition under 1883 Act, s. 125, for the administration of the estate of deceased debtor, on which an administration order was subsequently made:—*Held:* the judgment creditor was in the circumstances entitled to the money in the hands of the sheriff. *Qu.:* whether an administration order was equivalent to a receiving order for the purposes of 1890 Act, s. 11.—WATKINS *v.* BARNARD, [1897] 2 Q. B. 521; 66 L. J. Q. B. 771; 46 W. R. 156; 41 Sol. Jo. 663; 4 Mans. 221.

Annotation:—**Refd.** Hasluck *v.* Clark, [1899] 1 Q. B. 699, C. A.

6965. —— ——.]—An order for the administration of the estate of deceased debtor under 1883 Act, s. 125, is not equivalent to a receiving order for the purposes of s. 45 of that Act, so as to disentitle an execution creditor of deceased debtor to retain, as against the trustee of debtor's estate, the benefit of an execution not completed before the date of the administration order.—HASLUCK *v.* CLARK, [1899] 1 Q. B. 699; 68 L. J. Q. B. 486; 80 L. T. 454; 47 W. R. 471; 15 T. L. R. 277; 43 Sol. Jo. 352; 6 Mans. 146, C. A.

Annotations:—**Consd.** *Re* Rhoades, *Ex p.* Rhoades, [1899] 2 Q. B. 347, C. A.; *Re* National United Investment Corpn., [1901] 1 Ch. 950. **Distd.** *Re* Mellison, *Ex p.* Day, [1906] 2 K. B. 68, D. C. **Consd.** Johnson *v.* Pickering, [1908] 1 K. B. 1, C. A.

6966. "The balance"—Claim of landlord deducted.]—Under an execution for a sum exceeding £20, the sheriff having notice of an available act of bkpcy. sold the goods, & within fourteen days received notice of a bkpcy. petition, and afterwards received notice of the landlord's claim for a quarter's rent. Debtor was adjudicated bkpt. The sheriff then paid the landlord his quarter's rent out of the proceeds of the execution, & paid the balance to the trustee:—*Held:* the sheriff was right in deducting the amount of the landlord's rent out of the proceeds of the execution, & was only accountable to the trustee for the balance.—*Re* MACKENZIE, *Ex p.* HERTFORDSHIRE (SHERIFF), [1899] 2 Q. B. 566; 68 L. J. Q. B. 1003; 81 L. T. 214; 15 T. L. R. 526; 43 Sol. Jo. 704; 6 Mans. 413, C. A.

Annotations:—**Distd.** *Re* Driver, *Ex p.* Official Receiver (1899), 80 L. T. 840, D. C. **Consd.** *Re* Craig, *Ex p.* Hinchcliffe, [1916] 2 K. B. 497.

See, now, 1914 Act, s. 35 (2).

6967. —— —— Sale on behalf of official receiver—No notice of landlord's claim given to official receiver.]— A sheriff, who had levied under a writ of *fi. fa.*, received notice of the landlord's claim for rent. Before sale he promised to pay the rent, & a portion of the goods were sold with the assent of the landlord. On the following day a bkpcy. petition was presented against debtor, of which the sheriff had notice. After the making of a receiving order, of which the sheriff also had notice, the sale was completed on account of the official receiver. The official receiver had no notice of the claim for rent:—*Held:* the sheriff was entitled to deduct the rent from the proceeds of sale.—*Re* DRIVER, *Ex p.* LANCASHIRE (SHERIFF) (1899), 43 Sol. Jo. 705, C. A.; *revsg.* S. C. *sub nom. Re* DRIVER, *Ex p.* OFFICIAL RECEIVER, 80 L. T. 840, D. C.

Annotation:—**Mentd.** St. Marylebone Vestry *v.* London County Sheriff (1899), 69 L. J. Q. B. 69.

6968. —— —— Payment by execution creditor.]—Landlord & Tenant Act, 1709 (c. 18), s. 1, is not overridden by 1914 Act, s. 41, except when the execution is itself avoided by the bkpcy. laws, & "the balance" of the proceeds of sale of the goods of debtor under an execution means the balance of the execution proper, *i.e.*, the balance after payment of the sheriff's costs. The sum, if any, paid by the execution creditor in discharge of the landlord's rent, which s. 1 of the earlier Act directs the sheriff to levy & pay to the execution creditor, must be paid to him direct.

Where an execution creditor, after levy by the sheriff on the goods of debtor, paid £220, being the landlord's claim for rent, & the sheriff then sold but, debtor's bkpcy. supervening, paid over the proceeds of sale to the trustee after deducting only

6966 i. "*The balance*"—*Claim of landlord deducted.*]—Where a sheriff pending sale under a *fi. fa.* receives notice of rent due, it is his duty to call upon pltf. to pay the rent before proceeding with the sale, & if, without doing so, he completes the sale, & the execution debtor, being a trader, is adjudicated a bkpt. within fourteen days, & the execution is for a sum exceeding £20, the sheriff is bound to lodge the proceeds of the execution in ct., deducting only the costs of the action & expenses of the execution, as prescribed by 1872 Act, s. 54. & he is not entitled to deduct from such proceeds the rent due.—*Re* GAVIN (1879), 3 L. R. Ir. 260.—IR.

6966 ii. —— ——.]—Under a *fi. fa.* against a trader, the sheriff sold his goods, & on the following day the execution debtor was adjudicated bkpt., of which the sheriff had notice. The landlord afterwards gave the sheriff notice of rent in arrear at the time of the seizure, & the sheriff, within fourteen days, lodged the proceeds of the execution in ct.:—*Held:* the landlord was not entitled to be paid, out of the sum so lodged, the rent which was in arrear at the time of the seizure.—*Re* HUDSON (1877), 1 L. R. Ir. 6.—IR.

6966 iii. —— ——.]—Where a sheriff, having seized & sold the goods of a trader under a writ of *fi. fa.*, in respect of a judgment for a sum exceeding £20, paid one quarter's rent due to the landlord of the trader's premises, in obedience to a demand made at the time of sale, & within fourteen days from the date of sale received notice of the trader's having been adjudicated a bkpt. on foot of the levy:—*Held:* the sheriff was entitled to deduct from the produce of the sale the amount of rent so paid by him.—*Re* M'CARTHY (1881), 7 L. R. Ir. 473.—IR.

his costs of execution :—*Held :* the trustee had £220 which formed no part of debtor's estate, & the trustee must pay that sum to the execution creditor.—*Re* CRAIG & SONS, *Ex p.* HINCHCLIFFE, [1916] 2 K. B. 497 ; 85 L. J. K. B. 1537 ; 115 L. T. 157 ; [1916] H. B. R. 125.

B. " *Exceeding* £20."

See, now, 1914 Act, s. 41, *& see* 1883 Act, ss. 145, 146 (1), & 1890 Act, s. 12. *The amount was formerly* £50.

6969. What amounts added—Costs of execution.]—Judgment having been entered up for £48 19*s.*, the sheriff levied & sold goods of debtor to the amount of £50 11*s.*, being the amount of the judgment, with £1 12*s.* for the costs of the execution :—*Held :* the goods had been taken in execution in respect of a judgment " for a sum exceeding £50 " & sold, & the proceeds must be paid to the trustee, & not to the execution creditor. —*Re* BULLEN, *Ex p.* LIVERPOOL LOAN CO. (1872), 7 Ch. App. 732 ; 42 L. J. Bcy. 14 ; 27 L. T. 669 ; 20 W. R. 1028, L. JJ.

Annotations :—**Folld.** Howes *v.* Young, Howes *v.* Stone (1876), 1 Ex. D. 146. **Refd.** *Re* Grubb, *Ex p.* Sims (1877), 5 Ch. D. 375, C. A. ; Mostyn *v.* Stock (1882), 9 Q. B. D. 432 ; Turner *v.* Bridgett (1882), 8 Q. B. D. 392.

6970. —— Poundage—Officer's fee.]—A sheriff seized goods on two successive days under two writs of *fi. fa.* issued by two judgment creditors, each being indorsed to levy debt, interest, & costs of execution, besides sheriff's poundage, officer's fees, & all other legal incidental expenses. In one case the amount of judgment debt, interest, & costs of writ of execution was under £50, & was raised by the poundage to more than £50. In the other, the amount of judgment debt, interest, costs of writ of execution, & poundage was under £50, & was raised by the officer's fee to more than £50. There was no sale, & within fourteen days after the seizures the sheriff received notice of a petition for liquidation, which was filed by debtor after the seizures :—*Held :* in each case the goods were taken in execution in respect of a judgment " for a sum exceeding £50," & although there had been no sale the trustee was entitled to the goods.—HOWES *v.* YOUNG, HOWES *v.* STONE (1876), 1 Ex. D. 146 ; 45 L. J. Q. B. 499 ; 34 L. T. 739 ; 24 W. R. 738.

Annotations :—**Consd.** *Re* Grubb, *Ex p.* Sims (1877), 4 Ch. D. 521. **Refd.** Mostyn *v.* Stock (1882), 9 Q. B. D. 432 ; Turner *v.* Bridgett (1882), 8 Q. B. D. 392.

6971. —— —— Contingent expenses of possession money, appraisement & sale.]—In determining whether an execution is " for a sum exceeding £20 " only the amount of the judgment debt & a sum for poundage are to be taken into consideration, & not the contingent expenses of possession money, appraisement, & sale.—WILLEY *v.* HUCKS, [1909] 1 K. B. 760 ; 78 L. J. K. B. 513 ; 100 L. T. 333 ; 53 Sol. Jo. 288 ; 16 Mans. 106, D. C.

6972. —— Possession money.]—Where an execution is levied for debt, poundage & other legal incidental expenses, including possession-money, where possession is necessary, is to be calculated for the purpose of ascertaining whether the execution is " for a sum exceeding £50."—*Re* GRUBB, *Ex p.* SIMS (1877), 5 Ch. D. 375 ; 46 L. J. Bcy. 103 ; 36 L. T. 340 ; 25 W. R. 453, C. A.

Annotations :—**Consd.** *Re* Bullen, *Ex p.* Ind, Coope (1881), 44 L. T. 587. **Refd.** Mostyn *v.* Stock (1882), 9 Q. B. D. 432 ; Turner *v.* Bridgett (1882), 8 Q. B. D. 392 ; Glassbrook *v.* David & Vaux, [1905] 1 K. B. 615.

6973. —— —— Increased by injunction against sale.]—The sheriff seized the goods of a trader under an execution for an amount less than £50. Two days after debtor filed a petition, & the judgment creditor was restrained from selling by an injunction. The injunction having ceased, the sheriff sold the goods, but owing to expenses, including possession-money, incurred by the sheriff after the injunction had been granted, the amount for which the execution was levied exceeded £50 : —*Held :* the execution was an execution in respect of a judgment " for a sum exceeding £50," & the trustee was entitled to the proceeds of sale.—*Re* FENTON, *Ex p.* LITHGOW (1878), 10 Ch. D. 169 ; 48 L. J. Bcy. 64 ; 38 L. T. 886 ; 26 W. R. 834.

Annotation :—**Refd.** *Re* Finch, *Ex p.* Essex (1891), 8 Morr. 284.

6974. —— —— Increased through postponement of sale at request of receiver.]—Where, by promising to pay extra expenses occasioned by the delay, the sheriff is induced not to sell goods seized under a *fi. fa.*, the trustee cannot take advantage of the fact that the debt, for which the goods were seized, has thus been raised by the addition of possession money to a sum exceeding £50, & the judgment creditor is entitled to the proceeds of the execution.—*Re* BULLEN, *Ex p.* IND, COOPE & CO. (1881), 44 L. T. 587 ; 29 W. R. 667.

6975. What amounts deducted—Payments on account before sale.]—After seizure under a *fi. fa.* for a sum which was increased by possession money to an amount above £50, payments on account were made by the execution debtor, reducing the amount below £50. The execution creditor knew & approved of such payments, & authorised the sheriff to give the execution debtor further time to pay the balance, so that a sale might be avoided. Proceedings in bkpcy, having been taken against the execution debtor, his trustee paid the balance to the sheriff, who gave possession of the goods to the trustee :—*Held :* the execution creditor was entitled to the balance, as the proceeds of an execution for a sum not exceeding £50.—MOSTYN *v.* STOCK (1882), 9 Q. B. D. 432 ; 51 L. J. Q. B. 592 ; 46 J. P. 709.

6976. Right to sign judgment for smaller amount than sued for.]—A creditor sued for a debt exceeding £50 :—*Held :* he was entitled to abandon part of his claim & sign judgment for less than £50, so as to avoid the operation of 1869 Act, s. 87.—*Re* SALINGER, *Ex p.* REYA (1877), 6 Ch. D. 332 ; 46 L. J. Bcy. 122 ; 37 L. T. 17 ; 26 W. R. 193, C. A.

Annotation :—**Consd.** Turner *v.* Bridgett (1882), 8 Q. B. D. 392.

6977. Right to issue execution for less than judgment signed for.]—A creditor signed judgment for more than £50 :—*Held :* he was entitled to issue execution for less than £50, so as to avoid the operation of 1869 Act, s. 87.—*Re* HINKS, *Ex p.* BERTHIER (1878), 7 Ch. D. 882 ; 47 L. J. Bcy. 764 ; 26 W. R. 576.

Annotations :—**Refd.** Mostyn *v.* Stock (1882), 9 Q. B. D. 432 ; Turner *v.* Bridgett (1882), 8 Q. B. D. 392.

6978. Right to direct officer to sell for less than sum on writ—With expenses incidental to execution.]—Judgment was signed for debt & costs amounting to less than £50. The judgment creditor delivered to the sheriff a writ of *fi. fa.* indorsed to levy the amount of the debt & costs, with the expenses of & incidental to the execution. The expenses of & incidental to the execution, added to the amount of the debt & costs, made a total exceeding £50, but upon notice of a petition against the execution debtor, the execution creditor directed the sheriff's officer not to sell for an amount exceeding £50, & goods to the amount of £49 17*s.* only were sold :—*Held :* the execution creditor could, by abandoning so much of his judgment debt as might be necessary

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to keep the total amount for which the goods were sold under £50, avoid the operation of 1869 Act, s. 87, & the execution creditor was entitled to the proceeds of the execution.—TURNER *v.* BRIDGETT (1882), 8 Q. B. D. 392; 51 L. J. Q. B. 374; 46 J. P. 343, D. C.; *subsequent proceedings*, 9 Q. B. D. 55, C. A.

Annotation:—**Consd.** Mostyn *v.* Stock (1882), 9 Q. B. D. 432.

6979. Seizure for less than statutory amount—Adjudication before sale.]—An execution creditor for a sum less than £50, who has seized the goods of bkpt. before the committing of any act of bkpcy., is entitled to the proceeds of them as against the trustee, although the adjudication is prior to the sale.—SLATER *v.* PINDER (1872), L. R. 7 Exch. 95; 41 L. J. Ex. 66; 26 L. T. 482; 36 J. P. 532; 20 W. R. 441, Ex. Ch.; *affg.* S. C. (1871), L. R. 6 Exch. 288; 40 L. J. Ex. 146; 24 L. T. 631; 35 J. P. 744; 19 W. R. 778.

Annotations:—**Consd.** *Re* Jecks, *Ex p.* Bailey (1871), L. R. 13 Eq. 314; *Re* Davies, *Ex p.* Williams (1872), 7 Ch. App. 314, L. JJ. **Distd.** *Re* Johnson, *Ex p.* Rayner (1872), 41 L. J. Bcy. 26; *Re* Edwards, *Ex p.* Eyles (1873), L. R. 16 Eq. 99. **Folld.** *Re* Peacock, *Ex p.* Lovering (1874), L. R. 17 Eq. 452. **Consd.** *Re* Rogers, *Ex p.* Villars (1874), 9 Ch. App. 432, L. C. & L. JJ.; *Re* Clarke, [1898] 1 Ch. 336, C. A. **Refd.** *Re* Hall, *Ex p.* Rocke (1871), 6 Ch. App. 795, L. C. & L. JJ.; Emanuel *v.* Bridger (1874), L. R. 9 Q. B. 286; Lowe *v.* Blakemore (1875), L. R. 10 Q. B. 485; Crew *v.* Terry (1877), 2 C. P. D. 403. **Mentd.** Bower *v.* Hett, [1895] 2 Q. B. 51.

6980. —— Right to proceed with sale after petition filed—Seizure by another creditor under writ for more than statutory amount.]—On Nov. 25 the sheriff seized the goods of a trader under a writ of execution for £191, & on Dec. 16 another seizure was made for a debt of £32. On Dec. 30 debtor filed a liquidation petition. At that time, the sheriff was still in possession, but no sale had been made. On Jan. 22 a trustee was appointed:—*Held:* the creditor for the £32 was entitled to proceed to a sale under his execution.—*Re* PEACOCK, *Ex p.* LOVERING (1874), L. R. 17 Eq. 452; 43 L. J. Bcy. 58; 29 L. T. 897; 22 W. R. 365.

Annotation:—**Distd.** *Re* Pearce, *Ex p.* Crossthwaite (1885), 14 Q. B. D. 966.

See, further, Nos. 7060 *et seq.*, *post.*

C. "Costs of the Execution."

See, now, 1914 Act, s. 41, replacing 1883 Act, s. 46 (1), & 1890 Act, s. 11 (1)

6981. Expenses of preparing sale.]—The sheriff having seized under a *fi. fa.*, notice was given of a prior act of bkpcy. by debtor, & a petition was filed, under which he was adjudicated bkpt.; the goods remained unsold, & the messenger took possession of them:—*Held:* the sheriff was not entitled to a rule calling upon the assignees to pay him the expenses of preparing for a sale of the goods.—SEARLE *v.* BLAISE (1863), 14 C. B. N. S. 856; 143 E. R. 680.

6982. —— Expenses of possession.]—A sheriff's officer seized the goods of a trader debtor under a *fi. fa.* for more than £50, & advertised them for sale. Before the sale could take place debtor filed a petition for liquidation, & the trustee obtained an injunction restraining the sale, & possession was then given up. Upon the application of the sheriff for his expenses:—*Held:* the facts of there having been no sale, & the liquidation of debtor, did not affect the right of the sheriff to be paid by the trustee the necessary expenses of possession & of preparing for sale.—*Re* CRAYCRAFT, *Ex p.* BROWNING (1878), 8 Ch. D. 596; 47 L. J. Bcy. 96; 38 L. T. 364; 26 W. R. 559.

6983. Poundage—1883 Act, s. 46 (1).]—When a bkpcy. of a judgment debtor supervenes after seizure, but before sale, by the sheriff under a writ of *fi. fa.*, the sheriff is not entitled to poundage under the words "costs of the execution" in the above sub-sect.—*Re* LUDMORE (1884), 13 Q. B. D. 415; *sub nom. Re* LUDFORD, 53 L. J. Q. B. 418; 51 L. T. 240; 33 W. R. 152; 1 Morr. 131.

Annotations:—**Consd.** *Re* Thomas, *Ex p.* Middlesex, [1899] 1 Q. B. 460, C. A. **Refd.** Lee *v.* Dangar, Grant, [1892] 1 Q. B. 231.

6984. —— 1890 Act, s. 11 (1).]—A sheriff's officer is not entitled to poundage where, after he has seized goods in execution under a *fi. fa.*, a receiving order is made against the judgment debtor & the goods are delivered to the official receiver or trustee in pursuance of the above sub-sect.—*Re* THOMAS, *Ex p.* MIDDLESEX (SHERIFF), [1899] 1 Q. B. 460; 68 L. J. Q. B. 245; 80 L. T. 62; 47 W. R. 259; 6 Mans. 1, C. A.

Annotation:—**Refd.** Montague *v.* Davies, Benachi, [1911] 2 K. B. 595, D. C.

6985. Cost of cutting & dressing corn—1883 Act, s. 46 (1).]—Expenses incurred by a sheriff for the cost of cutting, carrying, threshing, & dressing corn, which has been taken in execution, are not "costs of the execution" within the above sub-sect.—*Re* WOODHAM, *Ex p.* CONDER (1887), 20 Q. B. D. 40; 57 L. J. Q. B. 46; 58 L. T. 116; 36 W. R. 526, D. C.

6986. Possession money—Sheriff continuing in possession—At request of creditor—1883 Act, s. 46.]—When the sheriff, who has seized the goods of debtor, remains in possession at the request of the execution creditor, & without the consent of the debtor, for a longer time than is reasonably necessary for the purposes of sale, if debtor subsequently becomes bkpt., the sheriff will not be entitled under the above sect. to payment out of the estate of the extraordinary costs for possession money caused by unnecessary delay of the sale under the execution at the creditor's request.—*Re* FINCH, *Ex p.* ESSEX (SHERIFF) (1891), 65 L. T. 466; 40 W. R. 175; 36 Sol. Jo. 44; 8 MORR. 284.

Annotation:—**Distd.** *Re* Hurley (1893), 41 W. R. 653.

6987. —— —— At request of creditor & debtor—1890 Act, s. 11.]—After seizure under a writ of *fi. fa.* the sheriff remained in possession of debtor's goods without selling, at the request of the execution creditor & of the debtor. A receiving order was subsequently made against debtor, & the sheriff handed over the goods to the official receiver, & claimed possession money for the time he remained in possession:—*Held:* the sheriff

PART XX. SECT. 10, SUB-SECT. 4.—C.

6981 i. *Expenses of sale by auction—Employment of auctioneer authorised by execution debtor.*]—If an execution debtor authorises the employment of an auctioneer to sell his goods seized by the sheriff, the proper expenses incurred by reason of a sale by auction may be deducted by the sheriff from the amount realised by the sale.—*Re* HACKETT (1876), 10 I. L. T. 96.—IR.

6983 i. *Poundage—Bankruptcy after possession but before sale.*]—Where the sheriff takes possession under a writ of sale, but bkpcy. takes place before sale, the sheriff is not entitled to poundage.—*Re* SUTHERLAND (1888), 6 N. Z. L. R. 596.—N.Z.

6983 ii. —— *On what amount calculated.*]—The sheriff is only entitled to poundage on the amount of the execution debt.—*Re* HACKETT (1876), 10 I. L. T. 96.—IR.

y. *Execution withdrawn—On intervention of Court of Bankruptcy.*]—Where the sheriff has properly incurred expenses in executing a writ of *fi. fa.*, & the execution is withdrawn by reason of the intervention of the Ct. of Bkpcy. in Ireland, the sheriff cannot obtain payment of such expenses from the assignees, but should obtain same from the person at whose instance he was required to execute the writ.—*Re* GOOD (A BANKRUPT) (1900), 34 I. L. T. 191.—IR.

a. *Seizure for less than statutory amount—Adjudication before sale—Sale prevented by messenger of court—Annulment of adjudication—Subsequent adjudication.*]—A judgment creditor lodged with the sheriff a writ of *fi. fa.*

was entitled to the possession money claimed as being part of the "costs of the execution" within the above sect.—*Re* HURLEY (1893), 41 W. R. 653; 37 Sol. Jo. 572; 10 Morr. 120; 5 R. 390.

Annotations:—**Apprvd. & Folld.** *Re* Beeston, [1899] 1 Q. B. 626, C. A. **Refd.** *Re* Rogers, *Ex p.* Sussex, [1911] 1 K. B. 104.

6988. —— —— —— ——.]—The sheriff levied execution on the goods of debtor & remained in possession for fifteen months, at the request of debtor & with the consent of the execution creditor. At the end of the fifteen months a receiving order was made against debtor on his own petition, & the goods were sold:—*Held:* the sheriff was entitled under the above sect. to possession money for the full period as costs of the execution.—*Re* BEESTON, *Ex p.* BOARD OF TRADE, [1899] 1 Q. B. 626; 68 L. J. Q. B. 344; 80 L. T. 66; 47 W. R. 475; 43 Sol. Jo. 300; 6 Mans. 27, C. A.

6989. —— —— —— ——.]—On Mar. 12, 1902, the sheriff levied under a *fi. fa.* on the goods of debtor, &, at the request of the execution creditor & of debtor, remained in possession. On Apr. 3 debtor committed an act of bkpcy. by the sheriff having been in possession for twenty-one days, & on May 16 a receiving order was made against debtor, whereby the title of the trustee related back to Apr. 3. The sheriff withdrew on May 29:—*Held:* the sheriff's possession money for the period beyond Apr. 3 was not "costs of the execution" within the above sect., as against the trustee.—*Re* ENGLISH & AYLING, *Ex p.* MURRAY & Co., [1903] 1 K. B. 680; 72 L. J. K. B. 248; 88 L. T. 127; 47 Sol. Jo. 299; 10 Mans. 34.

Annotation:—**Consd.** *Re* Rogers, *Ex p.* Sussex, [1911] 1 K. B. 104.

6990. —— —— **After notice of receiving order.**]—Though interpleader proceedings are pending when notice of a receiving order is served on the sheriff, he is bound, on being so served, to deliver the goods or their proceeds to the official receiver, & is not entitled, as against the official receiver or the trustee, to costs for any time for which he may remain in possession after he has been so served.—*Re* HARRISON, *Ex p.* ESSEX (SHERIFF), [1893] 2 Q. B. 111; 62 L. J. Q. B. 266; 68 L. T. 590; 41 W. R. 512; 9 T. L. R. 396; 37 Sol. Jo. 426; 10 Morr. 106; 5 R. 367, D. C.

Annotations:—**Expld.** *Re* Hurley (1893), 41 W. R. 653. **Consd.** *Re* Thomas, *Ex p.* Middlesex, [1899] 1 Q. B. 460, C. A. **Folld.** *Re* Thomas, *Ex p.* Trustee, [1899] 1 Q. B. 66. **Consd.** *Re* Rogers, *Ex p.* Sussex, [1911] 1 K. B. 104.

6991. —— —— **Goods seized under several warrants.**]—When the high bailiff of a county ct. levies execution on the goods of a judgment debtor under several warrants, & seizes the same goods to satisfy the warrants, he is only entitled to charge one possession fee. But if he seizes & appropriates different goods to satisfy each warrant, he is entitled to possession money under each warrant, although all the goods seized under the several warrants are on the same premises & possession under all the warrants is held simultaneously by one person only.—*Re* MORGAN, *Ex p.* BOARD OF TRADE, [1904] 1 K. B. 68; 89 L. T. 452; 52 W. R. 79; 20 T. L. R. 2; 47 Sol. Jo. 877.

Annotation:—**Refd.** Glasbrook *v.* David & Vaux, [1905] 1 K. B. 615.

6992. —— —— ——.]—Where a sheriff has put a man in possession of goods under a writ of *fi. fa.* issued by one creditor, & afterwards has received other writs against same debtor from other creditors, & has merely kept the same man in possession on behalf of all the creditors, he cannot upon the executions being withdrawn, recover possession money at 5*s.* a day from more than one creditor. Though called a fee, possession money under Sheriffs Act, 1887 (c. 55), is only intended to cover the sheriff's out-of-pocket expenses.—GLASBROOK *v.* DAVID & VAUX, [1905] 1 K. B. 615; 74 L. J. K. B. 492; 92 L. T. 299.

6993. —— **Review of taxation.**]—On Sept. 2, 1889, the goods of bkpt. were seized by the sheriff under a writ of *fi. fa.*, & in consequence of interpleader proceedings the possession was continued without selling until Oct. 2, 1889, when, on notice of a receiving order having been made against bkpt., the goods were delivered by the sheriff to the official receiver. The sum of £5 10*s.* having been taxed by the master off a charge made by the sheriff in his bill of costs of £7 10*s.*, for thirty days' possession money from Sept. 2 to Oct. 2, 1889, the sheriff applied that the decision of the taxing-master might be reviewed. The ct. made the following order:—Amount allowed, unless the official receiver within seven days after service of the order requires the sheriff to take out a summons before the master to have the costs disposed of. If such summons is taken out, the official receiver to be at liberty to appear on it & to contend, if so advised, that claimant or the execution creditor ought to pay the possession money in dispute, In case of difficulty the master to be at liberty to refer such summons into ct. for determination.—*Re* LEVY, *Ex p.* ESSEX (SHERIFF) (1890), 63 L. T. 291; 38 W. R. 784; 7 Morr. 125.

Annotations:—**Consd.** *Re* Rogers, *Ex p.* Sussex, [1911] 1 K. B. 104. **Refd.** *Re* Finch, *Ex p.* Essex (1891), 8 Morr. 284.

6994. Levy fee & mileage—Goods seized under several warrants.]—When a sheriff makes a seizure, & subsequently has another writ of *fi. fa.* delivered to him for execution, he is not entitled to charge a fee or mileage for a second seizure unless there is a second seizure in a different place.—*Re* WELLS, *Ex p.* KENT (SHERIFF) (1893), 68 L. T. 231; 9 T. L. R. 228; 37 Sol. Jo. 288; 10 Morr. 69; 5 R. 226.

Annotation:—**Apld.** Glasbrook *v.* David & Vaux, [1905] 1 K. B. 615.

6995. Costs of interpleader—1890 Act, s. 11.]—Goods of a judgment debtor, which had been seized by the sheriff under a writ of *fi. fa.*, were claimed by a bill of sale holder & the sheriff interpleaded. On the hearing of the interpleader summons an order was made for the sale of the goods & for payment out of the proceeds of the claim of the bill of sale holder, the amount of the execution, & the costs of all parties, including the costs & charges of the sheriff. Before the sale, notice was served on the sheriff that a receiving order had been made against the judgment debtor:—

to levy the amount of his judgment debt & costs on the goods of C., such debt & costs together amounting to less than £20. Between the time of seizure & attempted sale C. was adjudged bkpt., & the sale was prevented by the messenger of the Ct. of Bkpcy., who took possession of the goods seized. This adjudication was subsequently annulled, & C. was again adjudged bkpt. on a new petition. On motion by the sheriff to be paid his expenses of levying execution, & by the judgment creditor for his costs under the judgment:—*Held:* the latter alone was entitled to move, & on consenting to prove as an ordinary creditor for the amount of his judgment, the sheriff's expenses should be paid out of ct. to the sheriff.—*Re* CAREY, *Ex p.* BOTTOMLEY & JORDI (1896), 31 I. L. T. 14.—IR.

b. *Insolvency intervening after postponement of payment.*]—Judgment creditors having executions in the sheriff's hands under which a seizure had been made, signed an agreement giving deft. an extension of time for payment on certain conditions therein mentioned. Upwards of thirty days afterwards deft. assigned under Insolvent Act of 1865, the conditions of the agreement having been so far performed:—*Held:* the sheriff had no lien or claim on the goods seized for his fees.—*Re* Ross (1866), 3 P. R. 394; *overd. Re* HEYDON (1869), 29 U. C. R. 262.—CAN.

Sect. 10.—*Rights of execution creditors & restrictions thereon: Sub-sect.* 4, *C. & D.*]

Held: the sheriff's costs of the interpleader were not "costs of the execution" within the above sect., & were not payable out of debtor's estate.—*Re* ROGERS, *Ex p.* SUSSEX (SHERIFF), [1911] 1 K. B. 641; 80 L. J. K. B. 418; 103 L. T. 883; 55 Sol. Jo. 219; 18 Mans. 22, C. A.

D. Actions against Sheriff.

See 1914 Act, ss. 35 (2), 41, 1913 Act, s. 15.

6996. Trover—Seizure after but without notice of act of bankruptcy.]—A sheriff, who takes in execution the goods of bkpt., is liable in trover to his assignees, although he has no notice of the bkpcy., & a commission has not been sued out at the time of the execution.—PRICE *v.* HELYAR (1828), 4 Bing. 597; 1 Moo. & P. 541; 6 L. J. O. S. C. P. 132; 130 E. R. 898.

Annotations:—**Consd.** Balme *v.* Hutton (1833), 9 Bing. 471, Ex. Ch.; Garland *v.* Carlisle (1833), 2 Cr. & M. 31, Ex. Ch. **Refd.** Jacobs *v.* Latour (1828), 2 Moo. & P. 201; Carlisle *v.* Garland (1831), 5 Moo. & P. 102; Garland *v.* Carlisle (1837), 4 Bing. N. C. 7, H. L.

6997. —— ——.]—*Qu.:* whether the sheriff is liable to an action of trover at the suit of the assignees of bkpt., whose goods he has seized under a writ of *fi. fa.*, such seizure being made after an act of bkpcy., though the sheriff had no knowledge of it.—DILLON *v.* LANGLEY (1831), 2 B. & Ad. 131; 9 L. J. O. S. K. B. 143; 109 E. R. 1092.

Annotations:—**Consd.** Balme *v.* Hutton (1831), 2 Cr. & J. 19; Garland *v.* Carlisle (1833), 4 Moo. & S. 24, Ex. Ch. **Refd.** Balme *v.* Hutton (1833), 9 Bing. 471, Ex. Ch.; Garland *v.* Carlisle (1837), 4 Bing. N. C. 7, H. L.

6998. —— —— **Sale before issue of commission.**]—A trader committed an act of bkpcy. on Nov. 9, & the sheriff took his goods in execution on the 15th, & sold them on Dec. 21. A commission was issued on the 23rd, & an assignment made on Jan. 6 following:—*Held:* the assignees might maintain trover against the sheriff, although he had sold before the assignment was made, as bkpt.'s property vested in them by such assignment, from the act of bkpcy., by relation.—LAZARUS *v.* WAITHMAN (1821), 5 Moore, C. P. 313.

Annotations:—**Consd.** Balme *v.* Hutton (1831), 2 Cr. & J. 19; Garland *v.* Carlisle (1833), 2 Cr. & M. 31, Ex. Ch.; Hutton *v.* Balme (1833), 2 Tyr. 620, Ex. Ch. **Refd.** Carlisle *v.* Garland (1831), 5 Moo. & P. 102; Garland *v.* Carlisle (1837), 4 Bing. N. C. 7, H. L.

6999. —— —— ——.]—A sheriff, who has seized goods under a *fi. fa.* & has sold & delivered them after a secret act of bkpcy. committed by deft., but before a commission issues against him, is liable in trover to the assignees under the commission.—BALME *v.* HUTTON (1833), 9 Bing. 471; 3 Moo. & S. 1; 1 Cr. & M. 262; 2 L. J. Ex. 116; 131 E. R. 689; *sub nom.* HUTTON *v.* BALME, 2 Tyr. 620, Ex. Ch.

Annotations:—**Distd.** Crosfield *v.* Stanley (1832), 4 B. & Ad. 87. **Consd.** Garland *v.* Carlisle (1833), 2 Cr. & M. 31, Ex. Ch. **Apld.** Groves *v.* Cowham (1833), 10 Bing. 5. **Consd.** Whitmore *v.* Greene (1844), 2 Dow. & L. 174. **Refd.** Garland *v.* Carlisle (1837), 4 Bing. N. C. 7, H. L.; Grainger *v.* Hill (1838), 5 Scott, 561; Belcher *v.* Magnay, Cheston *v.* Gibbs, Edwards *v.* Evans (1843), 7 Jur. 1160; Tharpe *v.* Stallwood (1843), 5 Man. & G. 760. **Mentd.** Lawes *v.* Reed (1835), 2 Lew. C. C. 152; O'Connell *v.* R. (1844), 11 Cl. & Fin. 155, H. L.; *R. v.* Cuffey (1848), 12 J. P. 807; Cannan *v.* S. E. Ry. Co. (1852), 7 Exch. 843; Holmes *v.* Tutton (1855), 5 E. & B. 65; Stanger *v.* Wilkins (1855), 19 Beav. 626; Billiter *v.* Young (1856), 6 E. & B. 1, Ex. Ch.; Hale *v.* Allnutt (1856), 25 L. J. C. P. 267; Edwards *v.* Scarsbrook (1862), 3 B. & S. 280; *Re* Nurse, *Ex p.* Foxley (1868), 17 L. T. 623.

7000. —— —— **Sale after & with notice of bankruptcy.**]—A sheriff who *bonâ fide*, & without notice of an act of bkpcy., seizes goods under a *fi. fa.*, issued on a judgment entered up under a warrant of attorney given by bkpt., is liable in trover by the assignees, if he sells the goods after notice of the fiat.—CHESTON *v.* GIBBS (1843), 12 M. & W. 111; 1 Dow. & L. 420; 13 L. J. Ex. 53; 7 Jur. 1160; 152 E. R. 1132; *subsequent proceedings* (1844), 8 J. P. Jo. 758.

Annotations:—**Apld.** Graham *v.* Witherby (1845), 7 Q. B. 491. **Consd.** *Re* Pearce, *Ex p.* Crossthwaite (1835), 14 Q. B. D. 966. **Refd.** Whitmore *v.* Greene (1844), 2 Dow. & L. 174; Congreve *v.* Evetts (1854), 10 Exch. 298.

7001. —— —— **Goods withdrawn from execution.**]—On Dec. 16, 1824, a writ of *fi. fa.* was delivered to the sheriff, on Dec. 17 the goods on the premises of debtor were seized, & on Dec. 24, in consequence of an arrangement between debtor & creditor, the execution was withdrawn, &, under the agreement, the goods were removed by the direction of an agent for the attornies of the execution creditor. On Jan. 8, 1825, a commission of bkpcy. issued against debtor, founded on an act of bkpcy. committed on Oct. 15, 1824. The sheriff at the date of the seizure had no notice that an act of bkpcy. had been committed:—*Held:* the sheriff was liable for conversion, notwithstanding his total ignorance at the time that an act of bkpcy. had been committed.—GARLAND *v.* CARLISLE (1837), 4 Bing. N. C. 7; 11 Bli. N. S. 421; 4 Cl. & Fin. 693; 3 M. & W. 152; 4 Scott, 587; 7 E. R. 263, H. L.

Annotations:—**Consd.** Reynolds *v.* Wedd (1838), 7 L. J. C. P. 244; Tharpe *v.* Stallwood (1843), 6 Scott, N. R. 715. **Refd.** Dillon *v.* Langley (1831), 9 L. J. O. S. K. B. 143; Balme *v.* Hutton (1833), 3 Moo. & S. 1, Ex. Ch.; Scott *v.* Lewis (1835), 2 Cr. M. & R. 289; Cannan *v.* S. E. Ry. Co. (1852), 7 Exch. 843; Hollins *v.* Fowler (1875), L. R. 7 H. L. 757, H. L. **Mentd.** Grainger *v.* Hill (1838), 1 Arn. 42; Simpson *v.* Howden (1842), 9 Cl. & Fin. 61, H. L.; O'Connell *v.* R. (1844), 11 Cl. & Fin. 155, H. L.; Heslop *v.* Baker (1853), 22 L. J. Ex. 333; Edwards *v.* Scarsbrook (1862), 3 B. & S. 280.

7002. —— **Seizure after bankruptcy—Whether demand by trustee necessary.**]—Where a person sues out execution against bkpt., & the sheriff seizes the goods & gives the proceeds to the person suing out the execution, the sheriff is liable to an action of trover. No demand is necessary, the property of bkpt. vesting in the assignees at the time of the bkpcy.—RUSH *v.* BAKER (1734), Cun. 130; 2 Stra. 996; Bull. N. P. 40; 94 E. R. 1107.

PART XX. SECT. 10, SUB-SECT. 4.—D.

6996 i. *Trover—Seizure after but without notice of act of bankruptcy.*]—Deft. in execution, on Nov. 12, committed an act of bkpcy.; on Nov. 26 the sheriff seized bkpt.'s goods under a *fi. fa.*, & sold them, not having received notice of the act of bkpcy., of which the creditor was aware:—*Held:* the sheriff was liable in trover for the value of the goods.—COMYNS *v.* LAND (1848), 12 I. L. R. 74.—IR.

c. —— *Sale after arrest of insolvent.*]—A., in 1843, having confessed a judgment to B., B., in Easter Term, 1845, issued a *fi. fa.* on the judgment, under which the sheriff seized the goods of A., & sold them on May 23. After the seizure, & before the sale, A. was arrested under the direction of deft. on a *ca. sa.*, & filed a petition under Insolvent Debtors' Act, & a vesting order was thereon made on June 16:—*Held:* the sheriff was liable in an action of trover for selling the goods after the imprisonment of A.—LINDSAY *v.* GOING (1849), 13 I. L. R. 456; 1 Ir. Jur. 278.—IR.

d. *Replevin—Seizure after delivery to registrar of deed of assignment but during removal thereof from office.*]—An assignment was made to pltf. for the benefit of creditors, which pltf. delivered to the Registrar of Deeds at his house, at 3 a.m., with instructions to record it as a deed, & file it as a bill of sale. The registrar did not mark it "filed," or file it as a bill of sale, or number, enter, or index it in the book kept by him for entry of bills of sale, but recorded it in the usual way as a deed of land. It remained in his office until Dec. 5, when it was, without any instructions from pltf., sent by mail to the residence of pltf., who was not then at home, & who did not personally learn that the deed had been returned until Jan. 6. On Jan. 9 pltf. returned the deed to the registrar. In the interval, the goods were seized under an attachment issued on Dec. 22, & an execution upon a judgment obtained on Jan. 2 against the assignor:—*Held:* the removal of the deed from the office could not be taken advantage of by an attaching or execution creditor, who knew of its having been in the office, & replevin for the goods could be main-

Annotations :—**Distd.** Whitmore *v.* Greene (1844), 2 Dow. & L. 174. **Refd.** Menham *v.* Edmonson (1799), 1 Bos. & P. 369; Woollen *v.* Wright (1862), 1 H. & C. 554, Ex. Ch. **Mentd.** Balme *v.* Hutton (1833), 9 Bing. 471, Ex. Ch.

7003. —— Seizure after act of bankruptcy—Sale after bankruptcy.]—If a sheriff takes goods of bkpt. in execution after the act of bkpcy., & before the commission issued, & sells them after the commission, trover will lie against him.—COOPER *v.* CHITTY (1756), 1 Wm. Bl. 65; 1 Burr. 20; 1 Keny. 395; 96 E. R. 36.

Annotations :—**Consd.** Timbrell *v.* Mills (1760), 1 Wm. Bl. 205; Smith *v.* Milles (1786), 1 Term Rep. 475; R. *v.* Wells (1807), 16 East, 278; Lazarus *v.* Waithman (1821), 5 Moore, C. P. 313; Price *v.* Helyar (1828), 4 Bing. 597. **Consd. & Expld.** Balme *v.* Hutton (1831), 2 Cr. & J. 19. **Consd.** Balme *v.* Hutton (1833), 9 Bing. 471, Ex. Ch.; Garland *v.* Carlisle (1833), 2 Cr. & M. 31, Ex. Ch.; Groves *v.* Cowham (1833), 10 Bing. 5. **Distd.** Savory *v.* Chapman (1840), 11 Ad. & El. 829. **Consd.** Cannan *v.* S. E. Ry. Co. (1852), 7 Exch. 843. **Refd.** Brassey *v.* Dawson (1733), Ridg. *temp.* H. 12; Coppendale *v.* Bridgen (1759), 2 Burr. 814; Hitchin *v.* Campbell (1772), 2 Wm. Bl. 827; Aldridge *v.* Ireland (1784), 3 Doug. K. B. 397; Smith *v.* Stokes (1801), 1 East, 363; Williams *v.* Nunn (1809), 1 Taunt. 270; Carlisle *v.* Garland (1831), 5 Moo. & P. 102; Garland *v.* Carlisle (1837), 4 Bing. N. C. 7, H. L.; Tharpe *v.* Stallwood (1843), 6 Scott, N. R. 715. **Mentd.** Rorke *v.* Dayrell (1791), 4 Term Rep. 402; Latkow *v.* Eamer (1795), 2 Hy. Bl. 437; Payne *v.* Drewe (1804), 4 East, 523; R. *v.* Giles (1820), 8 Price, 293; Giles *v.* Grover (1832), 9 Bing. 128, H. L.; White *v.* Teal (1840), 12 Ad. & El. 106; Hollins *v.* Fowler (1875), L. R. 7 H. L. 757, H. L.; Gloucestershire Banking Co. *v.* Edwards (1887), 20 Q. B. D. 107, C. A.; Consolidated Co. *v.* Curtis, [1892] 1 Q. B. 495.

7004. —— —— ——.]—*Held :* a sheriff was liable in trover for having sold, after notice of assignment to the provisional assignee, the goods of insolvent taken in execution under a judgment on *cognovit*, after the commencement of insolvent's imprisonment, but before the assignment to the provisional assignee.—GROVES *v.* COWHAM (1833), 10 Bing. 5; 3 Moo. & S. 352; 2 L. J. C. P. 196; 131 E. R. 806.

Annotations :—**Expld.** Whitworth *v.* Clifton (1836), 1 Mood. & R. 531. **Consd.** Cheston *v.* Gibbs (1843), 1 Dow. & L. 420.

7005. —— —— —— Measure of damages.]—Where, after an act of bkpcy., a sheriff seizes & sells goods, in trover by the assignee the jury may deduct, in their estimate of the damages, the expenses of the sale.—CLARKE *v.* NICHOLSON (1835), 1 Cr. M. & R. 724; 3 Dowl. 454; 1 Gale, 21; 5 Tyr. 233; 4 L. J. Ex. 66; 149 E. R. 1272.

Annotation :—**Refd.** Peruvian Guano Co. *v.* Dreyfus (1887), [1892] A. C. 170, n.

7006. —— —— —— ——.]—A., a trader, purchased plant & stock, under an agreement to pay the purchase-money by instalments, a proper assignment to be executed when the whole of the instalments should have been duly paid, & the vendor having power, in case of default for fourteen days after notice in writing to pay the several instalments, to re-enter, & expel the purchaser, etc. Default having been made in payment of certain instalments, but the vendor not having availed himself of his power to resume possession in the manner provided by the agreement, & A., the vendee, having become bkpt. :—*Held :* the assignees of A. were entitled to recover the whole value of the goods, in an action of trover against a sheriff, who had sold the goods after notice of an act of bkpcy.—TURNER *v.* HARDCASTLE (1862), 11 C. B. N. S. 683; 31 L. J. C. P. 193; 5 L. T. 748; 142 E. R. 964.

Annotations :—**Mentd.** Johnson *v.* L. & Y. Ry. Co. (1878), 3 C. P. D. 499; The Winkfield, [1902] P. 42, C. A.; Royal Mail S.S. Co. *v.* Macintyre Co. (1911), 16 Com. Cas. 231; Eastern Construction Co. *v.* National Trust Co. & Schmidt, [1914] A. C. 197, P. C.

7007. —— Seizure & sale after but without notice of act of bankruptcy—Notice of act of bankruptcy to creditor before sale.]—A sheriff, who seizes & sells under a *fi. fa.* the goods of debtor, after a secret act of bkpcy., of which at the time of the seizure the execution creditor had no notice, is not liable in trover at the suit of the assignees, although before the sale the execution creditor had notice of the act of bkpcy., both the seizure & the sale being before the fiat.—WHITMORE *v.* GREENE (1844), 2 Dow. & L. 174; 13 M. & W. 104; 13 L. J. Ex. 311; 3 L. T. O. S. 241; 8 Jur. 697; 153 E. R. 43.

Annotations :—**Consd.** Follett *v.* Hoppe (1847), 5 C. B. 226. **Distd.** Woollen *v.* Wright (1862), 1 H. & C. 554, Ex. Ch. **Refd.** Baylis *v.* London, [1913] 1 Ch. 127, C. A. **Mentd.** Higgins *v.* Thomas (1846), 10 Jur. 753; Mayhew *v.* Herrick (1849), 7 C. B. 229.

7008. —— Notice of intention to dispute petitioning creditor's debt—Proof of debt.]—In trover by assignees, against the sheriff & an execution creditor, where defts. had given notice under 49 Geo. 3, c. 121, that they intended to dispute petitioning creditor's debt, proof by pltfs. that one of defts., the execution creditor, had proved his debt under the commission :—*Held :* no proof of petitioning creditor's debt, either against the sheriff or such execution creditor.—RANKIN *v.* HORNER (1812), 16 East, 191; 104 E. R. 1061.

Annotation :—**Mentd.** Inglis *v.* Spence (1834), 1 Cr. M. & R. 432.

7009. Trespass—Seizure after act of bankruptcy—Sale after & with notice of commission.]—Trespass will not lie by assignees against a sheriff for taking the goods of bkpt. in execution after an act of bkpcy., & before the issuing of the commission, notwithstanding he sells them after the issuing of the commission, & after a provisional assignment, & notice from the provisional assignee not to sell.—SMITH *v.* MILLES (1786), 1 Term Rep. 475; 99 E. R. 1205.

Annotations :—**Consd.** Garland *v.* Carlisle (1833), 2 Cr. & M. 31, Ex. Ch. **Refd.** Lazarus *v.* Waithman (1821), 5 Moore, C. P. 313; Price *v.* Helyar (1828), 4 Bing. 597; Balme *v.* Hutton (1831), 2 Cr. & J. 19; Carlisle *v.* Garland (1831), 5 Moo. & P. 102. **Mentd.** A.-G. *v.* Dimond (1831), 1 Cr. & J. 356; Dunwich Corpn. *v.* Sterry (1831), 1 B. & Ad. 831; Balme *v.* Hutton (1833), 9 Bing. 471, Ex. Ch.; Garland *v.* Carlisle (1837), 11 Bli. 421, H. L.; Spence *v.* Rogers (1843), 11 M. & W. 191; Brown *v.* Notley (1848), 3 Exch. 219; Pemberton *v.* Chapman (1857), 7 E. & B. 210.

7010. —— Seizure after bankruptcy—Goods in possession of trustee.]—The sheriff, under a *fi. fa.* issued at the suit of a judgment creditor, seized the goods of bkpt. The assignees, in their own name, & not in their character of assignees, brought trespass against the sheriff & execution creditor for seizing the goods, which consisted of the stock on a farm, which had belonged to bkpt. On the issuing of the commission, the assignees took possession of the farm, managed it for the benefit of the creditors, & purchased additional stock & farming utensils, & they had continued in possession several months before the goods were seized by the sheriff under the *fi. fa.* The ct. refused to stay the proceedings in the action of trespass.—BERNASCONI *v.* FAIRBROTHER (1827), 7 B. & C. 379; 108 E. R. 764.

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tained by the assignee against the sheriff.—FISHER *v.* BISHOP (1884), 5 R. & G. 451.—**CAN.**

e. *Action for improperly selling & for failing to hand over property to trustee.*]—When deft., as sheriff, levied on goods under executions, & a writ of attachment in bkpcy. was afterward issued against the execution debtor, but the sheriff after the issue of the attachment, proceeded to sell under the executions & paid over the proceeds to the execution creditors, the ct. refused to set aside a verdict against the sheriff, at the suit of the assignee, for improperly selling the goods, etc., & for his failure duly to execute the writ of attachment & hand over the property of insolvent to the assignee.—KINNEY *v.* DUDMAN (1876), 2 R. & C. 19.—**CAN.**

Sect. 10.—*Rights of execution creditors & restrictions thereon: Sub-sect.* 4, *D.; sub-sects.* 5 *&* 6.]

7011. Money had & received—Seizure before act of bankruptcy—Sale after & with notice of bankruptcy.]—A creditor issued a *fi. fa.*, under which the sheriff seized the goods of debtor, who afterwards & before the goods were sold, committed an act of bkpcy., upon which a commission issued, & he was duly declared a bkpt. The sheriff had notice of the bkpcy., but nevertheless sold the goods, & paid over the proceeds to the execution creditor:—*Held:* he was not justified in paying over the money, & was liable to be sued for it by the assignees, in an action for money had & received. *Qu.:* whether the sheriff was justified in selling the goods after notice of the bkpcy.—NOTLEY *v.* BUCK (1828), 8 B. & C. 160; 2 Man. & Ry. K. B. 68; 6 L. J. O. S. K. B. 271; 108 E. R. 1003.

Annotations:—**Consd.** Morland *v.* Pellatt (1828), 8 B. & C. 722. **Apld.** Higgins *v.* M'Adam (1829), 3 Y. & J. 1. **Consd.** Groves *v.* Cowham (1833), 10 Bing. 5; Kelcey *v.* Minter (1835), 1 Bing. N. C. 721; Graham *v.* Witherby (1845), 7 Q. B. 491; Follett *v.* Hoppe (1847), 5 C. B. 226. **Refd.** Giles *v.* Grover (1832), 9 Bing. 128, H. L.; Belcher *v.* Magnay (1843), 13 L. J. Ex. 49; Cheston *v.* Gibbs (1843), 12 M. & W. 111; Wood *v.* Dunn (1865), 35 L. J. Q. B. 11; *Re* Pearce, *Ex p.* Crossthwaite (1885), 14 Q. B. D. 966; Baylis *v.* London, [1913] 1 Ch. 127, C. A. **Mentd.** Cumming *v.* Welsford, Cumming *v.* Harris (1830), 8 L. J. O. S. C. P. 168; Taylor *v.* Lanyon (1830), 6 Bing. 536.

7012. —— —— Sale after & with notice of act of bankruptcy.]—A sheriff having seized & sold goods on an execution issued upon a judgment on a warrant of attorney, & paying over the proceeds after notice of an act of bkpcy. committed by deft., is answerable to the assignees for money had & received.—CROSFIELD *v.* STANLEY (1832), 4 B. & Ad. 87; 110 E. R. 388.

Annotation:—**Mentd.** Linnit *v.* Chaffers (1843), 4 Q. B. 762.

SUB-SECT. 5.—EXECUTION AS PROTECTED TRANSACTION.

See 1869 Act, s. 95 (2), (3), not re-enacted.

See, now, 1914 Act, ss. 40, 41.

See, also, Sect. 13, *post,* as to cases under 1869 Act, s. 94.

7013. Execution against goods under writ of fieri facias—Presentation of petition for liquidation—Sale before appointment of trustee.]—In 1869 Act, s. 95 (3), "act of bkpcy." means an act of bkpcy. which has been committed at the time of seizure.

Where a petition for liquidation was presented after the goods of debtor, a non-trader, were seized in execution, & the sale took place before the appointment of a trustee, & no act of bkpcy. had been committed before the seizure:—*Held:* the execution creditor was entitled to the proceeds.—*Re* NORTON, *Ex p.* TODHUNTER (1870), L. R. 10 Eq. 425; 39 L. J. Bcy. 17; 25 L. T. 313; 18 W. R. 890.

Annotations:—**Distd.** *Re* Adams, *Ex p.* Birmingham Gaslight & Coke Co. (1870), L. R. 11 Eq. 204; *Re* Hall, *Ex p.* Rocke (1871), 6 Ch. App. 796, n. **Folld.** *Re* Hall, *Ex p.* Rocke (1871), 6 Ch. App. 795, L. C. & L. JJ.; Slater *v.* Pinder (1871), L. R. 6 Exch. 228. **Refd.** *Re* Gwynn, *Ex p.* Veness (1870), 39 L. J. Bcy. 23; *Re* Skinner, *Ex p.* Keys (1870), 39 L. J. Bcy. 28; *Re* Johnson, *Ex p.* Rayner (1872), 41 L. J. Bcy. 26, L. JJ. **Mentd.** Lucas *v.* Dicker (1880), 6 Q. B. D. 84, C. A.

7014. —— Sale advertised but prevented by bill of sale holder—Appointment of trustee in liquidation.]—A judgment creditor issued execution for a sum under £50 against the goods of a trader debtor, & the bailiff seized the goods, & advertised the sale. After the seizure, the sale was prevented from taking place on the day advertised by the claim of the holder of a bill of sale, & before the sale could be effected, debtor filed a petition for liquidation under 1869 Act, a receiver was appointed, & an injunction granted to restrain the sale. The goods never were sold, & a trustee in liquidation was appointed:—*Held:* the execution was not protected by s. 95 (3), since it had not been completed by seizure & sale before the date of the appointment of the trustee, & the goods were the property of the trustee.—*Re* GWYNN, *Ex p.* VENESS (1870), L. R. 10 Eq. 419; 39 L. J. Bcy. 23; 25 L. T. 311; 18 W. R. 979.

Annotations:—**Distd.** *Re* Adams, *Ex p.* Birmingham Gaslight & Coke Co. (1870), L. R. 11 Eq. 204. **Consd.** Slater *v.* Pinder (1871), L. R. 6 Exch. 228. **Refd.** *Re* Skinner, *Ex p.* Keys (1870), 39 L. J. Bcy. 28; *Re* Johnson, *Ex p.* Rayner (1872), 41 L. J. Bcy. 26. **Mentd.** *Re* Hall, *Ex p.* Rocke (1871), 6 Ch. App. 796, n.

See, now, 1914 Act, s. 40 (1).

7015. —— Liquidation petition filed—Notice before sale.]—After a petition for liquidation by arrangement had been filed by a trader debtor, his goods were seized & sold under an execution for less than £50. After the seizure, & before the sale, the sheriff & the execution creditor received notice of the filing. After the sale a trustee in liquidation was appointed:—*Held:* the execution was not protected by 1869 Act, s. 95 (3), & the goods were the property of the trustee.—*Re* BISSELL, *Ex p.* DUIGNAM (1871), 6 Ch. App. 605; 40 L. J. Bcy. 68; 25 L. T. 286; 19 W. R. 1127, L. C. & L. JJ.

Annotations: **Distd.** *Re* Walton, *Ex p.* Hoare (1873), L. R. 16 Eq. 625. **Refd.** *Re* Hall, *Ex p.* Rocke (1871), 40 L. J. Bcy. 70, L. C. & L. JJ.; Megrath *v.* Gray, Gray *v.* Megrath (1874), L. R. 9 C. P. 216.

7016. —— Sale by consent of parties after notice of act of bankruptcy—Before expiry of time limit in County Courts Act, 1846 (c. 95), s. 106.]—An execution levied by seizure upon the goods of a trader under a county ct. judgment, & sold by the high bailiff by consent of both parties after the commission of an act of bkpcy., of which the execution creditor had notice, & upon which the adjudication subsequently proceeded, but before the expiration of the five days required by the above sect.:—*Held:* not a protected transaction within 1869 Act, s. 95 (3).—*Re* HUGHES, *Ex p.* BULMER (1879), 48 L. J. Bcy. 62; 40 L. T. 40.

See, now, 1914 Act, s. 40.

7017. Execution against goods under writ of elegit—Petition presented before inquisition.]—After an act of bkpcy. had been committed, a judgment creditor for a sum exceeding £50, without notice of the act of bkpcy., issued an *elegit* against the goods of bkpt., there being no land, but before inquisition proceedings preparatory to sale had been commenced, a bkpcy. petition founded on the act of bkpcy. was presented, & the sheriff was restrained:—*Held:* the transaction was not protected by 1869 Act, s. 95 (3).—*Re* CHINN, *Ex p.* SULGER (1881), 17 Ch. D. 839; 50 L. J. Ch. 687; 44 L. T. 652; 29 W. R. 808.

7012 i. *Money had & received—Sale after & with notice of act of bankruptcy—Payment of rent to landlord.*]—B., a county ct. bailiff, seized the land of judgment debtor under an execution. After seizure B. received knowledge by informal notice of the sequestration of debtor's estate & the appointment of S. as official assignee. B. sold, & out of the proceeds paid the landlord £32. Being then sued by S. he paid all the balance into ct. S. took the money out of ct. & went on for the £32 as paid to the landlord by B. in his own wrong: *Held:* B. was liable for the money.—SIMPSON (OFFICIAL ASSIGNEE) *v.* BURROWES (1867), 4 W. W. & A'B. 150.—**AUS.**

f. *What trustee must prove.*]—Where an execution has been placed in the hands of a sheriff, & execution debtor, before the sheriff executes the writ, makes an assignment of his goods, the trustee, who brings an action to recover the goods, must fail, unless he shows want of notice of the execution on the part of debtor, as well as on his

7018. —— Delivery of goods to creditor—At value appraised on inquisition.]—The delivery to the execution creditor of goods seized by the sheriff under an *elegit* at the value appraised by the jury on the inquisition is a sale of the goods within 1869 Act, s. 95 (3), & is protected by that sub-sect., if the creditor has not at the time of the delivery notice of any act of bkpcy. committed by debtor prior to the seizure & available against him for adjudication. Notice of an act of bkpcy. committed between the seizure & the delivery will not deprive the creditor of the protection.—*Re* BANNISTER, *Ex p.* VALE (1881), 18 Ch. D. 137; 50 L. J. Ch. 797; 45 L. T. 200; 29 W. R. 855, L. C. & L. JJ.

Annotation :—**Consd.** *Re* Windas & Dunsmore, *Ex p.* Hough (1884), 50 L. T. 212.

7019. Attachment of debt.]—Even if a garnishee order attaching a debt due to bkpt. is "an attachment against goods" of bkpt. within 1869 Act, s. 95 (3), it is not protected, unless the garnishor has received actual payment from the garnishee before the order of adjudication.—*Re* CURTOYS, *Ex p.* PILLERS (1881), 17 Ch. D. 653; 50 L. J. Ch. 691; 44 L. T. 691; 29 W. R. 575, C. A.

Annotations :—**Consd.** *Re* Chinn, *Ex p.* Sulger (1881) 17 Ch. D. 839; Butler *v.* Wearing (1885), 17 Q. B. D. 182. **Refd.** *Re* Bannister, *Ex p.* Vale (1881), 45 L. T. 200, L. C. & L. JJ. **Mentd.** *Re* O'Shea's Settlmt., Courage *v.* O'Shea, [1895] 1 Ch. 325, C. A.; Hosack *v.* Robins, [1918] 2 Ch. 339, C. A.

See, also, Part IX., Sect. 2, *ante*.

Notice of act of bankruptcy.]—*See* Sect. 13, sub-sect. 2, *post*.

SUB-SECT. 6.—POSITION OF PARTIES ON AVOIDANCE OF EXECUTION.

7020. Execution by landlord—Right to deduct rent under Landlord & Tenant Act, 1709 (c. 14), s. 1.]—A landlord, who seizes his tenant's goods under an execution, the proceeds of which he is obliged to refund to the assignees of the tenant under 7 Geo. 4, c. 57, s. 34, cannot retain against the assignees the amount of a year's rent under s. 1 of the earlier Act.—TAYLOR *v.* LANYON (1830), 6 Bing. 536; 4 Moo. & P. 316; 8 L. J. O. S. C. P. 180; 130 E. R. 1387.

See, now, 1914 Act, s. 35.

7021. First execution set aside—Right of trustee to benefit—As against second execution creditor.]—The goods of X. being seized under several writs of *fi. fa.* issued successively by A. & B., X. became bkpt. Upon an issue tried under an order of interpleader obtained by the assignees of X., A.'s execution was set aside, as having issued on a judgment founded on a warrant of attorney :—*Held :* B. was entitled to be paid, as if he had been the sole execution creditor, & the assignees of X. were not entitled to take the benefit of A.'s execution.—GOLDSCHMIDT *v.* HAMLET (1843), 1 Dow. & L. 501; 6 Man. & G. 187; 6 Scott, N. R. 962; 12 L. J. C. P. 304; 1 L. T. O. S. 314; 134 E. R. 859.

Annotations :—**Folld.** Graham *v.* Witherby (1845), 7 Q. B. 491. **Consd.** *Re* Pearce, *Ex p.* Crossthwaite (1885), 14 Q. B. D. 966. **Refd.** Congreve *v.* Evetts (1854), 10 Exch. 298.

7022. —— —— ——.]—B. entered up judgment on a warrant of attorney, & sued out a *fi. fa.*, under which the sheriff seized. W. afterwards lodged a *fi. fa.* with the same sheriff in a *bonâ fide* adverse action against same debtor, & the sheriff delivered a warrant, in W.'s action, to the officer already in possession. The goods seized were sufficient only to satisfy B.'s execution. Before any sale, a fiat in bkpcy. issued against debtor. The assignees claimed the goods, & an issue was directed between B. & the assignees, to try whether B. was entitled to the proceeds of the goods, which were in the meantime sold, & the produce paid into ct. The issue was decided in favour of the assignees, on the ground that B.'s writ was founded upon a judgment on a warrant of attorney, & had not been executed by sale before the fiat :—*Held :* the issuing of the fiat rendered B.'s writ void, & W.'s writ, having already attached upon the goods provisionally, became, in effect, the first writ, & W. was entitled to have his execution satisfied out of the proceeds, & the assignees could not first claim any part of them under 6 Geo. 4, c. 16, s. 108, for rateable distribution among the creditors.—GRAHAM *v.* WITHERBY (1845), 7 Q. B. 491; 14 L. J. Q. B. 290; 5 L. T. O. S. 263; 9 Jur. 1104; 115 E. R. 574.

Annotations :—**Consd.** Congreve *v.* Evetts (1854), 10 Exch. 298. **Distd.** *Re* Pearce, *Ex p.* Crossthwaite (1885), 14 Q. B. D. 966. **Mentd.** Nicholson *v.* Cooper (1858), 31 L. T. O. S. 184.

7023. —— —— ——.]—On Mar. 4 the sheriff entered upon premises of A., under a *fi. fa.* at the suit of B., A.'s goods being then already under seizure, upon an execution at the suit of C., by an officer of the Lord Mayor's Ct., & D., the landlord of the premises, being also in for rent. On Mar. 9 a fiat in bkpcy. was awarded against A. On Apr. 6, D. sold all the goods, &, after paying C.'s execution, & retaining the amount due to himself for rent, paid the residue into ct. to abide the event of an issue between A.'s assignees & B., as to whether, at the date & issuing of the fiat, the assignees were entitled to the goods as against B. :—*Held :* it was not competent to the assignees, under such issue, to set up either the prior execution or the distress, to defeat the claim of B.—BELCHER *v.* PATTEN (1848), 6 C. B. 608; 6 Dow. & L. 370; 18 L. J. C. P. 69; 12 L. T. O. S. 220; 12 Jur. 1028; 136 E. R. 1387.

Annotation :—**Consd.** Richards *v.* Jenkins (1886), 17 Q. B. D. 544, D. C.

7024. Bill of sale holder paying off execution—Bill of sale invalid—Right to repayment out of proceeds of goods.]—The goods of debtor having been seized in execution, & a man left in possession, the holder of an unregistered bill of sale over them paid the debt & costs & took possession himself. On the same day, & before he did so, debtor was adjudicated bkpt. :—*Held :* the holder of the bill of sale was entitled to be paid, out of the proceeds of the goods, the amount of the executions, which were good against the trustee.—*Re* COLE, *Ex p.* MUTTON (1872), L. R. 14 Eq. 178; 41 L. J. Bcy. 57; 26 L. T. 916; 20 W. R. 882.

Annotations :—**Folld.** *Re* James, *Ex p.* Harris (1874), L. R. 19 Eq. 253. **Distd.** *Re* Craig, *Ex p.* Hinchcliffe, [1916] 2 K. B. 497. **Refd.** *Re* Ayshford, *Ex p.* Lovering (1887), 35 W. R. 652. **Mentd.** Davis *v.* Petrie (1905), 93 L. T. 511.

7025. Debtor paying off sheriff—Before any levy made—& before act of bankruptcy—Money paid over to execution creditor after act.]—Judgment

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own part.—ROSS *v.* CREIGHTON (1890), 40 N. S. R. 131.—**CAN.**

h. *Estoppel of trustee—From disputing validity of fraudulent cognovit given by bankrupt.*]—The assignees of bkpt. in suing the sheriff, represent the interest of creditors, & not merely the person or estate of bkpt., & they will not be estopped, as bkpt. might be, from disputing the validity of a *cognovit* given by bkpt. in fraud of the bkpt. law, on the ground of fraud.—PONTON *v.* MOODIE (1850), 7 U. C. R. 301.—**CAN.**

i. —— *From disputing sheriff's return to writ of attachment.*]—In a suit by an assignee against a sheriff, for improperly selling goods, & for failure duly to execute a writ of attachment in bkpcy. & hand over the property of insolvent to the assignee :—*Held :* the return of the writ of attachment did not estop pltf. from saying that same had not been duly executed.—KINNEY *v.* DUDMAN (1876), 2 R. & C. 19.—**CAN.**

Sect. 10.—*Rights of execution creditors & restrictions thereon: Sub-sects.* 6, 7 & 8.]

was entered upon a warrant of attorney given by two joint-traders, & a *fi. fa.* issued, returnable on May 2. On the 1st of that month the sheriff's officer received from defts. the money directed to be levied. On May 2 one of them committed an act of bkpcy., & the other on the 5th. On the 11th a commission issued, & on the 19th the sheriff paid over the money to the execution creditor. In an action by the assignees:—*Held:* he was entitled to retain it, not being a creditor having a security at the time of the bkpcy.—MORLAND *v.* PELLATT (1829), 8 B. & C. 722; 3 Man. & Ry. K. B. 411; 7 L. J. O. S. K. B. 54; 108 E. R. 1211.

Annotations:—**Refd.** Cumming *v.* Welsford, Cumming *v.* Harris (1830), 8 L. J. O. S. C. P. 168; Giles *v.* Grover (1832), 9 Bing. 128, H. L.; *Re* Greer, Napper *v.* Fanshawe, [1895] 2 Ch. 217. **Mentd.** Bower *v.* Hett, [1895] 2 Q. B. 51.

7026. Auctioneer paying off sheriff—Before any levy made—Knowledge that debtor about to file petition—Fraud.]—After a writ of *fi. fa.* had been issued against a non-trader & lodged with the sheriff, but before any levy had been made, a fraudulent arrangement was, with the knowledge of the under-sheriff, made between debtor & H., an auctioneer, that H. should, after a levy had been made, purchase goods of debtor sufficient to satisfy the amount to be levied, & that he & debtor should at once select the goods which H. was to purchase. H. knew that debtor was about to file a liquidation petition. On Mar. 19 the goods were selected, & were pointed out to B., a clerk of the under-sheriff, who took a list of them, which he handed to the under-sheriff. On Mar. 20 B. seized the goods & put a man in possession. Shortly afterwards debtor filed a liquidation petition, but before notice of the petition had been served on the under-sheriff, he had sent to H., telling him that the seizure had been made, & that the selected goods were his property, & asking him to send a cheque for the amount of the levy. Later in the same day the under-sheriff gave up possession of the goods to a receiver, who had been appointed under the petition, under the mistaken impression that debtor was a trader. The next day H. sent a cheque for the amount of the levy to the under-sheriff, & out of the proceeds the execution debt was paid. A trustee having been appointed under the petition, H. applied to the ct. for an order that the trustee should deliver up the selected goods to him, or pay him the amount which they had produced. The trustee had sold them for double what H. had paid:—*Held:* the goods had never become the property of H., &, although, by virtue of the seizure before the filing of the petition, the execution creditor had acquired a security for his debt on debtor's property, yet H., who had chosen to enter into a fraudulent arrangement with debtor with knowledge that he was about to commit an act of bkpcy., had no equity to be allowed to stand in the place of the execution creditor, notwithstanding the fact that, by paying the execution debt, he had relieved debtor's estate from the necessity of paying it.—*Re* TOWNSEND, *Ex p.* HALL (1880), 14 Ch. D. 132; 42 L. T. 162; 28 W. R. 556, C. A.

7027. Bill of sale holder taking sufficient possession—After execution—Before filing petition.]—If, after the sheriff under an execution has seized the goods comprised in an unregistered bill of sale, to which Bills of Sale Act, 1878 (c. 31), applies, the bill of sale holder takes a sufficient possession before the filing of a bkpcy. petition, on which the grantor is afterwards adjudicated a bkpt., & the execution is then avoided by virtue of the relation back of the title of the trustee to an act of bkpcy. committed before the levy of the execution, the execution is swept away as if it had never existed, & the bill of sale holder is entitled to the goods as against the trustee.—*Re* TOOMER, *Ex p.* BLAIBERG (1883), 23 Ch. D. 254; 52 L. J. Ch. 461; 49 L. T. 16; 31 W. R. 906, C. A.

Annotations:—**Apld.** Sanguinetti *v.* Stuckey's Banking Co., [1895] 1 Ch. 176. **Mentd.** *Re* Johnstone, *Ex p.* Abrams (1884), 50 L. T. 184; *Re* Monolithic Building Co., Tacon *v.* The Co., [1915] 1 Ch. 643, C. A.

SUB-SECT. 7.—PROCEEDINGS AT SUIT OF CROWN.

See, now, 1914 Act, s. 151.

7028. Goods seized before bankruptcy—Delivered to creditor after commission—Sale by commissioners.]—Goods taken upon a writ of extent, three days before a commission issues, cannot be sold by the comrs., although they are not delivered to the creditor by the sheriff upon a liberate until three days after the issuing the commission.—AUDLEY *v.* HALSEY (1629), Cro. Car. 148; 79 E. R. 731; *sub nom.* AWDLEY *v.* HALSEY, 2 W. Jo. 202.

Annotations:—**Consd.** Brassey *v.* Dawson (1733), Cunn. 65. **Refd.** Giles *v.* Grover (1832), 9 Bing. 128, H. L.

7029. Writ of extent on same day as commission—Whether extent preferred.]—Where an extent & a commission of bkpcy. issue the same day, the extent shall have the preference.—R. *v.* EARL (1718), Bunb. 33; 145 E. R. 585.

Annotation:—**Consd.** R. *v.* Edwards (1853), 9 Exch. 32.

7030. —— ——.]—Where an adjudication in bkpcy. & appointment of an official assignee take place at an earlier period of the same day, on which a writ of extent is issued against bkpt. for a Crown debt, the title of the Crown will prevail.—EDWARDS *v.* R. (1854), 9 Ex. Ch. 628; 23 L. T. O. S. 39; 18 Jur. 384; 2 C. L. R. 590; 156 E. R. 268, Ex. Ch.

Annotations:—**Consd.** Wright *v.* Mills (1859), 4 H. & N. 488. **Refd.** Clarke *v.* Bradlaugh (1881), 8 Q. B. D. 63, C. A. **Mentd.** Migotti *v.* Colvill (1878), 4 C. P. D. 233; Clarke *v.* Bradlaugh (1881), 7 Q. B. D. 151.

7031. Writ of extent issued after commission—Validity of.]—On May 19, 1778, a commission issued against A., who was that day found bkpt., & a provisional assignment executed to the messenger. On May 20 an extent issued against him, upon an inquisition taken that morning, for above £2,300 due for malt duties, directed to the sheriff of Suffolk, who, by virtue thereof, entered on bkpt.'s premises, & seized upwards of the value of £2,300:—*Held:* the extent was legal, & the malt in the hands of the assignees was liable to all the duties in arrear.—R. *v.* FOWLER (1779), 2 Doug. K. B. 416, n.; 99 E. R. 267.

Annotations:—**Apld.** Stracy *v.* Hulse (1780), 2 Doug. K. B. 411. **Refd.** R. *v.* Tregoning (1828), 2 Y. & J. 132.

7032. —— ——.]—An extent issued against the property of debtor for a Crown debt between the filing of the petition & the appointment of the trustee is not affected by the relation back of the title of the trustee.—*Re* BONHAM, *Ex p.* POSTMASTER-GENERAL (1879), 10 Ch. D. 595; 48 L. J. Bcy. 84; 40 L. T. 16; 27 W. R. 325, C. A.

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j. *Charge—After sequestration.*]—In a suspension of a charge at the instance of the Crown upon May 15, against debtor, who was sequestrated, the first deliverance on the petition being dated May 12:—*Held:* the diligence of the Crown was effectual against the trustee under Exchequer Act, s. 42, Bkpt. Stat. having no application against the Crown.—BORTHWICK *v.* LORD ADVOCATE (1862), 1 Macph. (Ct. of Sess.) 94.—SCOT.

Annotations :—**Mentd.** Mersey Docks & Harbour Board *v.* Lucas (1881), 51 L. J. Q. B. 114, C. A.; *Re* Utley (1901), 17 T. L. R. 349; *Re* De Keyser's Royal Hotel, De Keyser's Royal Hotel *v.* R., [1919] 2 Ch. 197, C. A.

7033. Goods seized after act of bankruptcy—On warrant from land tax commissioners—Whether good against commissioners of bankrupt.]—A warrant from land tax comrs. to seize the goods of the collector for money in his hands, shall be deemed an extent, & be good against the comrs. of bkpt., though the bkpcy. was committed before the goods were seized, but in the case of a private person, it is otherwise.—BRASSEY *v.* DAWSON (1733), Cunn. 65; Kel. W. 290; 7 Mod. Rep. 182; Ridg. *temp.* H. 12; 2 Stra. 978; 94 E. R. 1065.

Annotations :—**Apprvd.** Giles *v.* Grover (1832), 9 Bing. 128, H. L. **Refd.** R. *v.* Cotton (1751), Park. 112; Balme *v.* Hutton (1831), 2 Cr. & J. 19. **Mentd.** Rush *v.* Baker (1734), Cunn. 130; A.-G. *v.* Allgood (1743), Park. 1; Balme *v.* Hutton (1833), 9 Bing. 471, Ex. Ch.; Garland *v.* Carlisle (1837), 4 Cl. & Fin. 693, H. L.

7034. —— & provisional assignment—Whether good against trustee.]—If a soap maker, having incurred a forfeiture for concealing soap contrary to 1 Geo. 1, c. 36, s. 2, become bkpt. & a provisional assignment of his estate be made, after which the soap is condemned & bkpt. convicted, & thereupon a warrant issues to levy the penalty on his goods generally, such a warrant is bad, & cannot justify a seizure of the soap in the hands of the assignees.—AUSTIN *v.* WHITEHEAD (1795), 6 Term Rep. 436; 101 E. R. 635.

7035. Sale in default of claim—Estoppel against assignees.]—Where dfdt.'s effects have been sold under a *venditioni exponas* on an extent in default of claim, it does not conclude his assignees under a commission of bkpcy., & they will be allowed, on application, to enter their claim, & plead in a proper case where the proceedings have gone so far, on payment of costs of the sale & the application & putting the prosecutors of the extent in the same situation as if they had claimed & pleaded in due time.—R. *v.* ADAM (1817), 5 Price, 39; 146 E. R. 529.

7036. Warrant issued to levy exact sum—Larger sum subsequently found due to crown—Title of crown to balance on sale.]—Local Comrs. of Taxes issued their warrant under 43 Geo. 3, c. 99, ss. 41, 52, for seizing & securing the real & personal estate of a collector refusing to pay over the money received by him, but as a matter of arrangement did not proceed to sell the property so seized under such warrant, which had been issued expressly to secure a certain sum of money said to be due from him to the Crown. Five days after, the solr. for the taxes, the collector having been declared a bkpt. on that day, issued extents, under which was taken not only the property already secured by the warrant of the Comrs. of Taxes within their jurisdiction, but also other real & personal property in other places, for the purpose of levying precisely the same sum claimed on the same account, but, it being eventually discovered, that the sum actually due to the Crown for money received by the collector, amounted to very considerably more than the sum for which the warrant & the extent had issued, but not to double the amount, the Crown sold all the property, & applied the proceeds in discharge of the public debt in aid of the parish, as far as it extended to satisfy it, which produced a net sum much larger than the sum sought to be raised originally, but not sufficient to pay the whole debt, which sum, so produced, was paid into the receipt of the Exchequer in Aug., 1817. In such circumstances, the ct. refused to make absolute a rule, founded on the objection, that it was having recourse to two modes of proceeding for the same debt, granted to show cause why it should not be referred to the Deputy Remembrancer, to take an account of the money due to the Crown, with a view to get the surplus, beyond the amount of the sum originally sought to be levied, paid back to the assignees of bkpt., inasmuch as for such a debt so incurred, in such a character, the Crown was entitled to use every mode of proceeding given by statute.—R. *v.* JONES (1820), 8 Price, 108; 146 E. R. 1147.

7037. Writ of extent sued out in fraud.]—The Ct. of Exch. declined to interfere as a Ct. of Equity, on behalf of assignees, to declare that certain writs of extent in aid were fraudulently sued out, & to decree on that ground an account & repayment of the sums recovered by the judgments obtained thereon, because it appeared that the money obtained thereby was really due & owing from bkpt. to the prosecutors of the extents at the time, notwithstanding there was ground for doubt whether there was a debt due from the prosecutors to the Crown.—EVANS & MACKLEW *v.* SOLLY (1821), 9 Price, 525; 147 E. R. 171.

7038. Writ of extent set aside for irregularity—Second extent while goods in custody of sheriff—Title of trustee.]—Personal estate was seized under the Crown's extent, which was afterwards set aside for irregularity, & the effects ordered to be delivered up to the assignees of debtor, duly appointed under a commission, sued out after the teste of the extent. A second extent, tested the day the first was set aside, & subsequently to the assignment, was issued, & delivered to the sheriff, before the execution of the order by delivery of the goods to the assignees, the sheriff still holding them in his custody :—*Held :* the property in the effects had been changed & transferred by the assignment, & the Crown had no lien thereon, & the assignees were entitled to reduce them into possession.—R. *v.* MARSH (1825), M'Cle. & Yo. 250; 148 E. R. 404.

7039. Money standing in name of accountant in bankruptcy.]—To a writ of extent in aid against bkpt., sued out long after the issuing of the commission, the sheriff returned that bkpt. was entitled to a sum standing in the name of the accountant in bkpcy., in the books of the Bank of England, that the accountant held the money in trust for bkpt., & that the sheriff had seized such money. On that return the Ct. of Exch. made an order, that the sheriff should pay over to the prosecutor of the extent the amount of his debt. On a petition by the sheriff to the Ct. of Review to order the money to be paid over by the accountant in bkpcy. : —*Held :* the finding of the inquisition, & the sheriff's return, were alike erroneous, & no such order should be made.—*Re* AUSTEN, *Ex p.* MAGNAY (1842), 2 Mont. D. & De G. 671; 11 L. J. Bcy. 38, Ct. of R.

7040. Committal under writ of extent—Right of bankrupt to discharge from.]—Bkpt., though he has conformed in every respect to the Acts relating to bkpcy., cannot be discharged from a commitment under an extent of the crown.—ANON. (1745), 1 Atk. 262; 26 E. R. 167, L. C.

SUB-SECT. 8.—OTHER CASES.

7041. "Execution"—Commission of bankruptcy—Landlord & Tenant Act, 1709 (c. 18), s. 1.]—A tenant committed an act of bkpcy. in Oct., 1810, upon which a commission issued on Jan. 21, 1811. The sheriff, on Jan. 7, levied an execution for a judgment debt, under which he sold the goods on Jan. 21 & 22, & out of the sum received, paid the landlord one year's rent in arrear :—*Held :*

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(1) the property in the goods being changed by the act of bkpcy. & commission, & transferred to the assignees, it lay upon the sheriff to prove that he had paid over the money to the landlord before he had notice of the commission issued, & not giving such proof, he was liable for the amount to the assignees; (2) he was not entitled to deduct the rent paid over to the landlord, as for the year's rent in arrear, under the above sect., a commission of bkpcy. not being an execution within that sect.—LEE *v.* LOPES (1812), 15 East, 230; 1 Rose, 342; 104 E. R. 831.

Annotations:—**Consd.** Duck *v.* Braddyll (1824), M'Cle. 217. **Expld.** *Re* Mackenzie, *Ex p.* Hertfordshire, [1899] 2 Q. B. 566, C. A. **Refd.** *Re* Craig, *Ex p.* Hinchcliffe (1916), 115 L. T. 157. **Mentd.** Balme *v.* Hutton (1833), 9 Bing. 471, Ex. Ch.; Garland *v.* Carlisle (1837), 4 Bing. N. C. 7, H. L.

7042. —— 6 Geo. 4, c. 16, s. 108—Judgment before but execution after act.]—Deft. obtained a judgment by *nil dicit*, in an action for goods sold, against bkpt., & afterwards executed a writ of inquiry, & signed final judgment, which was affirmed on a writ of error, & issued execution against his effects, before any act of bkpcy. committed, but an act of bkpcy. was committed before the sale. The final judgment was obtained before, but the execution issued after 6 Geo. 4, c. 16, came into operation:—*Held*: this was a judgment within the proviso in the above sect., & the assignees were entitled to recover from the execution creditor the money levied.—CUMING *v.* WELSFORD (1830), 6 Bing. 502; 4 Moo. & P. 238; 130 E. R. 1374; *sub nom.* CUMMING *v.* WELSFORD, CUMMING *v.* HARRIS, 8 L. J. O. S. C. P. 168.

7043. —— Delivery of writ.]—The mere delivery of the writ to the sheriff is not any execution thereof.—PHILIPS *v.* THOMPSON (1684), 3 Lev. 191; 83 E. R. 645.

Annotations:—**Consd.** Giles *v.* Grover (1832), 9 Bing. 128, H. L. **Refd.** Newland *v.* —— (1706), 1 P. Wms. 92; Garland *v.* Carlisle (1837), 11 Bli. 421, H. L. **Mentd.** Brassey *v.* Dawson (1733), 7 Mod. Rep. 182; A.-G. *v.* Allgood (1743), Park. 1; Cooper *v.* Chitty (1756), 1 Burr. 20; Hitchin *v.* Campbell (1772), 2 Wm. Bl. 827; Balme *v.* Hutton (1833), 9 Bing. 471, Ex. Ch.

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k. *Jurisdiction of court to stay execution.*]—*Re* DELAHOYD (1861), 11 I. Ch. R. 404.—**IR.**

l. *Duty of court to stay execution.*]—In bkpcy. the proper order to make is an order absolute in the first instance, restraining proceedings under executions, upon which the facts should be fully before the ct.; the order will be set aside if made improvidently or upon suppression or misstatement of facts.—*Re* ARRANGING DEBTOR (1873), 7 I. L. T. 17.—**IR.**

m. *Application to issue execution—Against property of insolvent—Refused.*]—ANON. (1829), 2 Ir. L. Rec. 1st ser. 419.—**IR.**

n. —— —— *To make other proceedings available.*]—Where a beneficed clergyman had been discharged as an insolvent debtor:—*Held*: a judgment creditor, whose debt had been returned in the sched., might legally issue a *fi. fa.* for the purpose of obtaining a return of *nulla bona*, & thereupon issuing a *levari de bonis ecclesiasticis*.—MILLS *v.* HORNER (1845), 7 I. L. R. 212.—**IR.**

o. *Application to set aside execution.*]—Application to set aside an execution under a *fi. fa.* against insolvent's property refused, & the party left to his action on the merits.—ARMSTRONG *v.* MAGREGGOR (1828), 1 Ir. L. Rec. 1st ser. 462.—**IR.**

r. —— *What must be shown.*]—To support an application by an insolvent to set aside an execution, a levy must be shown upon some property not vested in the assignee, who would otherwise be the proper party to apply.—MULLENS *v.* BURKE (1854), 1 P. R. 271.—**CAN.**

s. —— *When granted.*]—Pltf. issued a *fi. fa.* on June 7, 1865, & renewed it from time to time until June 4, 1867. On Mar. 30, 1867, deft. obtained his discharge in insolvency. Pltf. had proved his claim for the full amount of the judgment in the insolvent ct., & had never attempted to take any proceedings under the writ, which he refused to withdraw, although requested to do so. The ct. set the *fi. fa.* aside with costs.—DICKINSON *v.* BUNNELL (1869), 19 C. P. 216.—**CAN.**

t. —— ——.]—An application to set aside an execution against a discharged insolvent, on a judgment entered after his discharge, on a bond & warrant executed eighteen years before, granted.—ANON. (1831), 3 Ir. L. Rec. 1st scr. 105, 125, 145, 274.—**IR.**

v. —— —— *Fi. fa. issued in district other than that where suit begun.*]—COMMERCIAL BANK *v.* BRONDGEEST (1849), 5 U. C. R. 325.—**CAN.**

x. *Application to compel creditor to refund proceeds of execution—When refused.*]—The ct. refused, on motion, to make pltf. in an execution refund money levied under an execution, on the suggestion that deft. therein, a bkpt., had, in contemplation of bkpcy., executed a bond, with warrant of attorney to confess judgment, as that would determine the property in a summary way.—ANON. (1800), Rowe, 611.—**IR.**

y. *Effect of insolvency — Upon prior seizure.*]—Where deft.'s property has been attached, & he afterwards becomes insolvent, the ct. is bound to dissolve the attachment, although the property was released on bond.—MCINTOSH *v.* HAMILTON (1879), 19 N. B. R. 1.—**CAN.**

a. —— *Upon subsequent sale.*]—Where prior to sale of a judgment debtor's property in execution of a simple decree for money, the judgment debtor becomes insolvent & the vesting order under Insolvency Act, s. 7, is made, the purchaser at such sale acquires no interest in the property sold.—SUNDARAPPAIYAR *v.* ARUNACHELLA CHETTIAR (1908), I. L. R. 31 Mad. 493.—**IND.**

b. *Effect of avoidance of assignment for creditors—Followed by proceedings in compulsory liquidation.*]—Proceedings in compulsory liquidation taken after the execution of an assignment for the benefit of creditors not made in accordance with 1864 Act, render it absolutely void as against creditors of insolvent, so as to let in intermediate execution creditors.—THORNE *v.* TORRANCE (1866), 16 C. P. 445; *affd.* (1868), 18 C. P. 29; *N. F.* JOHNS *v.* BARBOUR (1882), 15 N. S. R. 42.—**CAN.**

c. *S.P.* ROSE *v.* BROWN (1866), 16 C. P. 477.—**CAN.**

d. *Effect of release of bankrupt's estate—Execution on judgment for defamation.*]—Resp., who had obtained a verdict against applt. in an action for defamation & breach of contract, & had signed judgment for the amount of the damages & costs, presented a petition in bkpcy. for the sequestration of applt.'s estate, &. an order having been made for sequestration, proved as a creditor for the full amount of the judgment. She then procured the arrest of applt. on a writ of *capias ad satisfaciendum* for the amount of the damages recovered on the count of defamation:—*Held*: after the release of bkpt. deft.'s estate, if the judgment debt in respect of the damages for defamation had not been wholly satisfied, the liability of deft. for the balance continued, & the judgment creditor had the same choice of methods of execution as before the bkpcy.—FERRIS *v.* MARTIN (1905), 2 C. L. R. 525.—**AUS.**

See, further, Part XVIII., *ante*.

e. *Application of Creditors' Relief Act, R. S. O.*, 1914 (*c.* 81), *s.* 6.]—*Re* HARRISON (1915), 9 O. W. N. 321; 35 O. L. R. 45.—**CAN.**

g. *Seizure under writ of fi. fa.—Whether stopped by assignment.*]—Goods in the possession of an assignee appointed under Insolvent Act 1875, cannot be taken in execution.—MCMASTER *v.* MEAKIN (1877), 7 P. R. 211.—**CAN.**

h. —— ——.]—The W. Co. was indebted to pltf., but sold & delivered possession of its stock to the S. Co. without observing Bulk Sales Act (Man.). Pltf. sued the W. Co. & placed an execution against the stock, which in the meantime passed to the assignee of the creditors of the S. Co. The sale to the S. Co. was held void in so far as the claim of pltf. was concerned. The assignee thereupon paid the bailiff the amount of the claim, & the bailiff advertised the receipt of the money, & before three months had elapsed pltf. filed a notice of claim under an execution out of the Ct. of King's Bench against the W. Co. On a claim to share rateably in the money in ct. under County Cts. Act:—*Held*: the money paid by the assignee was not realised under a writ of execution within s. 204 of the Act, & was not the proceeds of the goods of debtor, but was the assignee's money.—DRAPER *v.* JACKSON (1916), 33 W. L. R. 796; 10 W. W. R. 78; 26 Man. L. R. 165.—**CAN.**

j. —— —— *By executors.*]—Testator gave all his estate, real & personal, to his exors. in trust, empowering them to continue his business, which they did for several years, & in doing so acquired a large amount of property. Subsequently they assigned same, as well as that portion remaining left by testator as that acquired since his death, to trustees for all creditors of the estate, & each exor. severally assigned for the benefit of individual creditors. A judgment having been recovered against the exors. individually, upon a note made by them as exors., the judgment creditors claimed a right to seize the goods in the hands of the trustees, notwith-

7044. Service of writ—Must be followed by actual execution.]—If the creditor does not proceed to actual execution, but lies by till act of bkpcy., he shall lose his goods notwithstanding service of the writ, for they are ostensibly the goods of bkpt., & as such the creditor shall take them.—ARMINER *v.* SPOTWOOD (1773), Lofft, 114; 98 E. R. 562.

7045. "Unable to meet his engagements"—1849 Act, s. 135.]—*Held:* a trader was not to be deemed "unable to meet his engagements" within the above sect., if his assets exceeded the amount of his liabilities, even although it did not appear that he could have immediately realised the amount.—LOADER *v.* HISCOCK (1858), 1 F. & F. 132.

7046. "Antecedent debt or demand"—1849 Act, s. 135.]—A warrant of attorney given to a retiring partner, contemporaneously with the deed of dissolution, to secure him repayment of the capital he had brought into the business, is not given for an "antecedent debt or demand" within the above sect.—LOADER *v.* HISCOCK (1858), 1 F. & F. 132.

7047. Seizure under writ of fi. fa.—Whether stopped by issue of commission.]—The seizure of goods in execution cannot be affected by any subsequent act of bkpcy. by the party to whom they belonged, but a seizure after an act of bkpcy., if a commission is taken out thereon, will.—COLE *v.* DAVIES (1699), 1 Ld. Raym. 724; 91 E. R. 1383, N.P.

Annotations:—**Refd.** Brassey *v.* Dawson (1733), Cunn. 65; Garland *v.* Carlisle (1837), 11 Bli. 421, H. L. **Mentd.** Ryall *v.* Rolle (1749), 1 Atk. 165, L. C.; Cooper *v.* Chitty (1756), 1 Burr. 20; Balme *v.* Hutton (1833), 9 Bing. 470, Ex. Ch.; Garland *v.* Carlisle (1833), 2 Cr. & M. 31, Ex. Ch.; Isitt *v.* Beeston (1869), 38 L. J. Ex. 89; Gladstone *v.* Padwick (1871), L. R. 6 Exch. 203.

7048. —— ——.]—An execution once begun does not stop on the issuing of a commission against debtor.—RORKE *v.* DAYRELL (1791), 4 Term Rep. 402; 100 E. R. 1087.

Annotations:—**Consd.** Paine *v.* Drew (1804), 1 Smith, K. B. 170. **Dbtd.** R. *v.* Wells (1807), 16 East, 278. **Consd.** R. *v.* Giles (1820), 8 Price, 283. **Dbtd.** Giles *v.* Grover (1832), 6 Bli. N. S. 277, Ex. Ch. **Refd.** R. *v.* Sloper (1818), 6 Price, 114; Garland *v.* Carlisle (1833), 2 Cr. & M. 31, Ex. Ch.

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standing the assignments thereof:—*Held:* the assignments passed the property to the trustees, who were entitled as pltfs. to a verdict.—KERR *v.* HALDAN (1864), 2 E. & A. 382; *affg.* HALDEN *v.* KERR (1862), 12 C. P. 620. —CAN.

k. —— —— *After stay of execution.*]—Judgment creditors having executions in the sheriff's hands, under which a seizure had been made, signed an agreement giving deft. an extension of time for payment on certain conditions therein mentioned. Upwards of thirty days afterwards deft. assigned under Insolvent Act, the conditions of the agreement having been so far performed:—*Held:* the writs were not in the sheriff's hands for execution, & the assignment took priority.—*Re* ROSS (1866), 3 P. R. 394.—CAN.

l. —— —— ——.]—During a stay of proceedings on an execution the writ cannot be considered as in the sheriff's hands to be executed until the stay is removed & the sheriff ordered to proceed, & if he is so ordered within thirty days of an assignment in insolvency the execution creditor is not entitled to priority over other creditors. —*Re* FAIR & BUTTS, 2 C. L. J. N. S. 216.—CAN.

n. —— —— *Seizure of partnership assets—By separate creditor.*]—V. & J. being in partnership, J. went out, & his father, D., took his place in the firm. About six months afterwards V. assigned to D. all the stock-in-trade, but the possession was not changed nor the assignment filed. Pltfs. subsequently became assignees of the firm under Insolvent Act, 1864, & of each of the partners. In an interpleader issue to try their right as against an execution creditor of V. alone, the execution being after the assignment to D., but whether before or after pltfs.' title accrued did not appear:—*Held:* deft., as creditor of one partner, could not seize the goods out of the possession of the assignees of the firm, although he might have a right to V.'s share of the proceeds, if any, after paying the partnership debts.—WILSON *v.* VOGT (1865), 24 U. C. R. 635.—CAN.

p. —— —— —— *Bankruptcy of partner.*]—Partnership assets were seized in execution by the sheriff & advertised for sale. Before the sale took place one of the partners became bkpt., & the other partner left the colony. The official assignee of the estate of the bkpt. partner claimed the administration of the partnership estate. The sheriff interpleaded:—*Held:* what the sheriff had to sell would be merely the interest of the solvent partner, which was indivisible, & as there was nothing the sheriff could seize, he must withdraw.—DALGETTY & Co. *v.* ROSS & Co. (1892), 11 N. Z. L. R. 170.—N.Z.

r. —— —— *Sale by trustee in ignorance of seizure.*]—An assignee for creditors sold goods assigned, in ignorance of a seizure thereof by the sheriff under execution, but before a sale under the execution. The sheriff had left the assignor in possession:—*Held:* the assignment took precedence of the execution, & the assignee could sell the goods & give a good title thereto, notwithstanding the assignee's failure to publish notice of the assignment & to furnish the sheriff with a copy of the assignment.—SEINBAINE & TOX *v.* CHRISTOPHERSON & SASKATCHEWAN GUARANTEE & FIDELITY CO. (1918), 3 W. W. R. 174; 11 Sask. L. R. 385.—CAN.

s. —— —— *Payment of proceeds into court by arrangement.*]—Payment of money into ct. by arrangement between the sheriff, the execution creditor, & the assignee, does not affect the lien of the execution creditor, as the proceeds stand in the place of the goods.—DEERING *v.* GIBBON (1907), 7 W. L. R. 178; 1 Alta. L. R. 7.—CAN.

t. —— —— *Mandamus to compel sheriff to convey land sold to execution creditor.*]—M., under a *fi. fa.* at his own suit against D., which was the first in the sheriff's hands, purchased land in Sept., 1867. D. had in Apr. made a voluntary assignment, under Insolvent Act, 1864, to an official assignee, who claimed the proceeds of the sale. M. claimed a conveyance from the sheriff, crediting the purchase money on his judgment. The ct., in the circumstances, discharged with costs an application by M. for a *mandamus* to compel the sheriff to convey, to which the assignee was no party.—*Re* MOFFATT (1867), 27 U. C. R. 52.—CAN.

w. —— —— *Further step required to perfect trustee's title.*]—W. made an assignment to pltf. for the benefit of his creditors, of his entire property, including a number of shares in a schooner, but no bill of sale of the shares was either executed or delivered to pltf. D. & M. having obtained a judgment against W., issued a writ of execution under which deft., as sheriff, levied upon the shares & proceeded to sell. Prior to the sale, pltf. appeared before the Registrar of Shipping, & after making a declaration of ownership was entered upon the register as owner of the shares:—*Held:* pltf. had no equitable right which could be so asserted or which could prevail over the judgment creditors & the levy made by deft.—MOFFATT *v.* FERGUSON (1885), 6 R. & G. 217; 6 C. L. T. 446.—CAN.

7047 i. —— *Whether stopped by attachment in insolvency.*]—An execution against an insolvent debtor is superseded by an attachment in insolvency. —ONTARIO BANK *v.* WILCOX (1878), 43 U. C. R. 460.—CAN.

7047 ii. —— ——.]—Where an attachment has been issued against the property of deft. under 37 Vict. c. 7 (C. S. c. 38), & a writ of attachment in insolvency was subsequently issued against deft.:—*Held:* the judge was bound to dissolve the attachment, & the regularity of the proceedings in insolvency could not be inquired into.—GANTER *v.* BLATCHFORD (1877), 17 N. B. R. (1 P. & B.) 6.—CAN.

7047 iii. ——.]—Writs of attachment against the mtgor., as an absconding debtor, were delivered to the sheriff on May 20, & copies of the writ, with the appraisement & description of the land, were registered on May 21. On the same day a writ of attachment, under Insolvent Act, 1869, was taken out against the mtgor., but was not delivered to the sheriff until after he had registered the documents connected with the proceedings under Absconding Debtors Act:—*Held:* the claims of the assignee of the estate, to the surplus proceeds, must prevail over that of the attaching creditors.—ALMON *v.* GRAY (1876), R. E. D. 6.—CAN.

7047 iv. —— ——.]—A writ of attachment had issued against A. under Insolvent Act, 1864; the sheriff returned that he had previously attached A.'s property under Absconding Debtors Act, & that he also had various writs of *fi. fa.* in his hands:—*Held:* the writs of *fi. fa.* & attachment did not keep the estate out of the hands of the assignee who would be obliged to give the execution & attaching creditors that priority that they would be entitled to.—HENRY *v.* DOUGLASS, 1 C. L. J. N. S. 108.—CAN.

x. —— *After assignment set aside—Right to follow money received by trustee.*]—Where an assignment has been held void as against 13 Eliz. c. 5, & a creditor, who had subsequently obtained judgment against the assignor, & notwithstanding the assignment, sold all debtor's personal property so transferred, becomes entitled to all the personal property of the assignor levied upon by him under his execution, such creditor has no legal right & no equity to an account or to follow money received by the assignee or paid by him under such assignment

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7049. —— Must be before act of bankruptcy—Act of bankruptcy & seizure on same day—Inquiry.]—Where goods are seized under a *fi. fa.* the same day that the party commits an act of bkpcy., it is open to inquire at what time of the day the goods were seized & the act of bkpcy. was committed; & the validity of the execution depends upon the priority.—SADLER *v.* LEIGH (1815), 4 Camp. 195; 2 Rose, 286, N. P.

Annotation:—**Mentd.** *Re* Gray, *Ex p.* Gray (1835), 4 Deac. & Ch. 778, Ct. of R.

7050. —— —— —— Fraction of day.]—The sheriff took possession under a *fi. fa.*, & at a later hour of the same day deft. surrendered in discharge of his bail, & afterwards lay in prison two months, & thereby committed an act of bkpcy., & by 21 Jac. 1, c.19, was a bkpt. from the time of his arrest. In an action by his assignees to recover the value of such goods:—*Held:* the ct. would notice the fraction of a day, & the sheriff having entered before bkpt. had surrendered in discharge of his bail, the assignees were not entitled to recover.—THOMAS *v.* DESANGES (1819), 2 B. & Ald. 586; 106 E. R. 480.

Annotations:—**Refd.** Giles *v.* Grover (1832), 9 Bing. 128, H. L.; Ackland *v.* Lutley (1839), 9 Ad. & El. 879; Woodland *v.* Fuller (1840), 11 Ad. & El. 859.

7051. —— —— Delivery of writ insufficient.]—A warrant of *fi. fa.*, on a county ct. judgment, was delivered to the bailiff to be executed. Later on the same day debtor filed a petition for liquidation, & a receiver was appointed. The bailiff, on coming to debtor's house to execute the warrant, found the receiver in possession:—*Held:* the trustee was entitled to the goods as against the execution creditor, for under 1869 Act, s. 12, goods were not, as against the trustee, bound by a writ of *fi. fa.* from the delivery of the writ to the sheriff, but a seizure of them before the act of bkpcy. was necessary.—*Re* DAVIES, *Ex p.* WILLIAMS (1872), 7 Ch. App. 314; 41 L. J. Bcy. 38; 26 L. T. 303; 36 J. P. 484; 20 W. R. 430, L. JJ.

Annotations:—**Expld. & Distd.** *Re* Jones, *Ex p.* Jones (1875), 33 L. T. 61. **Distd.** *Re* Watt, *Ex p.* Joselyne (1878), 8 Ch. D. 327, C. A. **Refd.** Emanuel *v.* Bridger (1874), L. R. 9 Q. B. 286; Lowe *v.* Blakemore (1875), L. R. 10 Q. B. 485; *Re* Balbirnie, *Ex p.* Jameson (1876), 3 Ch. D. 488; *Re* Hoare, *Ex p.* Nelson (1880), 14 Ch. D. 41, C. A.; *Re* Clarke, [1898] 1 Ch. 336, C. A.; Davies *v.* Thomas, [1900] 2 Ch. 462, C. A.; *Re* A Debtor, *Ex p.* Smith, [1902] 2 K. B. 260, C. A. **Mentd.** Lee *v.* Dangar, Grant, [1892] 1 Q. B. 231.

7052. —— After resolutions for compositions registered & composition paid—Writ delivered before petition filed.]—A judgment creditor delivered a writ of *fi. fa* to the sheriff before debtor filed a liquidation petition, but no seizure was made until after the creditors had resolved to accept a composition, the resolutions had been registered, & debtor had paid the amount of the composition to a trustee appointed by the creditors:—*Held:* the execution creditor was not a creditor holding a security at the time when the composition became binding, & he could not enforce his writ against debtor's goods afterwards.—*Re* BALBIRNIE, *Ex p.* JAMESON (1876), 3 Ch. D. 488; 45 L. J. Bcy. 156; 35 L. T. 533, C. A.

Annotation:—**Mentd.** *Re* McColla, *Ex p.* McLaren (1881), 16 Ch. D. 534, C. A.

See, further, Part IX., Sect. 2, *ante*.

7053. —— Of after acquired property—For provable debt.]—The after-acquired goods of a certificated bkpt. having been taken in execution for a debt, which might have been proved under the commission, the ct. set aside the *fi. fa.* & refused to put bkpt. to an *auditâ querelâ*, though it was stated on behalf of the creditor that the bkpcy. was collusive, & that in an action by the assignee, a jury had found against pltf. as to the fact of the trading.—BARROW *v.* POILE (1830), 1 B. & Ad. 629; 9 L. J. O. S. K. B. 95; 109 E. R. 921.

Annotations:—**Consd.** Clark *v.* Smith (1847), 3 C. B. 982. **Apld.** O'Brien *v.* Don (1857), 1 C. B. N. S. 702.

See 1914 Act, ss. 9, 30 (3).

7054. —— After possession taken under vesting order.]—Deft. having obtained a judgment against T., lodged a *fi. fa.* with the deputy of the sheriff, & the deputy immediately issued a warrant to an

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in respect to which he has not secured a prior claim by taking the necessary proceedings to make them exigible.—CUMMINGS *v.* TAYLOR (1898), 28 S. C. R. 337.—**CAN.**

y. —— *Whether stopped by protection order.*]—A protection order granted to an arranging debtor, under Irish 1857 Act, s. 343, takes effect from the time it is pronounced by the ct., so that the goods thereby protected from process will not be affected by a writ of *fi. fa.* afterwards lodged with the sheriff by an execution creditor, although he has not had notice of the making of the order.—*Re* M'C. & G., *Ex p.* MONSELL, MITCHELL & Co. (1876), 10 I. L. T. 107.—**IR.**

a. —— —— *Seizure with notice of act of bankruptcy.*]—On Nov. 3, D. filed a declaration of insolvency. On Nov. 22, F., a creditor of D., with notice of the act of bkpcy., seized the goods of D., under a *fi. fa.* On Nov. 24, D. presented a petition for arrangement, & obtained the usual protection order:—*Held:* the order operated against the previous seizure so as to prevent the execution creditor proceeding to a sale.—*Re* DELAHOYD (1861), 11 I. Ch. R. 404.—**IR.**

b. —— *Of property acquired after discharge.*]—*Held:* the goods of insolvent, discharged under Insolvent Act, 1795, acquired by him after the discharge, were not liable to be seized under execution for debt due prior to his discharge.—MAXWELL *v.* KERR (1796), Rowe, 396.—**IR.**

d. —— —— *Property fraudulently assigned before discharge.*]—The language of Insolvent Debtors Act, 1846, which permitted pltf. to take under execution property subsequently acquired by insolvent:—*Held:* not to restrain pltf. from taking under execution goods fraudulently assigned by insolvent previous to his discharge under the Act.—FALCONER *v.* SAWYER (1851), 2 N. S. R. (James) 277.—**CAN.**

f. —— *Prior writ invalid—Commission before first writ satisfied.*]—If two writs of execution issue, the first of which is invalid, the seizure under the second is good, as against a commission in bkpcy. issued before the first was satisfied.—BOURKE *v.* CROSTHWAITE (1846), Bl. D. & Osb. 74.—**IR.**

g. —— *Undischarged bankrupt continuing to trade.*]—A party had been declared a bkpt., & the assignee appointed on Sept. 15, 1842. In Apr., 1843, the usual consent to enable him to obtain his certificate had been signed by the assignee, & by the majority in number & value of the creditors, but the other necessary steps to obtain the certificate had not been taken, & bkpt. had continued to trade in his own name, without any attempt on the part of the assignee to take possession of his goods, until Aug., 1844, when they were seized & sold by the sheriff under a writ of *fi. fa.* at the suit of a judgment creditor. The sum levied having been lodged in the ct. by the sheriff, the ct. refused to pay it over to the assignee, pltf. in the execution undertaking to appear to a writ served on him by the assignee for money had & received, & also to admit the receipt of the money.—COLEMAN *v.* LYNCH (1844), 7 I. L. R. 208.—**IR.**

h. *Poinding—Within sixty days.*]—In a question whether bkpcy. had taken place within sixty days of a poinding, which had been executed on the sixtieth day before the day of the bkpcy. exclusive:—*Held:* in computing the sixty days, either the day of the bkpcy. or the day of the poinding was to be excluded, the poinding had not been executed within the sixty days before bkpcy., &, the poinding creditor had secured a preference over the goods poinded.—SCOTT *v.* RUTHERFORD (1839), 2 Dunl. (Ct. of Sess.) 206; 15 Fac. Coll. 214.—**SCOT.**

j. *Seizure of ship under warrant of Court of Admiralty—After protection order.*]—When seizure of a ship, the property of arranging debtor, is effected under a warrant of the High Ct. of Admlty., issued at the suit of a master in a cause of wages & disbursements after the granting of a protection order to arranging debtor, the Ct. of Bkpcy. has jurisdiction, under 1872 Act, s. 66, to restrain by injunction the Marshal of the High Ct. of Admlty., & such

officer. Afterwards, on the same day, a vesting order was made by the Insolvent Debtors Ct. transferring the estate of T., & the assignee took possession of T.'s property. Afterwards the sheriff's officer seized it:—*Held:* the seizure was proper.—WOODLAND *v.* FULLER (1840), 11 Ad. & El. 859; 113 E. R. 641.

Annotations:—**Distd.** Bridge *v.* Tattersall (1857), 29 L. T. O. S. 76. **Refd.** Holmes *v.* Tutton (1855), 5 E. & B. 65; Bothamley *v.* Heyward (1862), 8 Jur. N. S. 1156; Johnson *v.* Pickering, [1908] 1 K. B. 1, C. A.

7055. —— Against firm—Separate goods of one partner seized under second writ.]—The sheriff, while holding the goods of T. & G. under B.'s writ, received a *fi. fa.* at the suit of L. in a *bonâ fide* adverse action, & delivered a warrant to an officer not holding any warrant under B.'s writ. The officer before fiat issued seized goods, the separate property of T. in his private house, which goods if applicable to B.'s executors would have been exhausted by it:—*Held:* as between L. & the assignees L. was entitled to priority.—GRAHAM *v.* WITHERBY (1845), 7 Q. B. 491; 14 L. J. Q. B. 290; 5 L. T. O. S. 263; 9 Jur. 1104; 115 E. R. 574.

Annotations:—**Distd.** Congreve *v.* Evetts (1854), 10 Exch. 298; *Re* Pearce, *Ex p.* Crossthwaite (1885), 14 Q. B. D. 966. **Mentd.** Nicholson *v.* Cooper (1858), 31 L. T. O. S. 184.

7056. —— Before act of bankruptcy.]—An execution creditor, who has seized the goods of his debtor before the latter has committed an act of bkpcy., is entitled to the proceeds of them as against the trustee.—*Re* JECKS, *Ex p.* BAILEY (1871), L. R. 13 Eq. 314; 41 L. J. Bcy. 1; 25 L. T. 918; 20 W. R. 76.

Annotations:—**Refd.** Slater *v.* Pinder (1872), 26 L. T. 482, Ex. Ch. **Mentd.** *Re* Stevens, *Ex p.* McGeorge (1882), 20 Ch. D. 697, C. A.

7057. —— —— Execution not ended.]—Where an act of bkpcy., under 1861 Act, s. 72, takes place after an execution issued against the party & a seizure of his goods, but before a sale takes place under it, the execution is not put an end to by 1849 Act, s. 133.—EDWARDS *v.* SCARSBROOK (1862), 3 B. & S. 280; 1 New Rep. 24; 32 L. J. Q. B. 45; 7 L. T. 275; 9 Jur. N. S. 537; 11 W. R. 33; 122 E. R. 106.

Annotations:—**Distd.** Young *v.* Roebuck (1863), 2 H. & C. 296. **Consd.** Birmingham Gas Co. *v.* Adams (1870), 19 W. R. 123. **Distd.** *Re* Gwynn, *Ex p.* Veness (1870), L. R. 10 Eq. 419. **Consd.** *Re* Norton, *Ex p.* Todhunter (1870), L. R. 10 Eq. 425. **Foll.** Slater *v.* Pinder (1871), L. R. 6 Exch. 228. **Consd.** *Re* Bannister, *Ex p.* Vale (1881), 18 Ch. D. 137. C. A. **Refd.** Collins *v.* Cliff (1863), 8 L. T. 466; *Re* Skinner, *Ex p.* Key (1870), L. R. 10 Eq. 432; *Re* Hall, *Ex p.* Rocke (1871), 6 Ch. App. 796, n. **Mentd.** O'Brien *v.* Brodie (1866), 4 H. & C. 544.

7058. —— —— ——.]—An execution creditor for less than £50, who has seized the goods of bkpt. before the committing of any act of bkpcy., is entitled to the proceeds of them as against the trustee, although the adjudication is prior to the sale.—SLATER *v.* PINDER (1872), L. R. 7 Exch. 95; 41 L. J. Ex. 66; 26 L. T. 482; 36 J. P. 532; 20 W. R. 441, Ex. Ch.; *affg.* S. C. (1871), L. R. 6 Exch. 228; 40 L. J. Ex. 146; 24 L. T. 631; 35 J. P. 744; 19 W. R. 778.

Annotations:—**Consd.** *Re* Hall, *Ex p.* Rocke (1871), 6 Ch. App. 795, L. C. & L. JJ.; *Re* Jecks, *Ex p.* Bailey (1871), L. R. 13 Eq. 314. **Distd.** *Re* Davies, *Ex p.* Williams (1872), 7 Ch. App. 314, L. JJ.; *Re* Johnson, *Ex p.* Rayner (1872), 41 L. J. Bcy. 26; *Re* Edwards, *Ex p.* Eyles (1873), L. R. 16 Eq. 99. **Foll.** *Re* Peacock, *Ex p.* Lovering (1874), L. R. 17 Eq. 452. **Consd.** *Re* Rogers, *Ex p.* Villars (1874), 9 Ch. App. 432, L. C. & L. JJ. **Refd.** Lowe *v.* Blakemore (1875), L. R. 10 Q. B. 485; Crew *v.* Terry (1877), 2 C. P. D. 403; Bower *v.* Hett, [1895] 2 Q. B. 51; *Re* Clarke, [1898] 1 Ch. 336, C. A. **Mentd.** Emanuel *v.* Bridger (1874), L. R. 9 Q. B. 286.

7059. —— —— Sale before appointment of trustee.]—A petition for liquidation was presented after the goods of debtor, a non-trader, were seized in execution, & the sale took place before the appointment of a trustee. No act of bkpcy. had been committed before the seizure:—*Held:* (1) in 1869 Act, s. 95 (3), "act of bkpcy." meant an act of bkpcy., which had been committed at the time of seizure; (2) the execution creditor was entitled to the proceeds.—*Re* NORTON, *Ex p.* TODHUNTER (1870), L. R. 10 Eq. 425; 39 L. J. Bcy. 17; 25 L. T. 313; 18 W. R. 890.

Annotations:—**Distd.** *Re* Hall, *Ex p.* Rocke (1871), 6 Ch. App. 796, n. **Foll.** *Re* Hall, *Ex p.* Rocke (1871), 6 Ch. App. 795, L. C. & L. JJ. **Consd.** Slater *v.* Pinder (1871), L. R. 6 Exch. 228. **Distd.** *Re* Adams, *Ex p.* Birmingham Gaslight & Coke Co. (1878), L. R. 11 Eq. 204. **Refd.** *Re* Skinner, *Ex p.* Keys (1870), 39 L. J. Bcy. 28; *Re* Johnson, *Ex p.* Rayner (1872), 41 L. J. Bcy. 26; Lucas *v.* Dicker (1880), 6 Q. B. D. 84, C. A. **Mentd.** *Re* Gwynn, *Ex p.* Veness (1870), 39 L. J. Bcy. 23.

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master mariner, from selling or disposing of the ship, where it is expedient or necessary with a view to doing complete justice, or making a complete distribution of arranging debtor's property; but, before exercising the power, the ct., will require adequate provision to be made for the full discharge of all claims, covered by the master mariner's specific lien, that may be ascertained to be due on account taken before its own officer, & to meet the costs incurred.—*Re* C. (1877), I. R. 11 Eq. 151; 11 I. L. T. 39.—**IR.**

k. *Attachment before judgment—Before insolvency.*]—An action was commenced against two joint debtors. A writ of foreign attachment was issued & an order made attaching property of E., one of defts. A verdict was found for pltf. but before judgment was signed, E. became insolvent:—*Held:* the property attached passed in the insolvency to E.'s official assignee.—LAURATET *v.* MCCRACKEN (1872), 3 V. L. R. 41.—**AUS.**

l. —— ——.]—P., having attached M.'s property & obtained a decree against him, subsequently had him adjudicated an insolvent:—*Held:* the attachment was unaffected by the adjudication.—*Re* RAMCOMOYE MITTER (1865), Bourke, 149.—**IND.**

m. —— ——.]—Pltfs. brought a suit against P. & Co., & on May 15 obtained a prohibitory order for attachment before judgment, under which they attached, on May 17, the right, title, & interest of P. & Co. in the premises in which they carried on business in Calcutta. On May 20, P. & Co. were adjudicated insolvents on the petition of other creditors, & a vesting order was made. On an application on behalf of the official assignee for an order releasing the property from attachment:—*Held:* the prohibitory order should be set aside, & the property attached thereunder to be released.—BANK OF BENGAL *v.* NEWTON (1873), 12 B. L. R. A. C. 1.—**IND.**

n. —— ——.]—The title of the official assignee of insolvent under 11 & 12 Vict., c. 21, is preferable to that of a creditor, who, before the vesting order, has obtained an order for attachment before judgment, in respect of the property compromised in such attachment.—JAVA RAMJI *v.* JADAVJI NATHA (1865), 1 Bom. 224.—**IND.**

o. *S. P.*—GAMBLE *v.* BHOLAGIR (1866), 2 Bom. 146.—**IND.**

p. *S.P.*—PETUMBER MUNDLE *v.* COCHRANE (1865), 1 Ind. Jur. N. S. 11: Bourke 339.—**IND.**

q. *S. P.*—RAMPERSAUD *v.* CALLACHUND DOSS (1866), 1 Ind. Jur. N. S. 325, 373.—**IND.**

r. *S. P.*—*Re* GOCOOL DASS SOONDERJEE & PETUMBER, MUNDUL *v.* GOCOOL DASS SOONDERJEE (1865), 1 Ind. Jur. N. S. 327; Bourke, 240.—**IND.**

s. *S. P.*—SHIB KRISTO SHAHA CHOWDHRY *v.* MILLER (1883), I. L. R. 10 Calc. 150; 13 C. L. R. 433.—**IND.**

t. *S. P.*—SADAYAPPA *v.* PONNAMA (1885), I. L. R. 8 Mad. 554.—**IND.**

v. *S. P.*—TURNER *v.* PESTONJI FARDUNJI (1895), I. L. R. 20 Bom. 403.—**IND.**

w. *S. P.*—KRISTNASAWMY MUDALIAR *v.* MADRAS OFFICIAL ASSIGNEE (1903), I. L. R. 26 Mad. 673.—**IND.**

x. —— *After insolvency.*]—An attachment before judgment has no effect against the official assignee, who holds the property of judgment debtors under a vesting order made before the order for attachment was passed.—MILLER *v.* MON MOHUN ROY (1881), I. L. R. 7 Calc. 213; 8 C. L. R. 213.—**IND.**

y. *Sale under judgment—Registered after assignment for creditors—Before writ of attachment in insolvency.*]—R. & Co., on May 10, assigned all their individual & partnership property, both real & personal, to a trustee, for the general benefit of their creditors, & executed at the same time a deed in trust to him of their lands, which was recorded on May 12. Defts. entered a judgment against R. & Co. on May 15, which was recorded the next day. On May 17 a writ of

Sect. 10.—*Rights of execution creditors & restrictions thereon: Sub-sect.* 8.]

7060. —— —— Sale delayed by injunctions.]—*Held:* 1869 Act, s. 95 (3), did not protect an execution against the claim of a trustee under a liquidation, who had been appointed after seizure & before sale, even though the sale has been delayed by an injunction obtained under 1870 Rules, r. 260.—*Re* GWYNN, *Ex p.* VENESS (1870), L. R. 10 Eq. 419; 39 L. J. Bcy. 23; 25 L. T. 311; 18 W. R. 979.

Annotations:—**Distd.** *Re* Adams, *Ex p.* Birmingham Gaslight & Coke Co. (1870), L. R. 11 Eq. 204. **Consd.** Slater *v.* Pinder (1871), L. R. 6 Exch. 228; *Re* Johnson, *Ex p.* Rayner (1872), 41 L. J. Bcy. 26. **Refd.** *Re* Skinner, *Ex p.* Keys (1870), 39 L. J. Bcy. 28; *Re* Hall, *Ex p.* Rocke (1871), 6 Ch. App. 796, n.

7061. —— —— —— 1869 Act, s. 13.]—After the sheriff, acting under a writ of *fi. fa.*, had seized the goods of debtor, debtor presented to the county ct. a petition for liquidation by arrangement, thereby committing an act of bkpcy., & on the same day obtained an injunction restraining the sheriff from proceeding to a sale, but the sheriff sold the goods, & paid the balance of the proceeds of the sale into the county ct.:—*Held:* (1) an injunction granted under the above sect. was merely for the protection of debtor's estate, & had no effect on the rights of the creditors *inter se;* (2) the execution creditor, & not the trustee was entitled to the money in ct.—*Re* HALL, *Ex p.* ROCKE (1871), 6 Ch. App. 795; 40 L. J. Bcy. 70; 25 L. T. 287; 19 W. R. 1129, L. C. & L. JJ.

Annotations:—**Folld.** *Re* Jecks, *Ex p.* Bailey (1871), L. R. 13 Eq. 314. **Distd.** *Re* Johnson, *Ex p.* Rayner (1872), 41 L. J. Bcy. 26. **Folld.** Slater *v.* Pinder (1872), L. R. 7 Exch. 95, Ex. Ch. **Distd.** *Re* Edwards, *Ex p.* Eyles (1873), L. R. 16 Eq. 99. **Folld.** *Re* Peacock, *Ex p.* Lovering (1874), L. R. 17 Eq. 452. **Consd.** *Re* Bannister, *Ex p.* Vale (1881), 18 Ch. D. 137, C. A. **Refd.** *Re* Davies, *Ex p.* Williams (1872), 7 Ch. App. 314, L. JJ. **Mentd.** *Re* Chapman (1872), L. R. 15 Eq. 75; *Re* Adams, *Ex p.* Greenway (1873), L. R. 16 Eq. 619; *Re* Keyworth, *Ex p.* Banner (1874), 9 Ch. App. 380, n.; Lowe *v.* Blakemore (1875), L. R. 10 Q. B. 485; *Re* Head, *Ex p.* Cochrane (1875), L. R. 20 Eq. 282; Crew *v.* Terry (1877), 2 C. P. D. 403.

7062. —— —— —— ——.]—The sheriff seized in execution under a judgment for more than £50 goods of a trader. Before sale, & whilst the sheriff was in possession, debtor presented a petition for liquidation by arrangement, & the trustee appointed under the liquidation obtained an order restraining further proceedings in the execution:—*Held:* the trustee was entitled to the goods as part of debtor's estate, & the sheriff must give up possession to him.—*Re* JOHNSON, *Ex p.* RAYNER (1872), 7 Ch. App. 325; 41 L. J. Bcy. 26; 26 L. T. 306; 20 W. R. 456, L. JJ.

Annotations:—**Expld.** *Re* Gourlay, *Ex p.* Abbott (1880), 15 Ch. D. 447, C. A. **Refd.** *Re* Bremner, *Ex p.* Harper (1875), 44 L. J. Bcy. 57, L. JJ.; Howes *v.* Young, Howes *v.* Stone (1876), 34 L. T. 739; Sneary *v.* Abdy (1876), 1 Ex. D. 299, C. A.; *Re* Curtoys, *Ex p.* Pillers (1881), 17 Ch. D. 653, C. A.

See, further, Part XXIII., *post.*

7063. —— On judgment in detinue—Goods being property of execution creditor.]—In an action of detinue for a mare, pltf. recovered judgment for £60, the value of the mare, to be reduced to 1*s.*, if she was returned to pltf. within two days, & £25 damages for the wrongful detention, & costs. After notice of the filing of a petition by deft., pltf. signed judgment & issued a writ of *fi. fa.* for the value of the mare, the damages, & his taxed costs. The sheriff seized deft.'s goods, but was restrained from levying by an injunction granted by the Ct. of Bkpcy. Subsequently pltf., seeing the mare in the possession of deft., who was using her with the trustee's permission, directed the sheriff to seize her under the writ, & the sheriff removed her forcibly:—*Held:* (1) the judgment not having been satisfied, the property in the mare was never divested from pltf., even though satisfaction was presented by the bkpcy. of deft., & he had a right to take possession of her peaceably, or to recover possession by legal process, but as he had seized her forcibly, he must pay his own costs; (2) the proper course to have adopted was for pltf. to have applied to the Ct. of Bkpcy. for an order on the trustee to deliver up the chattel.—*Re* WARE, *Ex p.* DRAKE (1877), 5 Ch. D. 866; 46 L. J. Bcy. 105; 36 L. T. 677; 25 W. R. 641, C. A.

Annotations:—**Mentd.** Eberles Hotels & Restaurant Co. *v.* Jonas (1887), 18 Q. B. D. 459, C. A.; Bradley & Cohn *v.* Ramsay (1912), 106 L. T. 771.

7064. Sale under writ of fi. fa.—After commencement of imprisonment—Goods seized before.]—A sale of the goods of insolvent under a *fi. fa.*, issued upon a warrant of attorney given by insolvent, is invalid if it take place after the commencement of insolvent's imprisonment, notwithstanding the goods may have been seized under the writ before the imprisonment.—KELCEY *v.* MINTER (1835), 1 Bing. N. C. 721; 4 L. J. C. P. 208; 131 E. R. 1295.

7065. —— Seizure & sale after imprisonment—Money had & received against creditors.]—An insolvent debtor executed a warrant of attorney, on which judgment was signed, & he afterwards went to prison. Subsequently his goods were seized & sold under a *fi. fa.* on the judgment, & the proceeds were paid to the judgment creditors. Insolvent petitioned, & his effects were assigned

attachment was issued against R. & Co., under Insolvent Act, 1875, & in June, creditors' assignees were appointed, to whom the trustee subsequently conveyed the lands, which were afterwards sold to pltfs. Defts. proceeded to advertise & sell the land under execution, & pltfs. sought to restrain them by injunction:—*Held:* the judgment creditors never obtained any lien on the property under their judgment.—JOHNS *v.* BARBOUR (1882), 3 R. & G. 43: 2 C. L. T. 603.—CAN.

z. —— *Registered after protection order.*]—After a protection granted by the Bkpt. Ct. to the person & property of a trader, & pending a settlement under the arrangement clauses, a creditor obtained a judgment against bkpt., registered it as a mtge. against his lands, & obtained an absolute order for sale in the L. E. Ct.:—*Held:* the order was erroneous, as the estate was in the official assignees.—*Re* KENNEDY'S ESTATE (1865), 17 I. Ch. R. 104; 10 Ir. Jur. 213.—IR.

a. —— *Under void warrant of attorney.*]—On Mar. 1, two traders executed to C. their bond, with warrant of attorney to confess judgment thereon, which was filed on Mar. 30, on which day judgment was marked & duly registered. No affidavit verifying the date of the execution of the bond & warrant, was filed. On Apr. 16 the traders were adjudicated bkpts. Before the bkpcy., C. levied a considerable amount of his judgment debt. By consent, & subject to the parties' rights, the money was lodged in ct.:—*Held:* the warrant was one to confess judgment in a personal action, within 20 & 21 Vict., c. 60, s. 334, & that, since the warrant had not been filed, or its execution verified, as required by that Act, the judgment was null & void against the assignees.—*Re* SHEIL & LYONS (1865), 17 Ir. Jur. 80.—IR.

b. —— ——.]—A. having entered up judgment against B., a trader, on a warrant of attorney given to A. by B., whilst in embarrassed circumstances, but before the committing of an act of bkpcy., issued execution against the goods of B., & levied the amount of the judgment. Within two months after the giving of the warrant of attorney, & after the execution of the writ of *fi. fa.*, by seizure & sale, a petition of bkpcy. was presented against B., under which he was adjudged a bkpt. No fraudulent preference was alleged to have existed:—*Held:* by 20 & 21 Vict. c. 60, s. 333, the warrant of attorney became a nullity, & the judgment was void, & the assignees of B. were entitled to maintain against A. an action of trover for the goods seized under the execution.—ORR *v.* DEVIN (1858), 9 I. C. L. R. 100; 4 Ir. Jur. 34.—IR.

c. —— *Obtained before insolvency—Sale of tenancy for arrears of rent.*]—A decree for arrears of rent of an undertenure was obtained against a tenant who became an insolvent, & whose tenure became vested in the official

under Insolvent Debtors Act, 1826 (c. 57):—*Held:* the assignee might recover the proceeds of the sale from the judgment creditors, as money had & received to the use of the assignee after the subscribing of the petition.—GYE *v.* HITCHCOCK (1835), 4 Ad. & El. 84; 111 E. R. 719.

7066. —— Under interpleader order between creditor & trustee—Trover by trustee against execution creditor—For difference between price & value at seizure.]—Goods were seized under a *fi. fa.* issued upon a judgment on a warrant of attorney, after an act of bkpcy. committed by debtor, against whom a fiat issued before the goods were sold. The assignees gave the sheriff notice not to sell, & he brought the parties before a judge by an interpleader order. The judge directed that the goods should be sold, & the money brought into ct. to abide the event of an issue to be tried between the execution creditor & the assignees. The latter made no objection, & did not suggest any other mode of disposing of the goods, which were sold by the sheriff's auctioneer. The execution creditor subsequently abandoned all claim to the goods, & the proceeds of sale were paid out of ct. to the assignees:—*Held:* the assignees were not entitled, as matter of law, to recover, in an action of trover against the execution creditor, the difference between the produce of the sale & the value of the goods at the time of the seizure, & it was no misdirection in the judge to state to the jury, that, if they thought the sale was *bonâ fide*, they might consider the produce of it as the measure of damages.—WHITMORE *v.* BLACK (1844), 2 Dow. & L. 445; 13 M. & W. 507; 14 L. J. Ex. 19; 4 L. T. O. S. 99; 8 Jur. 1103; 153 E. R. 211.

7067. —— Restrained by court—After presentation of petition.]—The ct. will, after the presentation of a petition, interfere to restrain a sale of the property of bkpt. by the sheriff, although the sheriff was in possession prior to the adjudication.—*Re* TIDEY (1870), 21 L. T. 685.

7068. Sequestration in Chancery suit—"Legal process"—1869 Act, s. 13.]—A sequestration in a Ch. suit is a "legal process" within the above sect.

Where the usual order directing a sale by the sequestrators had been made by the Ct. of Ch., & the owner of the property was adjudicated bkpt. before the sale:—*Held:* the Ct. of Bkpcy. had jurisdiction to restrain the sale.—*Re* BROWNE, *Ex p.* HUGHES (1871), L. R. 12 Eq. 137; 40 L. J. Bcy. 46; 19 W. R. 771.

Annotations:—**Folld.** *Re* Hastings, *Ex p.* Brown (1892), 61 L. J. Q. B. 654, D. C.; *Re* Pollard, *Ex p.* Pollard, [1903] 2 K. B. 41.

Writ of elegit.]—*See* Nos. 6929, 6930, *ante*, & *generally* EXECUTION.

7069. Garnishee order nisi—Before notice of bankruptcy.]—In an action by pltfs. as trustees, under a deed of assignment under 1861 Act, to recover a debt due from defts. to bkpt., it was admitted that a garnishee order for payment of the debt was served upon defts. before they had notice of the deed, & before its registration, & that they paid the debt to the judgment creditor in order to avoid execution, & because they could not otherwise avoid it:—*Held:* the payment was a good defence to the action as being compulsory, & under the sanction of a ct. of competent authority. *Semble:* if a garnishee had notice of a trust deed or bkpcy. before the time for showing cause against the *ex p.* order had elapsed, he would be bound to show cause, & if he were to pay the judgment creditor, instead of showing cause, the assignees could recover the debt from him.—WOOD *v.* DUNN (1866), L. R. 2 Q. B. 73; 7 B. & S. 94; 36 L. J. Q. B. 27; 15 L. T. 411; 15 W. R. 180, Ex. Ch.

Annotations:—**Consd.** Barnfather *v.* Barrow, Barrow, Page, & Draper (1877), 37 L. T. 231. **Reid.** European Bank *v.* Fox (1866), 15 L. T. 288. **Mentd.** London Corpn. *v.* Cox (1867), L. R. 2 H. L. 239, H. L.; Turnbull *v.* Robertson (1878), 47 L. J. Q. B. 294; Cronmire *v.* MacColla (1893), 9 T. L. R. 549, C. A.; Martin *v.* Nadel, [1906] 2 K. B. 26, C. A.; Ponsford, Baker *v.* Union of London & Smith's Bank, [1906] 2 Ch. 444, C. A.; Ranson *v.* Platt, [1911] 2 K. B. 291, C. A.

7070. —— Before sequestration in Scotland.]—A judgment for a sum of money, which was obtained in an action in Scotland, was extended to England under Judgments Extension Act, 1868 (c. 54), & the judgment creditor served a garnishee order on a firm, who owed a debt in England to the judgment debtor. After the service of the garnishee order *nisi* the whole estate of the judgment debtor was sequestrated under the Scottish bkpcy. law & transferred wherever situated to applt. as trustee for the creditors with power to recover all estates, debts, or money due to the judgment debtor. In an interpleader issue in England between the trustee & the judgment creditor as to their respective claims to the garnished debt:—*Held:* the judgment creditor having by the service of the garnishee order *nisi* obtained an attachment in England before the date of the sequestration, the Scottish Ct. had no power to interfere with the claim of the judgment creditor.—GALBRAITH *v.* GRIMSHAW, [1910] A. C.

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assignee. On an application for an order that the tenure should be sold for its own arrears:—*Held:* whether the arrears of rent became due before or after the insolvency of the judgment debtor, the decree-holder was entitled to sell the tenure in execution of his decree.—CHUNDER NARAIN SINGH *v.* KISHEN CHAND GOLECHA (1883), I. L. R. 9 Calc. 855.—**IND.**

d. —— *Sale by equitable mortgagee before adjudication.*]—Bkpt., before his adjudication, was in possession of premises subject to an equitable mtge. The equitable mtgee. recovered judgment & issued execution, & the premises were sold by the sheriff, & the purchaser lodged the proceeds of the sale with the sheriff. The adjudication took place four days afterwards, & the sheriff, being served with notice by the assignees, lodged the money in ct.:—*Held:* the equitable mtgee. was not entitled to have the money paid out to him, which he had recovered not as mtgee., but in the capacity of an unsecured creditor, & the money should be dealt with under 1872 Act, s. 54.—*Re* KEANE, [1899] 2 I. R. 798.—**IR.**

e. *Appointment of receiver — Whether stopped by assignment—Made after interim order.*]—Motion to make permanent an interim order, appointing pltfs. receivers of the interest of judgment debtor in the estate of her deceased father, refused, debtor having made a statutory assignment for benefit of creditors since the interim order was granted.—REINHARDT *v.* HUNTER (1905), 6 O. W. R. 421.—**CAN.**

f. *Charging order nisi — Before bankruptcy.*]—A charging order *nisi* ceases to be available upon the bkpcy. of the judgment debtor.—COMMON & SHELTON *v.* FOX (1886), 4 N. Z. L. R. 334.—**N.Z.**

g. *Charging order absolute—Whether stopped by bankruptcy.*]—*Semble:* proceedings on a charging order absolute would be stopped by bkpcy., if the debt had not been paid by the garnishee.—COMMON & SHELTON *v.* FOX (1886), 4 N. Z. L. R. 334.—**N.Z.**

h. *Attachment of debt—Whether stopped by bankruptcy.*]—A judgment creditor obtained an order of attachment under C. L. P. Act, 1857, s. 27, against a garnishee, but before execution issued against the garnishee, the estate of the judgment debtor was sequestered:—*Held:* by the sequestration the debt due by the garnishee passed to the judgment debtor's assignee, & the order of attachment ought to be set aside.—RENCLAND *v.* COX, *Ex p.* WALMSLEY (1866), 5 N. S. W. S. C. R. 347.—**AUS.**

j. —— ——.]—L. commenced an action against bkpt. to recover a sum for goods supplied, & notice under Contractor's Debts Act, s. 14, was served on V., for whom bkpt. was building a house under a contract. A subsequent notice under s. 7 that judgment had been obtained in the action was served on V., but prior to that bkpt. had committed an act of bkpcy., of which L. had notice, bkpt. subsequently voluntarily sequestrated his estate:—*Held:* (1) the first notice had the effect of an interlocutory injunction until the hearing, & ceased to be operative on judgment; (2) the second notice was an attachment, which was not completed by receipt of the debt before notice of an available

Sect. 10.—*Rights of execution creditors & restrictions thereon: Sub-sect.* 8. *Sect.* 11: *Sub-sect.* 1.]

508; 79 L. J. K. B. 1011; 103 L. T. 294; 54 Sol. Jo. 634; 17 Mans. 183, H. L.

Annotation:—**Apld.** Singer *v.* Fry (1915), 84 L. J. K. B. 2025.

7071. Attachment of debt—After curators appointed in Holland.]—A. & Co., merchants at Amsterdam, corresponded with B. & C., merchants in London. On Dec. 18, 1759, A. & Co. stopped payment, & on Jan. 2, 1760, they were declared bkpts., & curators or assignees appointed of their estates & effects. On Dec. 20, 1759, C., who was a creditor of bkpts. for £3,000 made an affidavit of his debt in the Mayor's Ct. of London, & attached their money in the hands of B., who was their debtor to the amount of £1,200. On Mar. 8, 1760, C. obtained judgment by default on the attachment, & thereupon a writ of execution issued against B., who was taken in execution, but being unable to pay the £1,200 gave C. his note payable in a month, on which C. caused satisfaction to be entered on the record of the judgment. A few days after, D., who had a power of attorney from the curators to act for them in England, filed a bill, making himself & the curators pltfs., praying that B. might account with them for the effects of bkpts. which were in his hands, might pay same over to D. for the use of the curators, & be restrained from paying or delivering them over to C. B. then filed a bill by way of interpleader, praying an injunction & that he might be at liberty to bring the £1,200 into ct., & the money was paid into the bank, pursuant to an order of the ct.:—*Held:* the stock purchased with the money paid into the bank, should be transferred to D., for the benefit of the creditors of bkpts., & C. should deliver up the note given by B. for £1,200 to be cancelled.—SOLOMONS *v.* ROSS (1764), 1 Hy. Bl. 131, n.; 126 E. R. 79.

Annotations:—**Consd.** Phillips *v.* Hunter (1795), 2 Hy. Bl. 402. **Dbtd.** Galbraith *v.* Grimshaw, [1910] A. C. 508, H. L. **Refd.** Sill *v.* Worswick (1791), 1 Hy. Bl. 665. **Mentd.** Folliott *v.* Ogden (1789), 1 Hy. Bl. 123; Alivon *v.* Furnival (1834), 1 Cr. M. & R. 277.

7072. —— —— Injunction.]—A. & Co., merchants at Amsterdam, on July 30, 1763, stopped payment. On Oct. 8, pltfs. were appointed curators of their estate & effects. At the time when A. & Co. stopped, & were declared bkpts., they were indebted to D. & Co., merchants of London, in £1,600, & B. & T. were indebted to A. & Co. in £2,131 18*s.* 11*d.* On Jan. 5, 1764, D. & Co. made an affidavit of their debt, & on the 12th of that month attached the money of A. & Co. in the hands of B. & T. Pending the attachment, the curators filed their bill against D. & Co. & B., T. being absent, praying, that an account might be taken of all dealings & transactions between bkpts. & B. & T., that the balance might be liquidated, & paid to pltfs., & that D. & Co. might be restrained by injunction, from any further proceedings against B. & T. in respect of the foreign attachment, or any security given in consequence thereof:—*Held:* pltfs. were entitled to recover from B. & T. the £2,131 18*s.* 11*d.*, & a perpetual injunction should issue against D. & Co. to restrain them from proceeding on the foreign attachment.—JOLLET *v.* DEPONTHIEN (1769), 1 Hy. Bl. 131, n.; 126 E. R. 80, L. C.

Annotations:—**Refd.** Hunter *v.* Potts (1791), 4 Term Rep. 182; Sill *v.* Worswick (1791), 1 Hy. Bl. 665; Phillips *v.* Hunter (1795), 2 Hy. Bl. 402.

7073. —— After act of bankruptcy—Restrained by injunction.]—Injunction against proceedings under a foreign attachment, by a joint creditor, upon a separate commission of bkpcy., overreaching the attachment by relation to the act of bkpcy.

The commission has relation to the act of bkpcy. . . . If a commission was afterwards taken out, the effect of the attachment would be defeated, upon the same doctrine that from the date of that prior act of bkpcy., the property ceased to belong to bkpts., & by relation to that prior act of bkpcy. belonged to the assignees (LORD ELDON, C.)—BARKER *v.* GOODAIR (1805), 11 Ves. 78; 32 E. R. 1017, L. C.

Annotations:—**Consd.** Dutton *v.* Morrison (1810), 17 Ves. 193, L. C.; Pennell *v.* Roy (1853), 3 De G. M. & G. 126. L. JJ. **Refd.** Brickwood *v.* Miller (1817), 3 Mer. 279. **Mentd.** Dibb *v.* Brooke, [1894] 2 Q. B. 338, D. C.

7074. Attachment of debt abroad—With knowledge of assignment in England—Money had & received.]—If, after the assignment of bkpt.'s estate, a creditor knowing it, & residing in England, attach the money of bkpt. abroad, the assignees

act of bkpcy., & was void.—*Re* DOSSI, *Ex p.* OFFICIAL ASSIGNEE & LANGDON (1905), 5 S. R. N. S. W. 204.—**AUS.**

k. —— —— *Magistrates' Courts Act*, 1893.]—Magistrates' Cts. Act, 1893, s. 137, does not give claimants under attachment orders which have not been completed any rights as against the assignee in bkpcy.—COMMERCIAL UNION ASSURANCE CO. *v.* MACGIBBON & CO. (1905), 25 N. Z. L. R. 43.—**N.Z.**

l. —— —— *Intervening before actual payment.*]—The attachment of a debt is by legal process, & if bkpcy. intervenes before actual payment, the right of the creditor is specifically destroyed by Bkpcy. Act, s. 80.—*Re* THOMAS (1910), 29 N. Z. L. R. 510.—**N.Z.**

—— —— *Bankruptcy in another country.*]—*See* cases in Sect. 4, sub-sect. 6, *ante*.

m. —— —— *Money in hands of official assignee.*]—In Mar., 1897, B. mortgaged his stock-in-trade & all outstandings & money then due & owing & thereafter to become due & payable to him. B. remained in possession. In July, 1899, pltf. sued B. on the mtge. deed. In Aug., pltf. gave notice to a person indebted to B. that pltf. claimed the amount of the debt under his mtge. In Sept. B. was adjudged an insolvent, & the usual vesting order was made. In Oct. pltf. obtained a decree by which it was ordered that B. should pay the principal & interest due under the mtge. deed & that in default of payment the mortgaged premises should be sold. In Feb., 1900, the person indebted to B. paid the amount of his debt to the official assignee. In Sept. an order was made in pltf.'s suit against insolvent, directing that the decree should be executed by the attachment of the money in the hands of the official assignee:—*Held:* pltf. was not entitled to an order that the official assignee should pay over the money.—PUNINTHAVELU MUDALIAR *v.* BHASHYAM AYYANGAR (1901), I. L. R. 25 Mad. 406.—**IND.**

n —— —— *Fund in court.*]—I., entitled to a charge upon land, died under age, unmarried & intestate, leaving her father, P., her sole next-of-kin, who, before her death, had been discharged under Insolvent Act. C., a son of P., took out administration to I. The amount of the charge was realised in the I. E. Ct., & paid into the Ct. of Ch., where it was transferred in the Accountant-General's books to the separate credit of the administrator of I.:—*Held:* P. had an interest in that fund which could be attached by a charging order. *Semble:* the administrator of I. could not rely on the insolvency as an objection to the charging order.—BROWNRIGG *v.* COLCLOUGH (1858), 7 I. Ch. R. 524; 10 Ir. Jur. 329.—**IR.**

o. —— —— *What evidence admissible—In interpleader issue between trustee for creditors & judgment creditor.*]—BERTRAND *v.* HEAMAN (1896), 11 Man. L. R. 205.—**CAN.**

p. *Execution under civil bill decree—Lodged with sheriff before protection order.*]—Liberty given to levy the amount of a civil bill decree lodged in the hands of the sheriff before protection order.—*Re* P. J. W., [1896] 1 I. R. 44; 30 I. L. T. Jo. 70.—**IR.**

r. *Charging order on land—Whether stopped by bankruptcy.*]—A charging order affecting land ceases to be available upon the bkpcy. of the judgment debtor.—BLAIKIE *v.* MALCOLMSON (1886), 4 N. Z. L. R. 408.—**N.Z.**

s. *Diligence in Scotland on English debt—Incurred before English adjudication.*]—An English bkpt., who had been some months resident & engaged in business in Scotland, & to whom a personal protection had been granted in the course of proceedings in bkpcy. in England:—*Held:* not thereby protected from diligence on an English debt incurred before the date of the adjudicated in bkpcy.—THOMAS *v.* PELLAT (1861), 23 Dunl. (Ct. of Sess.) 1349.—**SCOT.**

may recover it in an action for money received to their use.—HUNTER *v.* POTTS (1791), 4 Term Rep. 182 ; 100 E. R. 962.

Annotations :—**Expld.** Hovil *v.* Browning (1806), 7 East, 154. **Apld.** *Re* Oriental Steam Co. (1874), 22 W. R. 622. **Distd.** Minna Craig S.S. Co. *v.* Chartered Mercantile Bank of India, London & China, [1897] 1 Q. B. 55. **Refd.** Brickwood *v.* Miller (1817), 3 Mer. 279 ; Scott *v.* Bentley (1855), 3 Eq. Rep. 428. **Mentd.** Sill *v.* Worswick (1791), 1 Hy. Bl. 665 ; Smith *v.* Buchanan (1800), 1 East, 6 ; Potter *v.* Brown (1804), 5 East, 124 ; Johnstone *v.* Beattie (1843), 10 Cl. & Fin. 42, H. L. ; Jefferys *v.* Boosey (1854), 4 H. L. Cas. 819 ; Gardiner *v.* Houghton (1862), 2 B. & S. 743.

7075. —— After act of bankruptcy—Money had & received.]—If after an act of bkpcy. committed, but before an assignment, a creditor of bkpt. makes an affidavit of debt in England, by virtue of which he attaches, & receives, after the assignment, money due to bkpt. in the West Indies, the assignees may recover the money in an action for money had & received.—SILL *v.* WORSWICK (1791), 1 Hy. Bl. 665 ; 126 E. R. 379.

Annotations :—**Distd.** Brickwood *v.* Miller (1817), 3 Mer. 279. **Refd.** Phillips *v.* Hunter (1795), 2 Hy. Bl. 402 ; Hovil *v.* Browning (1806), 7 East, 154 ; Scott *v.* Bentley (1855), 1 K. & J. 281 ; *Re* Oriental Steam Co. (1874), 22 W. R. 622. **Mentd.** Johnstone *v.* Beattie (1843), 10 Cl. & Fin. 42, H. L. ; Simpson *v.* Fogo (1863), 1 Hem. & M. 195 ; *Re* Elliott, Elliott *v.* Johnson (1891), 39 W. R. 297 ; *Re* Queensland Mercantile & Agency Co., *Ex p.* Australasian Investment Co., *Ex p.* Union Bank of Australia, [1891] 1 Ch. 536 ; Minna Craig S.S. Co. *v.* Chartered Mercantile Bank of India, London & China, [1897] 1 Q. B. 55 ; Didisheim *v.* London & Westminster Bank, [1900] 2 Ch. 15, C. A. ; Dulaney *v.* Merry, [1901] 1 K. B. 536.

7076. —— After commission issued—Money had & received.]—A., B., & C., were partners in trade in England, A. & B. resided in England, & C. went to a foreign country for the purpose of managing the concerns of the house in that country. D. was resident in England, where a debt was contracted by D. to A., B., & C. D. became insolvent, & C., knowing that D. had stopped payment, &, after a commission had in fact issued against D., attached in the names of himself & his partners a debt due to D. in the foreign country by legal process & obtained payment of it under the judgment of a ct. of justice of that country :—*Held :* the assignees of D., had a right to recover the money so received by C., in an action against A., B., & C., for money had & received to the use of the assignees. —PHILLIPS *v.* HUNTER (1795), 2 Hy. Bl. 402 ; 126 E. R. 618.

Annotations :—**Distd.** Martin *v.* Nicolls (1830), 3 Sim. 458. **Consd.** Reynolds *v.* Wedd (1838), 4 Bing. N. C. 694. **Mentd.** Smith *v.* Nicolls (1839), 5 Bing. N. C. 208 ; Reimers *v.* Druce (1857), 23 Beav. 145.

7077. Attachment of goods abroad—Bankruptcy subsequent.]—By a charter-party B. hired a ship to convey a cargo to Hayti, & engaged to find a cargo for the homeward voyage. On the ship's arrival at Hayti, B. assigned the cargo to C. as a security for advances made by him. The hire of the ship not having been paid, defts., the owners, under the judgment of a ct. at Hayti, attached the cargo in the hands of C. to discharge defts.' claim for the hire. B. having declined to find a cargo for the homeward voyage, the captain procured one for defts., who received the freight on its arrival in London. B., subsequently to the assignment, became bkpt. :—*Held :* his assignees could not recover from defts. the proceeds of the cargo attached at Hayti, or of the homeward freight.—KYMER *v.* LARKIN (1828), 5 Bing. 71 ; Dan. & Ll. 74 ; 2 Moo. & P. 183 ; 6 L. J. O. S. C. P. 237 ; 130 E. R. 987.

SECT. 11.—AVOIDANCE OF SETTLEMENTS.

See, now, 1914 Act, s. 42.

SUB-SECT. 1.—" ANY SETTLEMENT OF PROPERTY."

See, now, 1914 Act, s. 42 (4).

7078. General rule.]—To bring a transfer of personal property within 1883 Act, s. 47, it must be manifest from the nature & circumstances of the case that it was the object of the transferor that the subject-matter of the transfer should permanently remain the property of the transferee. —*Re* VANSITTART, *Ex p.* BROWN, [1893] 1 Q. B. 181 ; 62 L. J. Q. B. 277 ; 67 L. T. 592 ; 57 J. P. 132 ; 41 W. R. 32 ; 9 T. L. R. 14 ; 37 Sol. Jo. 12 ; 9 Morr. 280 ; 5 R. 38.

Annotations :—**Folld.** *Re* Tankard, *Ex p.* Official Receiver, [1899] 2 Q. B. 57. **Apprvd.** *Re* Plummer, [1900] 2 Q. B. 790, C. A. **Consd.** Hubbard *v.* Hubbard (1901), 84 L. T. 441. **Refd.** Tasker *v.* Tasker, [1895] P. 1 ; *Re* Branson, *Ex p.* Moore, [1914] 3 K. B. 1086, C. A.

7079. ——.]—" Settlement " in 1883 Act, s. 47, means such a conveyance or transfer by the donor as contemplates the retention of the property by the donee, either in its original form or in such a form that it can be traced, & does not extend to a conveyance or transfer of property, which cannot be traced, *e.g.*, where there is a gift of money to be employed in a business, or in the purchase of a business, & the money is so employed, or spent, the business itself not being settled.—*Re* PLUMMER, [1900] 2 Q. B. 790 ; 83 L. T. 387, C. A.

t. *Concurrent remedies—Creditor not bound to elect.*]—*Held :* deft. was not put to his election, but might proceed in insolvency, as well as upon his *fi. fa.*—THORNE *v.* TORRANCE (1866), 16 C. P. 445 ; *affd.* (1868), 18 C. P. 29 ; *dbtd.* MCLEAN *v.* GARLAND (1885), 13 S. C. R. 366.—**CAN.**

w. *Right of sheriff—To interplead.*]—Where a sale has been made under an execution against a judgment debtor who after the sale makes an assignment in insolvency, the sheriff has a right to an interpleader when the proceeds are claimed by the official assignee.—BRAND *v.* BICKLE (1868), 4 P. R. 191. —**CAN.**

x. —— ——.]—BURNS *v.* STEEL, 2 C. L. J. 189.—**CAN.**

y. —— *To enlargement of time for return.*]—The sheriffs levied an execution in July, 1841, when they received notice from a third party, a creditor of deft., not to pay over the amount of the execution levied, on an allegation that deft. had committed an act of bkpcy., & that it was intended to have a commission issued, but no further steps were taken in that respect. On the sheriffs moving that the time for the return of the *fi. fa.* be extended, offering to lodge the amount levied in ct., the ct. refused the motion, but without costs, as it did not appear that there was any collusion between the sheriffs & the creditor.—POWER *v.* O'BRIEN (1841), 4 I. L. R. 8.—**IR.**

z. —— —— *& to indemnity.*]—The mere serving out of a commission of bkpcy. against deft., is sufficient to entitle the sheriff to an indemnity or to an enlargement of the time for returning a *fi. fa.*—CROWTHER *v.* NELSON (1840), 2 Jebb & S. 403.—**IR.**

a. *Costs of execution creditor.*]—Creditors who have proceeded by attachment up to the date of the declaration of insolvency are entitled to be allowed out of the estate their costs.—*Re* INSOLVENCY OF MCDONALD & RYAN (1861), 4 Nfld. L. R. 556.—**NFLD.**

b. —— *Lien.*]—CONVERSE *v.* MICHIE (1865), 16 C. P. 167.—**CAN.**

c. —— —— *Insolvent Act,* 1865, *ss.* 3, 12, 13.]—*Re* ROSS (1866), 3 P. R. 394.—**CAN.**

d. —— —— *Executions Act, R. S. M.,* 1902 (*c.* 58)—*Assignments Act, R. S. M.,* 1902 (*c.* 8).]—THORDARSON *v.* JONES (1908), 18 Man. L. R. 223.—**CAN.**

e. *No appeal—From order making over to official assignee proceeds of sale in execution.*]—INDUR CHUNDER DOOGAR *v.* OFFICIAL ASSIGNEE (1868), 11 W. R. 100.—**IND.**

PART XX. SECT. 11, SUB-SECT. 1.

7078 i. *General rule—Insolvency Act,* 1890 (*Victoria*), *s.* 72.]—To constitute a " settlement " within the above sect. it is necessary to show that the gift was intended by the donor to be kept in its original form, or in the form of an investment for the benefit of the donee.—JACK *v.* SMAIL (1905), 2 C. L. R. 684.—**AUS.**

a. *Conveyance of live-stock & furniture to trustees—On settlor entering into business.*]—A farmer being about to enter into business as a butcher executed a voluntary settlement in favour of his wife & children of live-stock & furniture, which comprised a considerable part of the settlor's assets.

Sect. 11.—*Avoidance of settlements: Sub-sect.* 1.]

Annotation :—**Consd.** *Re* Branson, *Ex p.* Moore, [1914] 3 K. B. 1086, C. A.

7080. Conveyance of real estate to trustees—For settlor for life, etc.]—B. in 1718 after marriage conveyed his real estate to trustees, in consideration of 5*s.* & other valuable considerations, in trust for himself for life, to his wife for life, then to his eldest son if he survived his father & mother, & so to the next son, etc. B. afterwards became bkpt. :—*Held :* this was a conveyance which fell directly within 1 Jac. 1, c. 15, s. 5, & trustees must convey to the assignees under the commission against B.—WALKER *v.* BURROWS (1745), 1 Atk. 93 ; 26 E. R. 61, L. C.

Annotations :—**Refd.** Glaister *v.* Hewer (1802), 8 Ves. 195 ; Holloway *v.* Milland (1816), 1 Madd. 414 ; *Re* Tetley, *Ex p.* Jeffrey *v.* Tetley (1896), 3 Mans. 321, C. A. **Mentd.** Smith *v.* Keating (1488), 6 C. B. 136 ; Scarf *v.* Soulby (1849), 1 H. & Tw. 426, L. C.

7081. Advance only repayable if legacy not given to children—Legacy given to children.]—A trader advanced half the money for the renewal of a lease, the lessee giving a note to repay the money, unless she should by will give the estate to one of his children. She bequeathed the estate to his daughter, & the father became a bkpt. before the decease of testatrix :—*Held :* a moiety of the estate vested in the assignee, under 1 Jac. 1, c. 15, s. 5.—FRYER *v.* FLOOD (1782), 1 Bro. C. C. 160 ; 28 E. R. 1053, L. C.

Annotations :—**Apld.** Glaister *v.* Hewer (1802), 8 Ves. 195, L. C. **Distd.** *Ex p.* Shorland (1802), 7 Ves. 88, L. C.

7082. Gift—Of money to son—1 Jac. 1, c. 15, s. 5.]—A mere gift of money by bkpt. to his son :—*Held :* not within the above sect.—*Ex p.* SHORLAND (1802), 7 Ves. 88 ; 32 E. R. 36, L. C.

Annotations :—**Consd.** *Re* Player, *Ex p.* Harvey (1885), 15 Q. B. D. 682, D. C. **Refd.** *Re* Smith, *Ex p.* Smith (1812), 1 Rose, 208, L. C. ; *Re* Hunt, *Ex p.* Simpson (1844), 14 L. J. Bcy. 1.

7083. —— —— ——.]—Money given by a father, a trader, to his son to advance him in a partnership trading concern, is not within the above sect., & cannot be recovered from the son by the assignee of the father who afterwards becomes bkpt.—KENSINGTON *v.* CHANTLER (1813), 2 M. & S. 36 ; 105 E. R. 295.

Annotations :—**Consd.** *Re* Hunt, *Ex p.* Simpson (1844), 14 L. J. Bcy. 1 ; *Re* Player, *Ex p.* Harvey (1885), 15 Q. B. D. 682, D. C. ; *Re* Vansittart, *Ex p.* Brown, [1893] 1 Q. B. 181. **Refd.** *Re* Tankard, *Ex p.* Official Receiver, [1899] 2 Q. B. 57. **Mentd.** Linley *v.* Bates (1832), 2 Cr. & J. 659.

7084. —— —— **6 Geo. 4, c. 16, s. 73.**]—A gift of money by a man to his son for the purpose of paying his bills :—*Held :* not within the above sect.—ABELL *v.* DANIELL (1829), Mood. & M. 370.

Annotations :—**Refd.** *Re* Hunt, *Ex p.* Simpson (1844), 14 L. J. Bcy. 1 ; Bills *v.* Smith (1865), 6 B. & S. 314.

7085. —— **Of jewellery, etc.—1883 Act, s. 47.**]—A donor within two years of his bkpcy. gave jewellery & furniture, with an intention that the donee should retain them for an indeterminate time, but without imposing any restriction on the power of alienation :—*Held :* the gift was a settlement within the above sect., & void as against the trustee.—*Re* TANKARD, *Ex p.* OFFICIAL RECEIVER, [1899] 2 Q. B. 57 ; 68 L. J. Q. B. 670 ; 80 L. T. 500 ; 47 W. R. 624 ; 15 T. L. R. 332 ; 43 Sol. Jo. 440 ; 6 Mans. 188.

Annotations :—**Refd.** *Re* Plummer, [1900] 2 Q. B. 790, C. A. ; *Re* Branson, *Ex p.* Moore, [1914] 3 K. B. 1086, C. A. **Mentd.** *Re* Hobbins, *Ex p.* Official Receiver (1899), 6 Mans. 212.

7086. —— —— —— **Gift to wife.**]—Upon an application under the above sect. to avoid a gift of valuable jewellery by bkpt., it appeared that such jewellery had been given by him as a present to his wife within two years of his bkpcy. There was no transfer in writing :—*Held :* it must be taken that bkpt. contemplated the retention by his wife of the present which he had given her, & the gift was void against the trustee.—*Re* VANSITTART, *Ex p.* BROWN, [1893] 1 Q. B. 181 ; 62 L. J. Q. B. 277 ; 67 L. T. 592 ; 57 J. P. 132 ; 41 W. R. 32 ; 9 T. L. R. 14 ; 37 Sol. Jo. 12 ; 9 Morr. 280 ; 5 R. 38.

Annotations :—**Folld.** *Re* Tankard, *Ex p.* Official Receiver, [1899] 2 Q. B. 57. **Apprvd.** *Re* Plummer, [1900] 2 Q. B. 790, C. A. **Consd.** Hubbard *v.* Hubbard (1901), 84 L. T. 441. **Refd.** Tasker *v.* Tasker, [1895] P. 1 ; *Re* Branson, *Ex p.* Moore, [1914] 3 K. B. 1086, C.A.

7087. Purchase in joint names of bankrupt & wife—1 Jac. 1, c. 15, s. 5—Purchase with wife's

The settlement was not registered, & shortly afterwards the settlor, without the consent of the trustee, converted the settled chattels into money. About four years afterwards the settlor became bkpt. :—*Held :* the settlement was void against creditors under the bkpcy. —TAYLOR *v.* BOWLES' OFFICIAL ASSIGNEE, [1886] 5 N. Z. L. R. 32.—**N.Z.**

b. *Settlement by woman afterwards becoming insolvent—Insolvency Act,* 1897 (*Vict.*), *s.* 100 *not applicable.*]—LORIMER *v.* SMAIL (1911), 12 C. L. R. 504.—**AUS.**

c. *Deed of assignment for creditors—Not a "settlement" within Insolvency Statute,* 1871, *s.* 70.]—DAVEY *v.* DANBY (1887), 13 V. L. R. 957.—**AUS.**

7082 i. *Gift—Of money to son—Pretence of paying salary.*]—A donation made by insolvent to his son on pretence of paying him a salary for the time he worked with him after he attained his majority :—*Held :* gratuitous & made in fraud of his creditors.

In an action to set aside such donation, the nature of the claim & the notorious insolvency of the donor will be taken into account in establishing a fraud.—LEBLANC *v.* GILLIN (1882), 11 R. L. O. S. 341.—**CAN.**

d. —— *Of money*—1883 *Act, s.* 76.]—*Held :* the words "settlement of property" in the above sect. included the handing over of a sum of money.—*Re* KINLEY, *Ex p.* OFFICIAL ASSIGNEE (1886), 4 N. Z. L. R. 385.—**N.Z.**

7086 i. —— *Of motor car to wife.*]—*Held :* a gift of a motor car by bkpt. to his wife without writing to support it was a settlement within 1898 Act, s. 55.—*Re* HERMAN, *Ex p.* OFFICIAL ASSIGNEE (1916), 16 S. R. N. S. W. 264.—**AUS.**

7086 ii. —— *Of personal property to wife—Before Married Women's Property Act,* 1882 (*c.* 75).]—A gift of personal property by a husband to his wife, made previously to the passing of the above Act, without the intervention of a trustee, is void as against the husband's assignee in bkpcy., notwithstanding that the chattels may have been regarded by the husband & wife & their friends as the property of the wife.—*Re* WILSON (1890), 24 I. L. T. Jo. 345.—**IR.**

7086 iii. —— *Of profits of business to wife.*]—In the absence of fraud, a husband can make valid gifts to his wife from time to time, of the earnings & profits of a business afterwards claimed by the wife as her separate estate, although the husband may have been allowed to interfere in the management of the business.—CLINTON *v.* SELLARS (1908), 7 W. L. R. 615 ; 1 Alta. L. R. 135,—**CAN.**

f. —— *Of property to daughter—Donor contemplating insolvency.*]—M., on Apr. 26, 1873, made a deed of property without consideration to his daughter, continuing himself in possession of the property until Oct., 1875, when he failed. Previous to the date of the deed two banks, of one of which M. was president, & a large shareholder, had suspended ; & a firm in which he was concerned had failed two days before the date of the deed. After the making of the deed M. was challenged in reference to it, & said it was all he could do, in the circumstances, to save his property :—*Held :* the deed must be set aside, even had it not been shown that M. a few days after making the deed admitted to his creditor that it was all he could do to save his property.—FORD *v.* MILES (1878), R. E. D. 323.—**CAN.**

h. —— —— *On donor going into business.*]—A donation made by a father to his daughter at a time when he was perfectly solvent, but with a view to going into business, & securing him against any debts he might contract, was set aside at the suit of the assignee of the donor after his insolvency, although the creditors represented by him were all subsequent to the donation.—MURPHY *v.* STEWART (1882), 12 R. L. O. S. 501.—**CAN.**

j. *Policy of life insurance in wife's favour—Premiums paid by bankrupt.*]—A husband, who had executed no ante-nuptial marriage contract, took a policy of insurance on his own life in favour of his wife & her heirs, or assignees, & paid the annual premiums from his own funds. A few weeks before his death he was sequestrated :—*Held :* the policy had been taken out as a provision for his wife, & was not to be regarded as a

money over which bankrupt has power of disposal.]—A purchase by a man in the joint names of himself & his wife, if he was a trader at the time & he afterwards becomes bkpt., is void against the creditors, within the above sect. So, if the purchase was made with the wife's money, if previously received & disposable by him as his own, not bound by any agreement with a trustee, & the receipt not connected with the purchase.—GLAISTER *v.* HEWER (1802), 8 Ves. 195; 32 E. R. 329; *subsequent proceedings* (1803), 9 Ves. 12, L. C.

Annotations:—**Folld.** Ryland *v.* Smith (1836), 1 My. & Cr. 53. **Refd.** Wombwell *v.* Laver (1828), 2 Sim. 360. **Mentd.** Barrack *v.* M'Culloch (1856), 3 K. & J. 110; Drew *v.* Martin (1864), 2 Hem. & M. 130.

7088. Purchase of stock in names of minor son & trustee—1 Jac. 1, c. 15, s. 5.]—Stock purchased by a father, afterwards a bkpt., in the names of his son, a minor, & a trustee:—*Held:* within the above sect.—BROWN *v.* BELLARIS (1820), 5 Madd. 53; 56 E. R. 815.

7089. Declaration of trust in separation deed—Whether annulled by resumption of cohabitation.]—By a separation deed, a debt due to the wife before marriage was declared to be held by debtor, who joined in the deed, upon trust for the wife & husband successively for life, & then for a child of the marriage absolutely. The husband & wife resumed cohabitation, & the husband became a bkpt. A demurrer, for want of equity, by the husband's trustee in bkpcy. on the ground (*inter alia*) that the deed was not a settlement, but a mere separation deed annulled by the resumption of cohabitation, was overruled.—RUFFLES *v.* ALSTON (1875), L. R. 19 Eq. 539; 44 L. J. Ch. 308; 32 L. T. 236; 23 W. R. 465.

Annotation:—**Folld.** *Re* Spark's Trusts, Spark *v.* Massey, [1904] 1 Ch. 451.

7090. Settlement of policies—Substituted for existing policies surrendered—Effect of Married Women's Property Act, 1870 (c. 93), on 1869 Act, s. 91.]—After the passing of Married Women's Property Act, 1870, a trader being entitled to two policies of assurance on his own life, upon each of which one premium only had been paid, surrendered them to the insurance office, & obtained in lieu thereof two new policies under the same premiums, & expressed upon the face of them to be for the benefit of his wife, if living at his death, for her sole & separate use, & bearing indorsements to the effect that they should be entitled to the same privileges as policies opened with the co. at the

donation, & was not revoked by the husband's sequestration.—GALLOWAY *v.* CRAIG (1861), 4 Macq. 267; 23 Dunl. (Ct. of Sess.) 12; 33 Sc. Jur. 649, H. L.—**SCOT.**

k. *Conveyance of property to trustees for wife—Husband's father party to settlement.*]—At the time of making a post-nuptial settlement, to which bkpt.'s father was a party, the husband was solvent, but ten years later he was rendered bkpt. The husband's trustee brought an action to have it declared that the provision made for the wife was excessive in amount, & that being *quoad excessum* a *donatio inter virum et uxorem*, it had to that extent been revoked by the husband's bkpcy. & was available for his creditors:—*Held:* the doctrine of *donatio inter virum et uxorem* did not apply, in respect that the provision to the wife was contractual between bkpt. & his father.—CORBIDGE *v.* SOMERVILLE'S TRUSTEES, [1911] S. C. 1326; 48 Sc. L. R. 1027; 2 S. L. T. 225.—**SCOT.**

l. *Purchase of land in wife's name*—1898 *Act, s. 55.*]—If bkpt. has paid for land purchased in his wife's name with his own money, that is just as much a settlement within the above sect. as if he had taken a conveyance to himself & then transferred the property to his wife.—*Re* HERMAN, *Ex p.* OFFICIAL ASSIGNEE (1916), 16 S. R. N. S. W. 264.—**AUS.**

m. —— *Debtors & Creditors Act*, 1876.]—H. bought a piece of land & directed the vendor to transfer it to his wife, in whose name a certificate of title issued. The wife died, leaving a son. The husband filed a declaration of insolvency under the above Act, within three years from the date of the transfer. In a suit by the creditors' trustee to have the certificate of title declared void:—*Held:* (1) although the certificate of title was bad as against pltf. as trustee, it was good as between bkpt. & the heir-at-law; (2) after satisfaction of the claims under the bkpcy., & the payment of all costs, the residue of the land, or the proceeds therefrom, belonged to the heir-at-law.—HALL *v.* HALL, 2 J. R. N. S. 259.—**N.Z.**

n. —— *Buildings erected thereon by bankrupt.*]—N. & D. his wife, were married in 1876, shortly after which time D., who alleged that she was possessed of £90, £55 of which was in the hands of her brothers, placed in N.'s hands £30, to invest for her benefit. In 1879, N., who carried on business as a storekeeper at F., assigned his estate, but arranged with his trustees to retain his assets in his own hands, contingently on his paying his debts in full by his own promissory notes. Next month he bought, in his wife's name simply, but without her knowledge, an allotment of land at C., paying a deposit of £20 upon it. In Dec., 1879, N. failed in paying an instalment of his debt to his trustees, when his wife's brothers paid to them £510, in full discharge, & in the same month paid £45 to complete the purchase of the above land, but the completion was delayed till 1881. In 1880 N. removed to C. having spent £100 of his own money on buildings suitable for his trade on the land, & started business there. In Apr., 1881, a certificate of title to the land was issued to D., in its terms giving her a power of appointment over the land apart from her husband. Upon the memorandum of transfer N. wrote a consent thereto. Rent for the land was paid by N.'s firm in cheques, which were paid by N. into his own private bank account. At various times, also, sums of money amounting to over £800 were expended on buildings on the land by N. In 1883 N. became insolvent:—*Held:* both the contract of 1879 & the transfer of 1881 were void against N.'s subsequent creditors as voluntary settlements made by N. in contemplation of trade.—LLOYD *v.* BLUMENTHAL (1884), 5 N. S. W. Eq. 99.—**AUS.**

p. —— *Payments by bankrupt of instalments of purchase money & interest*—1908 *Act, ss.* 75, 76.]—The term of an agreement for the purchase of land, into which bkpt.'s wife had entered, was extended by a second agreement, executed more than three years before the adjudication, in which bkpt. joined to guarantee payment of the balance of the purchase-money & interest thereon. Under that agreement bkpt. paid an instalment of purchase-money & some interest less than three years before his adjudication. The official assignee claimed to have such payments declared void as settlements of property in her favour within 1908 Act, s. 75. A second instalment of purchase-money & some interest, which bkpt. paid within two years before his adjudication, were claimed from the wife by the official assignee under ss. 75, 76:—*Held:* (1) the first instalment of purchase-money was a sum settled on his wife within s. 75, but was not recoverable, as it was not a voluntary payment or transfer of property; (2) the second instalment of purchase-money was recoverable under s. 76; (3) the first payments of interest were not recoverable under s. 75, ; (4) the sums paid for interest within the two years were not recoverable under s. 76.—OFFICIAL ASSIGNEE *v.* TOSSWILL, [1919] N. Z. L. R. 91.—**N.Z.**

r. —— *Part of purchase-money belonging to wife.*]—The trustee of a bkpt. estate brought an action against bkpt. & his wife, concluding for declarator that a conveyance of certain house property had been fraudulently taken by bkpt. in favour of his wife while he was insolvent, or otherwise "that the disposition was a donation *stante matrimonio*, &, as such, revocable by the trustee, & in either event, bkpt. & his wife should be ordained to denude & convey the subjects to the trustee, &, if necessary, that there should be a decree of reduction. The defence was that part of the purchase-money belonged to the wife's estate:—*Held:* the pursuer was not entitled to an issue of partial donation.—TOLMIE *v.* CRUICKSHANKS (1859), 21 Dunl. (Ct. of Sess.) 840.—**SCOT.**

s. *Assignment to wife of interest under agreement for sale of land—Buildings erected thereon by bankrupt with wife's money.*]—A few days before making a general assignment for the benefit of his creditors to pltf., W. assigned to his wife his interest under an agreement for sale of land, on which he had paid $200, & had erected on the land a building, the money for which was supplied by his wife, on the understanding that she was to have the property.:—*Held:* the assignment by W. to his wife should be set aside.—SMITH *v.* SUGARMAN (1910), 13 W. L. R. 671; 3 Alta. L. R. 108.—**CAN.**

7090 i. *Settlement of policies—For benefit of children.*]—L. assured his life for £1,000, & voluntarily assigned the policy to P. as trustee for his, L.'s, children. He then became insolvent. The policy was settled in circumstances which rendered the settlement void against the trustee in insolvency both under 13 Eliz., c. 5 & Insolvency Statute, 1871 (No. 379), s. 70:—*Held:* the settlement of the policy was valid as against the trustee in insolvency under Life Assurance Cos. Act, 1873 (No. 474), s. 37, & P. was entitled to

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date of the original policies. Within two years after obtaining the new policies he filed a petition for liquidation under 1869 Act, & shortly afterwards he died:—*Held:* the transaction did not amount to a voluntary settlement, within 1869 Act, s. 91, & was not void as against the trustee, as the original policies had no surrender value at the time of the substitution of the new policies, & the premiums upon the new policies had been paid out of the wife's separate property.—HOLT *v.* EVERALL (1876), 2 Ch. D. 266; 45 L. J. Ch. 433; 34 L. T. 599; 24 W. R. 471, C. A.

7091. Advances to set son up in business.]—Bkpt., more than two years before bkpcy., advanced money to his son to enable him to set up in business:—*Held:* not a voluntary settlement within 1883 Act, s. 47.—*Re* PLAYER, *Ex p.* HARVEY (1885), 15 Q. B. D. 682; 54 L. J. Q. B. 554; 2 Morr. 265, D. C.

Annotations:—**Apld.** Wenman *v.* Lyon, [1891] 1 Q. B. 634, D. C. **Expld.** *Re* Vansittart, *Ex p.* Brown, [1893] 1 Q. B. 181. **Apld.** *Re* Tankard, *Ex p.* Official Receiver, [1899] 2 Q. B. 57. **Expld. & Apprvd.** *Re* Plummer, [1900] 2 Q. B. 790, C. A. **Mentd.** *Re* Ashcroft, *Ex p.* Todd (1887), 19 Q. B. D. 186, C. A.; Hubbard *v.* Hubbard (1901), 84 L. T. 441.

7092. Agreement to transfer shares to trustees—Subsequent transfer in pursuance of agreement—No covenant to transfer.]—Bkpt. within ten years of his bkpcy. entered into an agreement with trustees, by way of voluntary settlement on his wife & children, by which the trustees were to stand possessed of shares in a co., so soon as they were transferred. There was no covenant by bkpt. to transfer the shares. The shares were transferred in pursuance of the agreement within two years of his bkpcy., & while bkpt. was solvent:—*Held:* the agreement was not a "settlement," but the transfer was a "settlement," & being voluntary, was void as against the trustee in bkpcy.—*Re* ASHCROFT, *Ex p.* TODD (1887), 19 Q. B. D. 186; 56 L. J. Q. B. 431; 57 L. T. 835; 35 W. R. 676; 3 T. L. R. 641; 4 Morr. 209, C. A.

7093. Settlement of damages in divorce suit.]—Damages recovered by a husband against a co-resp. under Matrimonial Causes Act, 1857 (c. 85), s. 32, are entirely under the control of the ct., & a settlement of such damages made by the husband with the sanction of the ct. is not a "settlement of property" within 1883 Act, s. 47.—*Re* STEPHENSON, *Ex p.* BROWN, [1897] 1 Q. B. 638; 66 L. J. Q. B. 423; 76 L. T. 328; 45 W. R. 416; 41 Sol. Jo. 388; 4 Mans. 13.

7094. Transfer to son of business acquired partly by bankrupt's money.]—In May, 1896, a trader, then in good credit, sold his business to a limited co. promoted by him for the purpose of purchasing it. He & his son took between them practically the whole of the shares issued by the co., & substantially the whole of the debenture issue was taken by the father himself. The co. in May, 1898, went into voluntary liquidation. With a view to preserving the father's credit, he & his son entered into an arrangement by deed with the co., by its liquidator, & the co.'s ascertained creditors, whereby the son purchased the co.'s business in consideration partly of a sum in cash & partly of payment by him of the debts due to the ascertained creditors secured by joint & several promissory notes of the father & son, &, by way of further consideration, the father surrendered his debentures & a private debt due to him from the co. The father & son also covenanted to pay off any then unascertained creditors of the co., & to indemnify the co. & its assets against all claims in respect of the business, & the father covenanted with the son that all money paid by him, the father, under the arrangement, & all property thereby handed over by him to the son, should be treated "as an absolute & irrevocable gift" from him to the son. The son took over the business, & carried it on with such success that, by means partly of his earnings & partly by contributions from the father, the whole of the purchase-money & debts payable under the arrangement were discharged. In March, 1899, the father became bkpt.; whereupon the trustee applied to have the transfer of the business to the son under the arrangement of 1898 declared void as a "settlement" within 1883 Act, s. 47:—*Held:* the mere fact that the business had been acquired by the son, partly by means of money obtained from or paid by the father, was not sufficient to make the transfer a "settlement" within the sect.—*Re* PLUMMER, [1900] 2 Q. B. 790; 83 L. T. 387, C. A.

Annotation:—**Refd.** *Re* Branson, *Ex p.* Moore, [1914] 3 K. B. 1086, C. A.

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the policy money; & the trustee in insolvency of L. had no claim upon the policy.—DAVEY *v.* PEIN, COLONIAL MUTUAL LIFE ASSURANCE SOCIETY *v.* DAVEY (1885), 11 V. L. R. 446.—**AUS.**

7090 ii. —— *For benefit of wife.*]—Where insured, under a policy of life insurance, declares same to be for the benefit of his wife under 58 Vict. c. 25, the trust thereby created is not invalidated by the subsequent insolvency of the husband, & creditors of insured have no rights which would interfere with the rights of such wife, even though the endowment policy matures during the life of insured. *Semble:* such a declaration is valid, even though insured be insolvent at the time of making it.—BANK OF NORTH AMERICA *v.* EDGECOMBE (1919), 46 N. B. R. 105.—**CAN.**

7090 iii. —— *For benefit of wife & children.*]—W. insured his life in 1907, obtaining a policy expressed to be payable to W., his exors., administrators or assigns. In May, 1912, W. ceded to his brother "from the amount of this policy £200 with interest" for money lent, & on July 1, 1912, ceded "the balance of the amount of the within policy as from July 1, 1912," to his brother. W. was in insolvent circumstances on July 1, 1912. He died on July 12, 1912, & his estate was surrendered in Mar., 1913. It was W.'s intention at the time he took out the policy to benefit his wife & children & the cession of July, 1912, was made & was accepted in trust for them:—*Held:* as W. had done no act by which his intention to benefit his wife & children was carried into effect, his trustee was entitled to the proceeds of the policy, less £200 & interest, as an asset in his insolvent estate.—WALLACH'S TRUSTEE *v.* WALLACH (1914), App. D. 202.—**S. AF.**

v. *Pretended sale to sister within thirty days of insolvency—Set aside.*]—COURT *v.* CUVILLIER (1878), 2 Steph. Q. Dig. 673 (28).—**CAN.**

x. *Savings by wife out of housekeeping allowance—Invested with husband's consent as her own.*]—Money saved by a wife out of an allowance made to her by her husband for housekeeping purposes, & with her husband's consent invested by the wife as her own, is not a "settlement of property" within Insolvency Act, 1890 (Vict.), s. 72.—JACK *v.* SMAIL (1905), 2 C. L. R. 684.—**AUS.**

y. —— *Invested in land—Right of trustee to follow.*]—With the help of savings from housekeeping allowances made by a husband between 1897 & 1905, his wife was enabled to purchase a piece of land & erect a house thereon. The intention of the husband was that the savings were to be invested in a house & land as a home for the family, & that she should so use & retain the property for an indefinite time, although there was no express restriction on disposal. The husband filed his petition for liquidation on Nov. 16, 1905:—*Held:* (1) as to savings for three years preceding the liquidation, they were a settlement of property by debtor within Insolvency Act, 1874, s. 106; (2) the trustee was entitled to an account of all money received by the wife from the husband & invested by her in the land from Nov. 16, 1902, to Nov. 16, 1905, & to charge upon the land for the amount so found.—HUTTON *v.* WILKINSON, [1906] S. R. Q. 237.—**AUS.**

——.]—*See, also,* cases in Sect. 4, Sub-sect. 3, B., *ante.*

a. *Transfer of conditional leases without consideration — Transferee ignorant of transaction.*]—W. & K., partners & conditional lessees of lands in Queensland, transferred their leases to G. in 1875. G. was ignorant of the transfer, W. acting for him under a general power of attorney. The balance of the rents was subsequently paid, it did not appear by whom, & Crown grants of the lands were issued

7095. Payment of premiums—Policy assigned to trustees by post-nuptial settlement—No covenant for payment of premiums.]—The owner of a policy on his life by a post-nuptial settlement in 1877 assigned it to trustees for his wife & children, & he himself continued to pay the premiums voluntarily, being under no covenant with the trustees to do so. In 1899 he became bkpt. & died :—*Held :* no part of the payments of premiums during the ten years preceding the bkpcy. was a "settlement" within 1883 Act, s. 47, so as to entitle the trustee in bkpcy. to any proportionate part of the policy money.—*Re* HARRISON & INGRAM, *Ex p.* WHINNEY, [1900] 2 Q. B. 710; 69 L. J. Q. B. 942; 83 L. T. 189; 49 W. R. 2; 16 T. L. R. 530; 44 Sol. Jo. 673; 7 Mans. 378, C. A.

7096. Chattel fixed by bankrupt to leasehold premises in consideration of reduction of rent—Payable by bankrupt's nephew—No transfer to nephew.]—Bkpt., within two years of the date of his bkpcy., purchased a valuable clock & caused it to be affixed to the front of an hotel, of which his nephew was then about to become the lessee & occupier. The nephew arranged with his lessor that, in consideration of the clock being allowed to become part of the freehold, the rent to be paid by him for the premises should be reduced by £10 a year. The trustee contended that the transaction constituted a voluntary settlement which was avoided by 1883 Act, s. 47: —*Held :* the property in the clock was never in the nephew, & there was no transfer of it to him & no settlement upon him within the sect.—*Re* BRANSON, *Ex p.* MOORE, [1914] 3 K. B. 1086; 83 L. J. K. B. 1673; 111 L. T. 741; 30 T. L. R. 604; 21 Mans. 229, C. A.

SUB-SECT. 2.—"MADE BEFORE AND IN CONSIDERATION OF MARRIAGE."

See, now, 1914 Act, s. 42.

7097. Marriage part of scheme to defraud creditors.]—The consideration of marriage will not support a settlement made on the eve of bkpcy., when there is a clear intention to withdraw property from creditors & to make marriage part of a scheme to defeat their rights.—COLOMBINE *v.* PENHALL (1853), 1 Sm. & G. 228; 65 E. R. 98; *sub nom.* COLUMBINE *v.* PENHALL, 1 W. R. 272.

Annotations :—**Distd.** Carter *v.* Hind (1853), 22 L. T. O. S. 116; Fraser *v.* Thompson (1859), 1 Giff. 49. **Folld.** Bulmer *v.* Hunter (1869), L. R. 8 Eq. 46; *Re* Pennington, *Ex p.* Pennington (1888), 5 Morr. 268, C. A. **Refd.** Acraman *v.* Corbett (1861), 1 John. & H. 410; *Re* Reis, *Ex p.* Clough, [1904] 2 K. B. 769, C. A. **Mentd.** Goldsmith *v.* Russell (1855) 5 De G. M. & G. 547, L. C.; Whelan *v.* Palmer (1888), 36 W. R. 587.

7098. ——.]—A man executed an ante-nuptial settlement & married a woman with whom he had previously cohabited, with intent to defraud his creditors, the wife being implicated in the transaction :—*Held :* the settlement was fraudulent, & void as against creditors.—BULMER *v.* HUNTER (1869), L. R. 8 Eq. 46; 38 L. J. Ch. 543; 20 L. T. 942.

Annotation :—**Folld.** *Re* Pennington, *Ex p.* Pennington (1888), 5 T. L. R. 29, C. A.

7099. ——.]—Debtor executed an ante-nuptial settlement of all his property. The only object of the marriage was, under cover of the relationship of husband & wife, to make the settlement a means of keeping debtor's property out of the reach of his creditors :—*Held :* the settlement must be set aside.—*Re* PENNINGTON, *Ex p.* PENNINGTON (1888), 5 T. L. R. 29; 5 Morr. 268, C. A.; *affg.* S. C. *sub nom. Re* PENNINGTON, *Ex p.* COOPER, 59 L. T. 774.

Annotation :—**Mentd.** *Re* Reis, *Ex p.* Clough (1904), 73 L. J. K. B. 929, C. A.

7100. —— Intended wife's knowledge of acts of bankruptcy.]—A trader previous to & in consideration of his marriage, which was solemnised in pursuance of an engagement of several years' standing, the fulfilment of which had been delayed by circumstances not connected with the state of his affairs, made a settlement of part of his property. After his marriage he was adjudged bkpt. Before the execution of the settlement he had, to the knowledge of the intended wife, committed

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to G. In Apr., 1876, the lands were transferred from G. to A. without the knowledge of either of them, W. acting for G. & the solr. for all the parties acting under a general power of attorney for A. It did not appear that any consideration passed. In Sept. W. & K. became insolvent, & in Jan., 1877, obtained their certificate of discharge :—*Held :* the transfer to G. & subsequent dealings with the land were fraudulent & void under Insolvency Act, 1874, ss. 55, 107, 109.—*Re* WILDASH & HUTCHISON (INSOLVENTS), *Ex p.* MISKIN (1877), Q. L. R. (Beor) 47.—**AUS.**

b. *Provision that income of legitim "should be alimentary & in no wise attachable for debt."*]—A provision without consideration in a post-nuptial contract that the income of the *legitim* "should be alimentary & in nowise attachable for debt" :—*Held :* insufficient to exclude the claim of the husband's creditors, he having become bkpt.—LEARMOUTH *v.* MILLER (1875), 2 L. R. Sc. & Div. 438.—**SCOT.**

d. *Agreement to transfer property to wife—Subsequent conveyance when insolvent.*]—A husband in pursuance of a voluntary agreement with his wife to convey his property to her *in futuro* so conveyed at a time when he was insolvent :—*Held :* the conveyance was fraudulent and void against his creditors.—KILGOUR *v.* ZASLAVSKY & ROSENFELD (1914), 30 W. L. R. 303; 25 Man. L. R. 14, 22; 7 W. W. R. 446; 19 D. L. R. 420.—**CAN.**

f. *Scope of exception—Irish* 1872 *Act, s.* 52.]—*Held :* the exception in the above sect. of settlements made before & in consideration of marriage from the settlements avoided by the sect. was not confined to settlements made on the marriage of the settlor.—*Re* DOWNES, [1893] 2 I. R. 302, 635; 33 I. L. T. 6.—**IR.**

7097 i. *Marriage part of scheme to defraud creditors—Parties living in concubinage.*]—The consideration of marriage is sufficient to support a settlement by a man on a woman, although they have been already living in concubinage, where the marriage is a *bonâ fide* one, even though the man be, to the knowledge of the woman, in very straitened circumstances, & his creditors are thereby defeated. But if the marriage is a mere contrivance, by parties already living in concubinage, to defeat the man's creditors, the settlement will be set aside at the suit of the creditors.

Where creditors bring an action to set aside a marriage settlement on the ground that it was a mere cloak or contrivance to enable the settlor to defeat his creditors, all the facts concerning the settlement being within the knowledge of the settlor & settlee & not within the knowledge of the creditors, although the burden of proof is on the creditors impugning the settlement, a very slight degree of proof is sufficient to shift the burden.—MICHAEL *v.* THOMPSON (1894), 20 V. L. R. 548.—**AUS.**

g. *Settlement of land on which uncompleted house—House completed after marriage.*]—Insolvent had conveyed by way of settlement to his intended wife a lot of land, on which he had commenced a house, but which was not completed until after the marriage :—*Held :* (1) for so much of the buildings as was completed after the marriage the creditors had a claim on the property, but the wife had the right to elect whether she would be paid the value of her interest without the expenditure after marriage, or pay to the assignee the amount of such expenditure; (2) it subsequently appearing that the husband had created a mtge. prior to the settlement the wife was entitled to have the value of the improvements made after marriage applied in discharge of the mtge. in priority to the claims of the creditors.—JACKSON *v.* BOWMAN (1867), 14 Gr. 156.—**CAN.**

h. *Conveyance of property—In pursuance of marriage articles.*]—*Re* DEANE, *Ex p.* OFFICIAL ASSIGNEE, *post.*—**AUS.**

i. *Mortgage to secure wife's fortune —Purported to be granted under covenant in marriage settlement.*]—A trader on his marriage covenanted, in case of failure in his circumstances, to repay the trustee £1,000, his wife's fortune, & paid to him with the usual covenant for further assurance. Upon application by the trustee a short time previous to an act of bkpty., he granted a mtge. to secure the £1,000, & soon after a commission of bkpcy. issued against him :—*Held :* the mtge., even

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acts of bkpcy. subsequent to his contracting the debt due to petitioning creditor, & within twelve months before the adjudication:—*Held:* the settlement was invalid as against the assignees.—FRASER *v.* THOMPSON (1859), 4 De G. & J. 659; 45 E. R. 256; *sub nom.* FRAZER *v.* THOMPSON, 34 L. T. O. S. 20; 7 W. R. 678, L. C. & L. JJ.

Annotation:—**Mentd.** Whelan *v.* Palmer (1888), 36 W. R. 587.

7101. —— Falsity of recital & settlor's insolvency unknown to wife.]—Debtor by an ante-nuptial settlement, which falsely recited that he was largely indebted to his intended wife, covenanted to pay the trustees the amount of the alleged debt. Debtor at his marriage was, unknown to his wife, insolvent. The false recital was made without the wife's knowledge. Debtor became bkpt.:—*Held:* the settlement was valid so far as it concerned the interests of the wife & children.—KEVAN *v.* CRAWFORD (1877), 6 Ch. D. 29; 46 L. J. Ch. 729; 37 L. T. 322; 26 W. R. 49, C. A.

Annotations:—**Refd.** Mackintosh *v.* Pogose, [1895] 1 Ch. 505; *Re* Reis, *Ex p.* Clough, [1904] 2 K. B. 769, C. A.

7102. Settlement with power of revocation.]—The mere fact that a husband makes a marriage settlement on his wife with a power of revocation is in itself no evidence that the settlement was made with intent to defraud creditors. The wife is entitled to claim possession of goods so settled on her as against the trustee in bkpcy. of the husband.—*Re* TARN, *Ex p.* TARN (1893), 57 J. P. 789; 9 T. L. R. 489, C. A.

7103. Settlement on remarriage of widower—Whether voluntary as regards children of first marriage.]—A settlement by a widower on remarriage is voluntary as regards a daughter by a previous marriage interested therein.—CARRUTHERS *v.* PEAKE (1911), 55 Sol. Jo. 291.

Covenants for future settlement in general, *see* Sub-sect. 6, *post.*

SUB-SECT. 3.—"PURCHASER OR INCUMBRANCER IN GOOD FAITH AND FOR VALUABLE CONSIDERATION."

7104. "Purchaser."]—*Held:* (1) "purchaser" in 1869 Act, s. 91, meant a "buyer" in the ordinary commercial sense, not a purchaser in the legal sense of the word; (2) the trustee of a post-nuptial settlement of lease-holds for the benefit of the settlor's wife & children was not a purchaser of the property for valuable consideration within the sect.—*Re* PUMFREY, *Ex p.* HILLMAN (1879), 10 Ch. D. 622; 48 L. J. Bcy. 77; 40 L. T. 177; 27 W. R. 567, C. A.

Annotations:—**Consd.** *Re* Lulham, Brinton *v.* Lulham (1884), 53 L. J. Ch. 928. **Distd.** Hance *v.* Harding (1887), 4 T. L. R. 185. **Expld.** Hance *v.* Harding (1888), 20 Q. B. D. 732, C. A. **Apld.** *Re* Parry, *Ex p.* Salaman, [1904] 1 K. B. 129. **Consd.** *Re* Pope, *Ex p.* Dicksee, [1908] 2 K. B. 169, C. A.; *Re* Collins (1914), 112 L. T. 87. **Refd.** Harris *v.* Tubb (1889), 42 Ch. D. 79; *Re* Briggs & Spicer, [1891] 2 Ch. 127; I. R. Comrs. *v.* Gribble, [1913] 3 K. B. 212, C. A. **Mentd.** *Re* Ridler, Ridler *v.* Ridler (1882), 22 Ch. D. 74, C. A.

7105. "Purchaser in good faith & for valuable consideration"—General rule.]—In order to constitute a "purchaser in good faith" within 1883 Act, s. 47, it is sufficient if there be good faith on the part of the purchaser; it is not necessary that both parties to the transaction should act in good faith.

A wife, who was married in 1883 & was then possessed of separate property, after the marriage allowed that property to pass into her husband's hands, but not as a gift, nor as a loan for the purposes of his trade. The husband, having applied part of her property to his own use, settled the residue of it, together with other property of his own, upon trusts under which he took a life interest, with a proviso for the cesser thereof in the event of his bkpcy. The wife had no notice of any fraud or fraudulent intention on his part:—*Held:* the wife was a "purchaser in good faith & for valuable consideration," & the settlement was

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if not affected by contemplation of bkpcy., was voluntary & void.—*Ex p.* ROBINSON (1828), 1 Mol. 291.—**IR.**

l. *Settlement executed after marriage—In pursuance of ante-nuptial agreement.*]—A trader, who afterwards became bkpt., on the occasion of his marriage, agreed to assign his house to trustees for himself for life, or until bkpcy., & on the same day a collateral bond for £1,000 was prepared to secure the £500. By some accident, the settlement or bond did not arrive until after the marriage, & were not executed until the following day. *Semble:* the settlement could not be considered post-nuptial, & the wife's claim against the husband's assignees was good.—*Ex p.* WOOD (1830), 4 Ir. L. Rec. 1st ser. 57. —**IR.**

m. *Gift of money to wife under ante-nuptial contract.*]—N., subsequent to his marriage under ante-nuptial contract, donated a sum of money to his wife, & about a year afterwards surrendered his estate as insolvent:—*Held:* the trustee could reclaim the money in order to pay the creditors of the estate, even though some of the creditors' claims were for debts contracted after the date of the gift, & there was no proof that at that time N.'s liabilities exceeded his assets.—VAN NIEKERK'S TRUSTEE *v.* VAN NIEKERK, 17 S. C. 470.—**S. AF.**

7103 i. *Settlement on re-marriage of widower—Whether voluntary as regards children of first marriage.*]—In 1884 bkpt., upon marrying a second time, by marriage articles agreed to convey & settle lands & property in trust to apply the income as follows:—to pay his wife for life £150 per annum without power of anticipation, or such other sum as bkpt. should by any writing direct, & the surplus income to bkpt. for life, & after his death divide same equally amongst all his children, *i.e.*, his then present children & any children or child which he might have by the then intended marriage, until the whole property was realised as provided. Provision was made after his death to realise the property, &, subject to providing for the annual payment to the wife, to divide the proceeds among the child or children, grandchild or grandchildren of bkpt. either by his former or then intended marriage as bkpt. might appoint, & in default of appointment for all & every such child or children of the former & then intended marriage as should come within the condition prescribed. The marriage took place; there was issue of the first marriage, but not of the second. The articles were never registered until after the bkpcy. Bkpt., who was a solr., was not at this time indebted, or about to engage in any risky business. On Dec. 13, 1888, bkpt. with six others entered into a guarantee to secure an overdraft; in Sept. 1901, demand was made under the guarantee; in June, 1902, bkpt. purporting to act in pursuance of the marriage articles, assured certain property to the trustees named in the articles, all of which was property which belonged to bkpt. at the date he executed the articles. On Sept. 14, 1903, judgment for over £3,000 was obtained against bkpt. on the guarantee, a bkpcy. notice followed, & on May 15, 1905, a sequestration order was made against him. From 1885 to 1899 bkpt. dealt with the property, the subject of the articles. On Dec. 1, 1890, bkpt. by indorsement on the articles directed the £150 payable to his wife to be increased to £300, bkpt. being then practically free from liability:—*Held:* (1) in the circumstances the articles were not fraudulent; (2) the children of the first marriage were included within the consideration of the articles executed on the second marriage.—*Re* DEANE, *Ex p.* OFFICIAL ASSIGNEE (1906), 6 S. R. N. S. W. 580. —**AUS.**

o. *Registration of contract in matrimonial domicil—Necessity for registration in place where bankruptcy happens.*]—Where an ante-nuptial contract had been duly registered in the Cape Colony, the matrimonial domicil, but was only registered in the Transvaal after the estate of the husband had been provisionally sequestrated in the Transvaal:—*Held:* the property of the wife, whether acquired before or after marriage, was not protected against the creditors of the husband in the Transvaal.—ASPELING *v.* ALEXANDER (1919), S. A. L. R. 139. —**S. AF.**

PART XX. SECT. 11, SUB-SECT. 3.

7105 i. "*Purchaser in good faith & for valuable consideration.*"]—A conveyance of land by a husband to his wife is "in good faith & for valuable consideration" within 1892 Act, s. 77, if it carries out a real sale & is a real conveyance in consideration of the release of a real debt from the husband to the wife, & without any concealed trust or stipulation for the benefit of the husband.—*Re* MCGRATH, *Ex p.* OFFICIAL ASSIGNEE (1897), 17 N. Z. L. R. 646.—**N.Z.**

7105 ii. ——.]—An actual sale made on the eve of insolvency, with an in-

not void under the above sect.—MACKINTOSH *v.* POGOSE, [1895] 1 Ch. 505; 64 L. J. Ch. 274; 72 L. T. 251; 43 W. R. 247; 39 Sol. Jo. 113, 218; 2 Mans. 27; 13 R. 254.

Annotations:—**Refd.** *Re* Tetley, *Ex p.* Jeffrey (1896), 66 L. J. Q. B. 111. **Mentd.** *Re* Johnson, *Ex p.* Matthews & Wilkinson, [1904] 1 K. B. 134, D. C.

7106. —— —— Release of claim or right.]—In order to constitute a person a "purchaser for valuable consideration" it is not necessary that money or physical property should be given. The *bonâ fide* release of a right or claim may be sufficient.—*Re* POPE, *Ex p.* DICKSEE, [1908] 2 K. B. 169; 77 L. J. K. B. 767; 98 L. T. 775; 24 T. L. R. 556; 52 Sol. Jo. 458; 15 Mans. 201, C. A.

Annotations:—**Apld.** *Re* Collins (1914), 112 L. T. 87; *Re* Macdonald, *Ex p.* Trustee (1919), 88 L. J. K. B. 1226.

See, also, Nos. 7121, 7122, *post.*

7107. Sufficiency of consideration—Wife's concurrence in conveyance.]—A husband & wife, at a time when the wife was under age, executed a deed, which purported to convey freehold property of the wife to a purchaser for £500. The deed was not acknowledged by the wife. The husband received the £500. The purchaser afterwards contracted to sell the property, & his sub-purchaser required the concurrence of the wife in the conveyance to him. The wife, who was then of age, refused to concur, unless the husband would execute a bill of sale of his furniture to a trustee for her, to secure the payment of £425 for her separate use. That was done by the husband, & she then executed the conveyance to the sub-purchaser. The bill of sale was registered. Possession of the furniture was given to the trustee by delivering to him a silver fork in the name of the whole, & the keys of the house where the furniture was. The furniture remained, until the husband filed a petition, in the house which was occupied by him & his wife, & it was used by them:—*Held:* the execution of the bill of sale amounted to a purchase of the wife's concurrence in the conveyance, & as the possession was consistent with the terms of the deed, the wife's trustee was entitled to the furniture as against the trustee.—*Re* REED, *Ex p.* COX (1875), 1 Ch. D. 302; 33 L. T. 757; 24 W. R. 302.

7108. —— Liability attached to settled property—Settlement of leaseholds.]—A settlement of leasehold property, to which liability is attached, is of necessity a settlement for valuable consideration, & cannot be avoided as a voluntary settlement under 1869 Act, s. 91, even though no other consideration be given.

A., being subject to a possible liability as surety for D., assigned the lease of his farm & the chattels thereon to his children B. & C., they undertaking to pay him an annuity of £50. At the date of such assignment D. was insolvent, although it did not appear that the fact was known to B. & C. Apart from the property assigned to B. & C., A. had not sufficient at the date of that assignment to discharge his liability as surety, & when upon the failure of his principal to pay the debt, he was called upon to do so, he made default & was subsequently adjudicated a bkpt.:—*Held:* the assignment of the leaseholds was not void under 1869 Act, s. 91.—*Re* DOBLE, *Ex p.* DOBLE (1878), 38 L. T. 183; 26 W. R. 407.

Annotations:—**Refd.** *Re* Ridler, Ridler *v.* Ridler (1882), 31 W. R. 93, C. A.; *Re* Lulham, Brinton *v.* Lulham (1884), 53 L. J. Ch. 928. **Mentd.** *Re* Pumfrey, *Ex p.* Hillman (1879), 10 Ch. D. 622, C. A.

7109. —— Settlement by wife's father.]—By a

tention known to the purchaser of using the purchase-money for the purpose of making a voluntary preference, or, to defeat or delay some of the vendor's creditors, is not void under Insolvency Statute, 1871 (No. 379), ss. 37 (ii), 69, as a transfer of property with intent to defeat or delay creditors.—*Re* WARD (1888), 14 V. L. R. 733.—**AUS.**

r. —— *Sale when vendor solvent—Formal transfer after vendor in insolvent circumstances.*]—C. & his intended wife entered into a contract of sale in Feb., 1894, by which C. sold landed property registered in his name & valued at £400 to her for £336, she taking over a mtge. bond for £300, & paying arrear interest of £36 thereon. The parties were thereafter married in Mar., but transfer of the property was not passed till Mar., 1895, when the value of the property had increased to £600 & when also C.'s liabilities, fairly calculated, far exceeded his assets fairly valued, he surrendering his estate soon after in May. C.'s trustees brought an action to declare the transfer void, under s. 83 of Ord. 6 of 1843:—*Held:* the sale was made when C. was not in insolvent circumstances, & the mere fact that formal transfer was not passed till shortly before C.'s insolvency would not work a cancellation of such transfer, as it was *bonâ fide* passed in completion of the previous sale.—CILLIERS' TRUSTEES *v.* CILLIERS (1896), 13 S. C. 68; 6 C. T. R. 91.—**S. AF.**

s. —— *Fictitious consideration.*]—H., in acting as a dummy for deft. under an agreement within Land Act, 1890 (No. 1106), s. 43, became the licensee of certain allotments from the Crown. Deft. paid all the rents & effected all the improvements. Crown grants of the allotments were issued to H. Subsequently H. conveyed the land to deft. for an admittedly fictitious consideration & within two years of such conveyance H. became insolvent:—*Held:* the conveyance was void.—DAVIDSON *v.* EXELL (1893), 19 V. L. R. 294.—**AUS.**

t. —— *Pretended sale at under value to brother-in-law—Transfer to bankrupt's wife—Sale null & void.*]—RIMMER *v.* BOUCHARD (1863), 7 L. C. J. 219.—**CAN.**

v. —— *Sale at undervalue to son—On eve of bankruptcy.*]—S. purchased from F., his father, land on the eve of F.'s insolvency, & mortgaged it the next day for the same price as he gave:—*Held:* the conveyance was not fraudulent, & F.'s official assignee was not entitled to the equity of redemption.—LYONS *v.* HENDERSON (1879), 2 N. S. W. S. C. R. N. S. (Eq.) 23.—**AUS.**

w. —— *Lease at undervalue—To bankrupt's steward.*]—On May 23, 1874, D., who was largely indebted, executed a lease demising to R., his steward, his mansion house & demesne, of which D. was tenant for life. The demise was for the life of D., & made at an undervalue. On July 14, 1874, D. was adjudged bkpt. The lease was executed with intent to defeat & delay the creditors of bkpt., & it was not executed *bonâ fide* or with intent that same should be acted upon:—*Held:* the lease was fraudulent & void against bkpt.'s assignees & creditors.—*Re* DOMVILE (1865), 9 I. L. T. 199, 204.—**IR.**

y. —— —— *To prevent plaintiff realising fruits of verdict.*]—Deft. in a pending action for damages, in contemplation of a verdict being had against him, & with the primary motive of preventing pltf. from realising the fruits of same, executed, while in solvent circumstances, a lease of premises, at a rent of an undervalue on Feb. 22, 1873. On Mar. 11, a verdict was had against him in the action. He remained in possession of the premises until Mar. 14, on which day the lease was registered, the lessor committing upon the same day a voluntary act of bkpcy., whereon he was subsequently adjudicated bkpt.:—*Held:* the lease should be set aside as fraudulent & void as against the assignees of the lessor.—*Re* O'NEILL (1873), 7 I. L. T. 199.—**IR.**

7107 i. *Sufficiency of consideration.*]—L., in 1843, settled real property on two unmarried daughters, one of whom, M., subsequently married B. L. continued in possession of the property, & B. knew nothing of the settlement until 1859. On Mar. 15, 1861, B. was sued for a large sum, & a verdict being obtained on May 30 against him, he became insolvent on June 1, following. On Mar. 26, L. having discovered that B. was entitled to a life interest in the property settled on his wife, & which was worth about £4,000, & not being then aware of the action, offered B. £500 for his life interest, for the purpose of settling the property on B.'s wife free from her husband's claims. The offer was accepted. Part of the £500 was, on Apr. 8, handed by L. to his solr. for payment to B., on the execution of the conveyance settling the property on the wife. The conveyance was executed on Apr. 20, & part of the £500 was returned to L. in payment of a prior debt:—*Held:* under Insolvent Act, s. 7, the deed was void as against B.'s creditors, the consideration not being such a valuable one as would give validity to the conveyance under the Act.—SEMPILL *v.* LEE (1865), 4 N. S. W. S. C. R. 90.—**AUS.**

7107 ii. ——.]—Conveyance of equity of redemption to insolvent's wife, the deed stating the consideration as natural love & affection:—*Held:* good, the wife having in fact given a considerable sum of money to insolvent.—FARQUHARSON *v.* DOWD (1905), 6 O. W. R. 760.—**CAN.**

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post-nuptial settlement the settlor assigned a policy of insurance upon his life to trustees for the benefit of his children, the settlor's father at the same time conveying leasehold property to the trustees on similar trusts. The transaction was entered into in good faith, for the purpose of securing a provision for the children, & not with any intention to defraud or defeat the settlor's creditors. The settlor became bkpt. within two years & subsequently died:—*Held:* the settlement was valid, bkpt.'s father being a purchaser in good faith for valuable consideration.—HANCE *v.* HARDING (1888), 20 Q. B. D. 732; 57 L. J. Q. B. 403; 59 L. T. 659; 36 W. R. 629; 4 T. L. R. 463, C. A.

Annotations:—**Distd.** *Re* Vansittart, *Ex p.* Brown, [1893] 2 Q. B. 377. **Apld.** Mackintosh *v.* Pogose, [1895] 1 Ch. 505. **Folld.** *Re* Tetley, *Ex p.* Jeffrey *v.* Tetley (1896), 3 Mans. 226. **Apld.** *Re* Parry, *Ex p.* Salaman, [1904] 1 K. B. 129. **Consd.** *Re* Pope, *Ex p.* Dicksee, [1908] 2 K. B. 169, C. A.; *Re* Collins (1914), 112 L. T. 87. **Refd.** *Re* Dale to Elsden (1892), 36 Sol. Jo. 347; Sturmey's Trustee *v.* Sturmey (1912), 107 L. T. 718; I. R. Comrs. *v.* Gribble, [1913] 3 K. B. 212, C. A.

7110. —— Settlement by wife's brother.]—A settlor's brother-in-law provided a sum of £4,000, upon the understanding that the settlor would settle it, & also a sum of £990 Madras stock, the property of the settlor, upon the wife of the settlor for life, for her separate use, & after her death upon the settlor for life, or until bkpcy. or alienation, & then upon the children of the marriage. A settlement to the above effect was executed in July, 1862, & in the following Oct. the wife of the settlor died. In 1866 the settlor executed a deed which operated as a determination of his interest under the settlement, & in 1867 he became bkpt.:—*Held:* notwithstanding that the £990 stock was the property of the settlor, regard being had to the much larger sum which was brought into settlement, the settlement was valid.—HAMMONDS *v.* BARRETT (1869), 21 L. T. 321; 17 W. R. 1078.

Annotation:—**Consd.** Mackintosh *v.* Pogose, [1895] 1 Ch. 505.

7111. —— Settled fund pledged for benefit of settlor.]—A father made a voluntary settlement on his daughter. The daughter subsequently mortgaged her interest & the father received the proceeds. The father became bkpt. within two years of the settlement. *Semble:* The fact that bkpt.'s estate got the benefit of the advance was itself sufficient *pro tanto* to prevent the settlement being a voluntary settlement within 1883 Act, s. 47.—*Re* BRALL, *Ex p.* NORTON, [1893] 2 Q. B. 381; 62 L. J. Q. B. 457; 69 L. T. 323; 41 W. R. 623; 10 Morr. 166; 5 R. 440.

Annotations:—**Refd.** *Re* Naylor, *Ex p.* Stephenson *v.* Pike (1893), 62 L. J. Q. B. 460. **Mentd.** *Re* Carter & Kenderdine's Contract, [1897] 1 Ch. 776, C. A.; Churston *v.* Buller (1897), 77 L. T. 45; *Re* Tankard, *Ex p.* Official Receiver, [1899] 2 Q. B. 57; *Re* Hart, *Ex p.* Green, [1912] 3 K. B. 6, C. A.

7112. —— Settled fund pledged in payment of settlor's past debt & present advance.]—Bkpt. made a voluntary settlement upon his sister of a policy of assurance. Subsequently he & his sister assigned the policy to secure a past debt & a present advance to him. A receiving order was subsequently made:—*Held:* the estate of bkpt. had had the benefit of the advance, & the settlement *pro tanto* was for valuable consideration.—*Re* NAYLOR, *Ex p.* STEPHENSON *v.* PIKE (1893), 62 L. J. Q. B. 460; 69 L. T. 355; 10 Morr. 173, n.; 5 R. 444, n.

7113. —— Annuities granted by members of family—Object of consideration to protect settlor's property.]—A settlor entitled under a will to £12,000 on his majority, & a further sum on the death of his mother, made the day before coming of age a post-nuptial settlement of all his interest under the will, upon trust to pay the income to himself for life or until he should charge same, & upon the determination of his interest, upon trust for his wife. At the time of executing the settlement a sum of £3,000 was expressly set aside for the payment of debts incurred during his minority. The settlor was extravagant, & his family were anxious that his property should be made secure from the claims of future creditors. On the advice of counsel, the settlor's mother & brother became parties to the settlement, & the mother covenanted during her life to pay him £50 a year, & his brother £25 a year repayable with compound interest on the death of his mother. The settlor became bkpt.:—*Held:* the settlement was made for valuable consideration, & notwithstanding that the consideration was given for the express purpose of protecting the settlor's property, from the claims of future creditors, for the benefit of the settlor, his wife & family, it was not intended to defeat & delay creditors, & was not void.—*Re* TETLEY, *Ex p.* JEFFREY (1896), 66 L. J. Q. B. 111; 75 L. T. 166; 40 Sol. Jo. 686; 3 Mans. 226; *affd.* 3 Mans. 321, C. A.

7114. —— Wife mortgaging separate estate to pay husband's debts.]—A wife, being entitled to freehold estate to her separate use, & of leasehold estate, agreed, through the intervention of herself & her husband's friends, to make a mtge. of same to pay his debts, as the consideration for a settlement on her of his real & personal estate, with the exception of £1,700, & certain chatttels, & the arrangement was effected. The husband subsequently became an insolvent debtor, & his assignee filed a bill to set aside the settlement:—*Held:* same was made for value, & was not fraudulent.—CARTER *v.* HIND (1853), 22 L. T. O. S. 116; 2 W. R. 27.

7115. —— Wife giving up fund held on trust for her separate use.]—A married woman gave up to her husband £500, held upon trust for her separate use, upon the understanding that the husband would settle his furniture upon her for her separate use. The husband assigned the furniture to a trustee to hold for the use & benefit of his wife, & the property remained in the joint possession of

a. —— *Verbal promise to maintain parents—Insolvency Act,* 1890, *s.* 72.]—BLOOMFIELD *v.* RUMMAGE (1897), 23 V. L. R. 365.—**AUS.**

b. —— *Increase of wife's fortune.*]—Covenant in marriage articles, by the husband, who received the wife's fortune, to give a bond for & to settle £4,000, with proviso that it should be void, if the husband settled lands of £100 a year in value. The wife's fortune was afterwards increased, & lands of over £100 a year were settled:—*Held:* as against the husband's assignees, there was a valuable consideration for the settlement of the excess over £100 a year.—MAGUIRE *v.* NICHOLSON (1818), Beat. 592.—**IR.**

d. —— *Money of wife's separate estate received & to be accounted for by bankrupt—Debtors & Creditors Act,* 1876, *s.* 63.]—BRAY (TRUSTEE OF) *v.* CANT (1883), 2 N. Z. L. R. 39.—**N.Z.**

f. —— *Not natural affection for daughter—Law* 13 *of* 1885, *s.* 33.]—SCHARFF'S TRUSTEE *v.* SCHARFF (1915), T. P. D. 463.—**S. AF.**

g. —— *Purchaser taking over mortgage bond & paying arrear interest.*]—CILLIERS' TRUSTEES *v.* CILLIERS, *ante.*—**S. AF.**

h. —— *Wife trading & contributing to family's support.*]—A husband purchased a house for £141 & took the disposition from the seller directly to his wife. She was not infeft. The wife kept a shop during her marriage, from the profits of which she materially contributed to the support of the family. The husband having become bkpt.:—*Held:* there being no allegation that the husband was insolvent at the date of purchase, it was a reasonable & onerous provision to the wife, & was not revocable by the husband or any one in his right.—RUST *v.* SMITH (1865), 3 Macph. (Ct. of Sess.) 378; 37 Sc. Jur. 182.—**SCOT.**

husband & wife. The assignment was not registered under Bills of Sales Act, 1854 (c. 36), & the husband afterwards became bkpt. Upon bill filed by the wife to have the assignment reformed so as to create a binding trust for her separate use, & to restrain the assignee from keeping possession of the furniture :—*Held :* independently of Bills of Sales Act, 1854, pltf. would have been entitled to have the furniture secured for her separate use.—ASHTON *v.* BLACKSHAW (1870), L. R. 9 Eq. 510 ; 39 L. J. Ch. 205 ; 22 L. T. 197 ; 34 J. P. 453 ; 18 W. R. 307.

Annotations :—**Refd.** Wright *v.* Redgrave (1879), 11 Ch. D. 24 ; Casson *v.* Churchley (1884), 53 L. J. Q. B. 335, D. C. **Mentd.** *Re* Broadbent, *Ex p.* Homan (1871), L. R. 12 Eq. 598 ; *Re* Fairbrother, *Ex p.* Harding (1873), L. R. 15 Eq. 223 ; Crawcour *v.* Salter (1881), 18 Ch. D. 30 ; Hollinshead *v.* Egan, [1913] A. C. 564, H. L.

7116. —— Wife agreeing to live apart.]—By a separation deed, after reciting that the husband & wife had agreed to live apart, the husband assigned leaseholds to trustees in trust to pay the rents to the wife for life, & then to sell & hold the proceeds, in the events which happened, in trust for himself, & he covenanted to make up the wife's income to £300 a year. The deed contained a proviso for determination in the event of the wife seeking to resume cohabitation, but it contained no covenant by the wife to live apart. The husband paid nothing under the covenant, & in 1868 he was adjudicated a bkpt. On the death of the wife the husband's assignee in bkpcy. claimed the leaseholds :—*Held :* (1) a covenant by the wife to live apart ought to be implied from the recital, & there was valuable consideration for the husband's covenant ; (2) the trustees were entitled to retain the leaseholds until the arrears due since the date of bkpcy. were satisfied.—*Re* WESTON, DAVIES *v.* TAGART, [1900] 2 Ch. 164 ; 69 L. J. Ch. 555 ; 82 L. T. 591 ; 48 W. R. 467.

7117. —— Consent of trustees to previous settlement to partial revocation thereof.]—In 1899 debtor executed a post-nuptial settlement, which contained a power of revocation with the consent of the trustees, which they had an absolute power to give or withhold. In 1902, in consideration of the settlor settling his life interest under the first settlement & a reversion to which he had become entitled since the execution of that settlement, the trustees consented to a partial revocation in order to provide funds for the payment of the settlor's debts. In 1903 the settlor became bkpt. : —*Held :* the new settlement was void against the trustee in bkpcy. to the extent necessary to pay the debts in the bkpcy., its trustees not being "purchasers for value" within 1883 Act.—*Re* PARRY, *Ex p.* SALAMAN, [1904] 1 K. B. 129 ; 73 L. J. K. B. 83 ; 89 L. T. 612 ; 20 T. L. R. 73 ; 52 W. R. 256 ; 48 Sol. Jo. 86 ; 11 Mans. 18.

Annotations :—**Distd.** *Re* Collins (1914), 112 L. T. 87. **Mentd.** Carter *v.* Hungerford, [1917] 1 Ch. 260.

7118. —— Agreement not to take divorce proceedings.]—A post-nuptial settlement was executed by the settlor within two years of his bkpcy., in pursuance of a bargain between him & his wife that she would not take proceedings against him in the Divorce Ct. for matrimonial misconduct if he settled his property upon her & their children : —*Held :* the settlement was a settlement in "favour of a purchaser in good faith & for valuable consideration," & was valid against the trustee in bkpcy.—*Re* POPE, *Ex p.* DICKSEE, [1908] 2 K. B. 169 ; 77 L. J. K. B. 767 ; 98 L. T. 775 ; 24 T. L. R. 556 ; 52 Sol. Jo. 458 ; 15 Mans. 201, C. A.

Annotations :—**Apld.** *Re* Collins (1914), 112 L. T. 87 ; *Re* Macdonald, *Ex p.* Trustee (1919), 88 L. J. K. B. 1226.

7119. —— Donee taking over liability for annuity —Agreeing to provide home for bankrupt.]—Debtor, in receipt of a life pension, assigned it to his sister, in consideration of her taking over the liability for the payment of an annuity of £50 to a third party, & also of her covenanting to maintain & provide him with a home. Debtor having become bkpt. :—*Held :* the taking over of the liability for the payment of the annuity was a good consideration, & to that extent the deed must stand, but after discharging the liability for the annuity, the assignee must pay the remainder of the pension to the trustee in bkpcy.—STURMEY'S TRUSTEE *v.* STURMEY (1912), 107 L. T. 718.

7120. —— Reduction of rent payable to donee by third party.]—Bkpt. within two years of his bkpcy., in order to assist his nephew to obtain a lease of a public-house, purchased a clock & had it fixed on to the public-house. The lessors of the public-house, in consideration of the clock being affixed to the premises as landlord's fixtures, granted a lease of the premises to the nephew at a reduced rent. The trustee claimed the clock or its value as a gift to the nephew constituting a voluntary settlement within 1883 Act, s. 47 :—*Held :* the clock having been transferred to the lessors for value could not be claimed by the trustee.—*Re* BRANSON, *Ex p.* MOORE, [1914] 3 K. B. 1086 ; 83 L. J. K. B. 1673 ; 111 L. T. 741 ; 30 T. L. R. 604 ; 21 Mans. 229, C. A.

7121. —— Release of right to sue for breach of trust.]—The release of a right to sue for a breach of trust is valuable consideration within 1883 Act, s. 47.—*Re* COLLINS (1914), 112 L. T. 87.

7122. —— Wife releasing husband's obligation to maintain her.]—By a deed supplemental to an ante-nuptial settlement the life interest which the settlor had in the settled fund was destroyed & the first life interest given to his wife, & the deed also gave an extra general power of appointment to the wife which might act in derogation of the ultimate reversion to the settlor. It was suggested that the wife, who was living apart from her husband, had accepted the deed in satisfaction of the husband's obligation to maintain her. The deed was made more than two years & less than ten years before the bkpcy. of the settlor :—*Held :* the supplemental deed was made without consideration moving from the wife &, as the wife was unable to prove that the settlor was at the time of executing that deed able to pay all his debts without the aid of the property comprised in it, the deed was void under 1914 Act, s. 42 (1) so far as was necessary for payment of the debts of the settlor in his bkpcy.—*Re* MACDONALD, *Ex p.* TRUSTEE (1919), 88 L. J. K. B. 1226 ; [1918–19] B. & C. R. 240.

See, also, No. 7106, *ante.*

7123. Proof of consideration.]—A deed of settlement, in form voluntary, but appearing from extrinsic evidence to have been made for valuable consideration, supported against creditors.

A person who was *in loco parentis* to a married woman devised to her a rent-charge for her life, & bequeathed certain personal property to her for her separate use. The will being inoperative both as to the real & personal estate, the heir at law &

7123 i. *Proof of consideration.*]—In an action under Insolvency Act 1890, s. 72, parol evidence is admissible to prove that a transfer of land made by a father to his son, & expressed upon its face to be made in consideration of natural love & affection, was in reality made *bonâ fide* & for valuable consideration.—BLOOMFIELD *v.* RUMMAGE (1897), 23 V. L. R. 365.—AUS.

7123 ii. ——.]—A. conveyed his real estate absolutely to defts. in consideration of 5*s.* ; the conveyance being impeached on the ground of fraud :—

Sect. 11.—*Avoidance of settlements: Sub-sects.* 3 & 4.]

next of kin of testator made a partial sacrifice of their interests in order to carry testator's intentions into effect, the property given up by them being invested in the funds & afterwards settled upon the woman & her children. At the time of the investment the husband of the woman was insolvent in his circumstances, & about three months after the date of the settlement he became bkpt.: —*Held:* the settlement was for valuable consideration, & was good against the husband's assignees in bkpcy.—POTT *v.* TODHUNTER (1845), 2 Coll. 76; 5 L. T. O. S. 144; 9 Jur. 589; 63 E. R. 644.

Annotation:—**Refd.** *Re* Holland, Cregg *v.* Holland, [1902] 2 Ch. 360, C. A.

SUB-SECT. 4.—"VOID AGAINST THE TRUSTEE IN THE BANKRUPTCY."

7124. "Void"—Means "voidable."]—*Held:* "void" in 1883 Act, s. 47, meant "voidable."—*Re* BRALL, *Ex p.* NORTON, [1893] 2 Q. B. 381; 62 L. J. Q. B. 457; 69 L. T. 323; 41 W. R. 623; 10 Morr. 166; 5 R. 440.

Annotations:—**Apprvd.** *Re* Carter & Kenderdine's Contract, [1897] 1 Ch. 776, C. A. **Consd.** *Re* Hart, *Ex p.* Green, [1912] 3 K. B. 6, C. A. **Refd.** Churston *v.* Buller (1897), 77 L. T. 45; *Re* Tankard, *Ex p.* Official Receiver, [1899] 2 Q. B. 57; *Re* Hart, *Ex p.* Green, [1912] 2 K. B. 257. **Mentd.** *Re* Naylor, *Ex p.* Stephenson *v.* Pike (1893), 62 L. J. Q. B. 460.

7125. From what date void—Date when trustee's title accrues.]—According to the true construction of 1883 Act, s. 47, a voluntary settlement is not void against the settlor's trustee in bkpcy. from its date, but is only void against the trustee from the date his title accrues.—*Re* CARTER & KENDERDINE'S CONTRACT, [1897] 1 Ch. 776; 66 L. J. Ch. 408; 76 L. T. 476; 45 W. R. 484; 13 T. L. R. 314; 41 Sol. Jo. 384; 4 Mans. 34, C. A.

Annotations:—**Apld.** *Re* Hart, *Ex p.* Green, [1912] 2 K. B. 257. **Extd.** *Re* Hart, *Ex p.* Green, [1912] 3 K. B. 6, C. A. **Refd.** *Re* Tankard, *Ex p.* Official Receiver, [1899] 2 Q. B. 57. **Mentd.** Churston *v.* Buller (1897), 77 L. T. 45; *Re* Handman & Wilcox's Contract, [1902] 1 Ch. 599, C. A.

7126. Against whom void—Only against trustee.]—By marriage articles made in 1886 between A., B., his intended wife, & pltf., & three other trustees, it was agreed that so soon as might be after the marriage a settlement should be made of the property therein mentioned, & A. agreed to settle any property which he might acquire during the intended coverture. The marriage took place, & a settlement was executed. Subsequently pltf. demised certain property to A. for twenty-one years, A. covenanting to keep the property in repair, & not to assign or underlet without leave of the lessor. A. thereafter became bkpt., & the premises were surrendered to pltf. by the trustee in bkpcy. In an action by pltf. against B. claiming possession of the premises:—*Held:* the premises must be held bound by the trusts of the settlement.

It was suggested that the settlement was void under 1883 Act, s. 47 (2). But the trustee in bkpcy. did not treat it as void, & the surrender of the term by him was expressly made subject to such claims as might be established under the agreement. It does not seem that the objection can be raised (STIRLING, J.).—CHURSTON (LORD) *v.* BULLER (1897), 77 L. T. 45.

7127. —— ——.]—Bkpt., who had been in partnership & traded as G. & Co., after the dissolution continued to trade alone in the same name, & incurred large liabilities to trade creditors. On Sept. 19, 1917, a private co. was registered as G. & Co., Ltd., the signatories to the memorandum of assocn. being bkpt. & another. By an agreement dated Sept. 20, 1917, bkpt. sold to the co. all the partnership assets except cash & negotiable

Held: it was competent to those upholding it to show the existence of considerations other than the 5*s.* expressed, although the common words, "& for other considerations," were omitted.—BANK OF TORONTO *v.* ECCLES (1860), 10 C. P. 282.—**CAN.**

PART XX. SECT. 11, SUB-SECT. 4

j. *Jurisdiction of court—Requisites for exercise*—1872 *Act, s.* 66.]—Before exercising jurisdiction under the above sect., to decide whether a deed was executed in order to defeat creditors, & to declare same fraudulent & void as against the assignees, the ct. will require to be satisfied, as far as possible, that the application is made, not capriciously, but for the purpose of benefiting the general creditors, & that the result of acceding to it would be advantageous to them on the whole, & would not onerate the assignees with a *damnosa hæreditas.*—*Re* O'NEILL (1873), 7 I. L. T. 170.—**IR.**

k. —— *To order sale summarily—5 Vict. No.* 17, *s.* 7.]—The above sect. is intended to give to creditors coming within its provisions a summary remedy & not merely a declaration of right, which it would require a bill in Equity to make available. Such summary remedy may be enforced by directing that if the creditor be not paid within a certain time, the Comr. of Insolvent Estates shall sell so much of the settled property as may be necessary for the purpose of making the payment, & directing the official assignee, the trustees of the settlement & insolvent all to join in the conveyance to the purchaser, the trustees to have their costs in priority out of the proceeds of the sale, & the benefit of any dividend which would otherwise be payable to the creditor.—*Re* MAHONEY, *Ex p.* WRIGHT (1863), 2 W. & W. 1.—**AUS.**

7124 i. *"Void"—Does not mean "voidable"—Sale after issue of writ of attachment.*]—A sale of property made by an insolvent, after issue of a writ of attachment against him, & which was not seized only because it was secreted, is not annullable only, but absolutely null & void.—MALLETTE *v.* WHYTE (1868), 12 L. C. J. 229; 1 R. L. O. S. 711.—**CAN.**

7126 i. *Against whom void.*]—A conveyance from an absconding debtor, which is found to be fraudulent & void, cannot defeat the title of the trustees, for, being void as against creditors, it is also void as against those who represent them.—DOE *v.* MCGUIRE (1850), 1 All. 612.—**CAN.**

m. *Action to avoid settlement—Who may bring.*]—The official assignee of an insolvent estate is the only person entitled to institute a suit to set aside a voluntary conveyance, & if he refuses to do so, a creditor, though he sue on behalf of all the creditors & make the assignee deft., cannot maintain such a suit.—DOUGLAS *v.* MCINTYRE (1884), 10 V. L. R. 249.—**AUS.**

n. —— ——.]—*Qu.:* if an assignee for the benefit of creditors has a right to bring an action for the purpose of invalidating a conveyance as fraudulent, except under the authority of a stat.—GRIFFITHS *v.* BOSCOWITZ (1891), Cam. Cos. 245.—**CAN**

o. —— ——.]—Apart from statutory provision, an assignee for the benefit of creditors is in no better position than his assignor, to impeach previous conveyances by him, & cannot be treated as occupying the place of the creditors for that purpose.—MCKENZIE & MCGOWAN *v.* BELL-IRVING, PATTERSON & CO. & MCEWEN (1892), 2 B. C. R. 241.—**CAN.**

p. —— —— *Nature of action.*]—The assignee of an insolvent debtor cannot recover premises in ejectment on the title, as against persons deriving under a voluntary conveyance of such premises, executed by insolvent before the execution by him of the deed of assignment required by Insolvent Acts.—BYRNE *v.* RYAN (1836), 4 Ir. L. Rec. N. S. 263.—**IR.**

r. —— *Who should be made parties to.*]—A bill was filed by assignees to set aside a settlement by insolvent on the marriage of his daughter, with a secret trust in his own favour. A demurrer by insolvent, on the ground that he was not a proper party, was allowed.—WILSON *v.* CHISHOLM (1865), 11 Gr. 471.—**CAN.**

t. —— ——.]—Insolvent & wife should not be made parties to a suit brought by the assignee under Insolvency Act, 1875, to set aside a conveyance by insolvent & wife to deft. before his insolvency for the purpose of defrauding his creditors.—FISHER *v.* DRISCOLL (1880), N. B. Dig. 15, 654.—**CAN.**

v. —— *Trial by jury.*]—An action by a creditor on behalf of himself & all other creditors of an insolvent & by the assignee for the benefit of insolvent's creditors to set aside transfers to insolvent's wife, should be tried by a judge without a jury.—CRISTALL *v.* MCKERNAN, [1918] 2 W. W. R. 519; 12 Alta. L. R. 317; 40 D. L. R. 82.—**CAN.**

w. —— *Estoppel—Previous action.*]—To a bill filed by the assignee

bills. The agreement was not stamped or filed with the registrar of joint-stock cos. The capital of the co. was £15,000. By the articles of assocn. the regulations contained in Table A., clause 77, of Cos. (Consolidation) Act, 1908 (c. 69), Sched. I., were not to apply. In Dec., 1917, bkpt. was appointed managing director of the co. at a salary of £1,000 a year for five years from Sept. 20, 1917. The total subscribed capital was £65. The co. did not take over the liabilities of the business which were the liabilities in the bkpcy. Within three months debtor became bkpt. :—*Held :* the agreement of Sept. 20, 1917, was fraudulent & void as against the trustee under 1914 Act, s. 1 (1) (*b*), as the sole object of the transaction was to protect bkpt. from his creditors, & as he did not care about getting paid for what he was selling, but wanted the position of general manager of the co. & to have an income of £1,000 a year, & that he should not be removable in the event of his becoming bkpt.—*Re* GUNSBOURG, *Ex p.* TRUSTEE (1919), 88 L. J. K. B. 562 ; [1918–19] B. & C. R. 108.

7128. Effect of avoidance—Generally.]—A voluntary settlement by bkpt., though void against his creditors, subsists for all other purposes.—*Re* WEBB, *Ex p.* BELL (1822), 1 Gl. & J. 282.

Annotation :—**Mentd.** *Re* Stephenson, *Ex p.* Official Receiver (1888), 20 Q. B. D. 540, D. C.

7129. —— On title—Of pledgee from beneficiary.]—A husband having settled on his wife jewellery by a settlement, which was subsequently declared void on the husband's bkpcy., his wife prior to the bkpcy., in order to secure a loan, & with her husband's privity, pledged the jewellery with a third party, who received it in good faith, & without knowledge that the wife's title to it was impeachable against creditors. The husband's trustee claimed the jewellery :—*Held :* the pledgee was entitled to the jewellery, & his title to it was not defeated by reason of the declaration that the settlement was void.—*Re* VANSITTART, *Ex p.* BROWN, [1893] 2 Q. B. 377 ; 62 L. J. Q. B. 279 ; 68 L. T. 233 ; 41 W. R. 286 ; 9 T. L. R. 277 ; 37 Sol. Jo. 271 ; 10 Morr. 44 ; 5 R. 280.

Annotations :—**Consd.** *Re* Hart, *Ex p.* Green, [1912] 3 K. B. 6, C. A. **Refd.** *Re* Carter & Kenderdine's Contract, [1897] 1 Ch. D. 776 ; *Re* Tankard, *Ex p.* Official Receiver, [1899] 2 Q. B. 57.

7130. —— —— Of assignee of insurance policy under voluntary settlement — Surrender value received on lapse.]—Bkpt. had insured his life with an Indian co., & had assigned the policy to his wife seven months before bkpcy. After bkpcy. the policy lapsed, & the co. paid a sum of money to bkpt. At the request of bkpt. & his wife the old policy was later converted into a paid-up policy, against which the co. made advances to bkpt.'s wife :—*Held :* whether or not the co. had notice of the English bkpcy., the trustee was entitled to the sums paid to bkpt., & if the co. had notice, the trustee was entitled to the paid-up policy free from incumbrances, but otherwise he must take it subject to the advances. —*Re* SHRAGER (1913), 108 L. T. 346.

7131. —— —— Of mortgagee subsequent to settlement.]—Bkpt., who was tenant for life of settled property by a post-nuptial settlement, charged his life interest in favour of his wife & children. He subsequently gave to pltf. equitable charges on the property. The settlement having been set aside under 1883 Act :—*Held :* the setting aside of a voluntary settlement as "void against the trustee" did not entitle him to stand in the place of the beneficiaries under the avoided settlement or give him any priority over incumbrances subsequent to the settlement.—SANGUINETTI *v.* STUCKEY'S BANKING Co., [1895] 1 Ch. 176 ; 64 L. J. Ch. 181 ; 71 L. T. 872 ; 43 W. R. 154 ; 11 T. L. R. 44 ; 39 Sol. Jo. 59 ; 1 Mans. 477 ; 13 R. 66.

Annotations :—**Apprvd.** *Re* Farnham, [1895] 2 Ch. 799, C. A. **Consd.** *Re* Sims, *Ex p.* Sheffield (1896), 3 Mans. 340. **Refd.** *Re* Carter & Kenderdine's Contract (1897), 66 L. J. Ch. 408, C. A. ; *Re* Hart, *Ex p.* Green, [1912] 3 K. B. 6, C. A. **Mentd.** Lister *v.* Hooson, [1908] 1 K. B. 174, C. A.

7132. —— —— Subject to prior title—Lunacy supervening after settlement.]—A voluntary settlement which is "void against the trustee" of the settlor, is void for all purposes, & does not entitle the trustee to stand in the place of the beneficiary so as to defeat a prior title to the settled property, such as the paramount jurisdiction of the Ct. in Lunacy where the settlor has, between the dates of the settlement & the adjudication in bkpcy. been found lunatic.—*Re* FARNHAM, [1895] 2 Ch. 799 ; 64 L. J. Ch. 717 ; 73 L. T. 231 ; 11 T. L. R. 556 ; 3 Mans. 109 ; 12 R. 554, C. A.

Annotations :—**Consd.** *Re* Sims, *Ex p.* Sheffield (1896), 3 Mans. 340. **Refd.** *Re* Tankard, *Ex p.* Official Receiver, [1899] 2 Q. B. 57. **Mentd.** Farnham *v.* Milward, [1895], 2 Ch. 730 ; *Re* Farnham, [1896] 1 Ch. 836, C. A. ; Lister *v.* Hooson, [1908] 1 K. B. 174, C. A.

7133. —— —— Of purchaser from beneficiary—With knowledge of settlement.]—A *bonâ fide* purchaser for value from the donee under a voluntary settlement has a good title against the trustee, even if he purchased with notice that the donee claimed under a voluntary settlement.—*Re* BRALL, *Ex p.* NORTON, [1893] 2 Q. B. 381 ; 62 L. J. Q. B.

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in insolvency of P., for the creditors other than D. & J., to impeach a sale of real estate to deft., the answer set up that before the proceedings in insolvency a bill was filed by D. & J. on behalf of themselves & all other creditors who should contribute to the expenses of the suit, for the purpose of avoiding the conveyance as a fraud upon creditors, & that the bill was dismissed upon the merits :—*Held :* the decree was not a bar to the suit.—SMITH *v.* DOYLE (1879), 4 A. R. 471.—**CAN.**

See, also, cases in Sect. 12, sub-sect. 6, *post.*

x. —— *Evidence.*]—Depositions already made in the Ct. of Insolvency by deft. in equity are admissible in evidence in a suit to set aside a voluntary settlement on deft. by insolvent & may be sufficient to establish pltf.'s case. The whole of such depositions will be regarded as in evidence, & the ct. will attach such weight to the different parts as it considers them entitled to.—DAVEY *v.* BAILEY (1884), 10 V. L. R. 240.—**AUS.**

y. —— —— *Bankrupt's statements.*]—The statements of insolvent, whether on oath or otherwise made after the execution by him of a voluntary settlement, are not evidence as against the trustees of the settlement. —*Re* MAHONEY, *Ex p.* WRIGHT (1863), 2 W. & W. 1.—**AUS.**

7128 i. *Effect of avoidance—Generally.*]—A conveyance void against creditors was made in Dec., 1868, through a third party, to the owner's wife ; the husband in Nov., 1869, became insolvent, & in June, 1870, joined his wife in a sale of the property to a purchaser without notice ; a conveyance to the purchaser was executed & registered, & the purchaser gave the wife a mtge. for part of the purchase-money, & paid her the residue in cash. On a bill by the assignee in insolvency he was declared entitled to the mtge., & to any of the money still in the wife's hands, & to any property, real or personal, which she had purchased with the residue, & still owned, but the ct. refused to direct an inquiry whether she had separate estate, in order to charge the same with any of the residue which had been spent by her, or with the costs of the suit.—SAUNDERS *v.* STULL (1871), 18 Gr. 590.—**CAN.**

7128 ii. —— ——.]—A chattel mtge. for $900 given by insolvent to his father having been ordered to be set aside :—*Held :* deft. should account to the assignee for the goods sold under it, of which he might have received the proceeds.—D'AVIGNON *v.* BOMERITO (1911), 20 O. W. R. 211 ; 3 O. W. N. 158.—**CAN.**

7133 i. —— *On title—Of purchaser from beneficiary.*]—A husband transferred his share in his family dwelling-house to his wife without consideration on Nov. 11, 1911. On Feb. 27, 1912, he was adjudicated insolvent, & his wife on Oct. 12 transferred the property, which had been so conveyed to her, to applt. :—*Held :* even assuming that

Sect. 11.—*Avoidance of settlements: Sub-sects.* 4 & 5.]

457; 69 L. T. 323; 41 W. R. 623; 10 Morr. 166; 5 R. 440.

Annotations:—**Apprvd.** *Re* Carter & Kenderdine's Contract, [1897] 1 Ch. 776, C. A. **Consd.** *Re* Hart, *Ex p.* Green, [1912] 3 K. B. 6, C. A. **Refd.** *Re* Naylor, *Ex p.* Stephenson *v.* Pike (1893), 62 L. J. Q. B. 460; *Re* Tankard, *Ex p.* Official Receiver, [1899] 2 Q. B. 57; *Re* Hart, *Ex p.* Green, [1912] 2 K. B. 257. **Mentd.** Churston *v.* Buller (1897), 77 L. T. 45.

7134. —— —— —— **Before trustee's title accrued.**]—If before the trustee's title has accrued the property comprised in a voluntary settlement has been sold *bonâ fide* to a purchaser for value, the title of the purchaser will be good as against the trustee.—*Re* CARTER & KENDERDINE'S CONTRACT, [1897] 1 Ch. 776; 66 L. J. Ch. 408; 76 L. T. 476; 45 W. R. 484; 13 T. L. R. 314; 41 Sol. Jo. 384; 4 Mans. 34, C. A.

Annotations:—**Apld.** *Re* Hart, *Ex p.* Green, [1912] 2 K. B. 257. **Extd.** *Re* Hart, *Ex p.* Green, [1912] 3 K. B. 6, C. A. **Refd.** *Re* Tankard, *Ex p.* Official Receiver, [1899] 2 Q. B. 57. **Mentd.** Churston *v.* Buller (1897), 77 L. T. 45; *Re* Handman & Wilcox's Contract, [1902] 1 Ch. 599, C. A.

7135. —— —— —— **Liability of donee to account for proceeds.**]—Gifts of personal property made by bkpt. within two years of his bkpcy., without restricting the donee's power of alienation, but with intention that the donee shall use or retain the property for an indeterminate time, are void as against the trustee, but without prejudice to any sale or disposition of the property made by the donee before the bkpcy. in good faith & without notice of an available act of bkpcy. But the donee may have to account for the proceeds of any such sale or disposition remaining in his hands at the commencement of the bkpcy.—*Re* TANKARD, *Ex p.* OFFICIAL RECEIVER, [1899] 2 Q. B. 57; 68 L. J. Q. B. 670; 80 L. T. 500; 47 W. R. 624; 15 T. L. R. 332; 43 Sol. Jo. 440; 6 Mans. 188.

Annotations:—**Apprvd.** *Re* Plummer, [1900] 2 Q. B. 790, C. A.; *Re* Branson, *Ex p.* Moore, [1914] 3 K. B. 1086, C. A. **Refd.** *Re* Hobbins, *Ex p.* Official Receiver (1899), 6 Mans. 212.

7136. —— —— —— **After but before notice of act of bankruptcy.**]—A purchaser for value from the donee under a voluntary settlement, without notice of an act of bkpcy. committed by the settlor, is entitled to hold the property as against the trustee of the settlor, even though the purchase is subsequent to the act of bkpcy., to which the title of the trustee relates back.—*Re* HART, *Ex p.* GREEN, [1912] 3 K. B. 6; 81 L. J. K. B. 1213; 107 L. T. 368; 19 Mans. 334, C. A.

Annotations:—**Folld.** *Re* Shrager (1913), 108 L. T. 346. **Refd.** *Re* Branson, *Ex p.* Moore (1914), 111 L. T. 741, C. A.

7137. —— **On liability of directors—Conveyance to company.**]—When a sale by bkpt. to a co., is set aside on the ground of fraud, the directors, in the absence of *mala fides*, are only liable to account for bkpt.'s property remaining in their hands. They cannot be called to account personally for all the proceeds of the business that have passed through their hands.—*Re* ELY, *Ex p.* TRUSTEE (1900), 48 W. R. 693; 44 Sol. Jo. 483, C. A.

Annotation:—**Distd.** *Re* Goldburg, *Ex p.* Page, [1912] 1 K. B. 606.

7138. —— **On rights of trustees of settlement—Lien for expenses.**]—Trustees of a settlement, originally valid, but which becomes void on the bkpcy. of the settlor, are entitled, as against the trustee in bkpcy., to a lien on the trust property for expenses incurred in the performance of their duty as trustees.

The settlor of a post-nuptial settlement brought an action to set it aside. The trustees of the settlement defended the action, which was dismissed with costs, but the costs were not paid. The settlor became bkpt. within two years after the date of the settlement, which became void under 1883 Act, s. 47:—*Held:* as the settlement was originally valid, & as the costs of the action had been incurred by the trustees in the performance of their duty as trustees, they were entitled, as against the official receiver, to a lien on the trust fund for such costs.—*Re* HOLDEN, *Ex p.* OFFICIAL RECEIVER (1887), 20 Q. B. D. 43; 57 L. J. Q. B. 47; 58 L. T. 118; 36 W. R. 189, D. C.

Annotations:—**Mentd.** *Re* Brall, *Ex p.* Norton (1893), 62 L. J. Q. B. 457; *Re* Carter & Kenderdine's Contract, [1897] 1 Ch. 776, C. A.; *Re* Hobbins, *Ex p.* Official Receiver (1899), 6 Mans. 212; *Re* Tankard, *Ex p.* Official Receiver, [1899] 2 Q. B. 57; *Re* Hart, *Ex p.* Green, [1912] 3 K. B. 6, C. A.

7139. —— —— **Costs of opposing proceedings to avoid settlement.**]—In a successful action by the trustee in bkpcy. of a settlor against the trustees of his settlement, by which he had purported to settle his own property upon trust for himself for life, with a gift over on bkpcy., the trustees of the settlement will be entitled to retain their costs, as between solr. & client, out of the money in their hands, before paying over the balance.—MERRY *v.* POWNALL, [1898] 1 Ch. 306; 67 L. J. Ch. 162; 78 L. T. 146; 46 W. R. 487; 42 Sol. Jo. 213.

Annotation:—**Refd.** Ideal Bedding Co. *v.* Holland, [1907] 2 Ch. 157.

7140. —— —— —— **Costs of appeals.**]—Trustees of a voluntary settlement appealed against the decision of a county ct. judge setting it aside. The High Ct. reversed the decision, but the Ct. of Appeal restored the order of the county ct. judge:—*Held:* the trustees of the settlement ought to have been satisfied with the decision of the county ct., & they must pay the costs of both appeals.—*Re* BUTTERWORTH, *Ex p.* RUSSELL (1882), 19 Ch. D. 588; 51 L. J. Ch. 521; 46 L. T. 113; 30 W. R. 584, C. A.

Annotations:—**Distd.** *Re* Holden, *Ex p.* Official Receiver (1887), 20 Q. B. D. 43, D. C. **Mentd.** *Re* Ridler, Ridler *v.* Ridler (1882), 52 L. J. Ch. 343, C. A.; *Re* Briggs & Spicer, [1891] 2 Ch. 127.

7141. —— **On surplus after payment of debts.**]—When a voluntary settlement is declared void as against the trustee in bkpcy., such avoidance only operates to the amount of the debts & costs of the bkpcy., & the surplus of the settled property reverts to the trustees of the settlement subject to the trusts thereof.—*Re* SIMS, *Ex p.* SHEFFIELD *v.* PRINCE (1896), 45 W. R. 189; 41 Sol. Jo. 113; 3 Mans. 340.

Annotation:—**Apprvd. & Distd.** Lister *v.* Hooson, [1908] 1 K. B. 174, C. A.

SUB-SECT. 5.—"PARTIES CLAIMING UNDER THE SETTLEMENT"—"SETTLOR ABLE TO PAY ALL HIS DEBTS, ETC."

See, now, 1914 Act, s. 42.

7142. To what settlements 1883 Act applicable—Settlements before 1883 Act.]—Debtor became bkpt. in Feb., 1885, having made in 1880 a voluntary gift of certain shares in a ship to his son. In default of proof that in 1880 debtor was in a position to pay his debts:—*Held:* s. 47 was retrospective in operation, & the gift of the shares came within it.—*Re* PLAYER, *Ex p.* HARVEY (1885), 54 L. J. Q. B.

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applt. had purchased the property for valuable consideration & without notice of the adjudication of insolvent, the transfer to applt. subsequent to adjudication was void.—LAKHI PRUJA DASSI *v.* RAI KESSORI DASSI (1916), 20 C. W. N. 554.—**IND.**

PART XX. SECT. 11, SUB-SECT. 5.

a. *General rule.*]—In order to set aside a deed of transfer on the ground of fraud, the insolvency of the assignor must be alleged & proved.—BERNIER *v.* VACHON & BOUCHER (1858), 8 L. C. R. 286.—**CAN.**

553; 2 Morr. 261; *sub nom. Re* PLAYER, *Ex. p.* PLAYER, 53 L. T. 768, D. C.

Annotations:—**Apprvd.** *Re* Ashcroft, *Ex p.* Todd (1887), 19 Q. B. D. 186, C. A. **Mentd.** *Re* Plummer, [1900] 2 Q. B. 790, C. A.

7143. —— ——.]—*Held:* 1883 Act, s. 47, was not retrospective, *i.e.*, did not apply to settlements executed before the Act came into operation, so far as its provisions differed from those of 1869 Act, s. 91, but was retrospective so far as it was a re-enactment of that sect.—*Re* ASHCROFT, *Ex p.* TODD (1887), 19 Q. B. D. 186; 56 L. J. Q. B. 431; 57 L. T. 835; 35 W. R. 676; 3 T. L. R. 641; 4 Morr. 209, C. A.

7144. Who are "parties claiming under settlement"—Purchaser from trustees of settlement.]—Purchasers from trustees of a voluntary settlement of freehold lands:—*Held:* "parties claiming under the settlement," within 1883 Act, s. 47.—*Re* BRIGGS & SPICER, [1891] 2 Ch. 127; 60 L. J. Ch. 514; 64 L. T. 187; 55 J. P. 278; 39 W. R. 377; 7 T. L. R. 274.

Annotations:—**Dbtd.** *Re* Carter & Kenderdine's Contract, [1897] 1 Ch. 776, C. A. **Mentd.** Mogridge *v.* Clapp, [1892] 3 Ch. 382; *Re* Vansittart, *Ex p.* Brown, [1893] 2 Q. B. 377; *Re* Handman & Wilcox's Contract, [1902] 1 Ch. 599, C. A.; *Re* Hart, *Ex p.* Green, [1912] 2 K. B. 257.

7145. What debts considered—Liability for tort committed before settlement—Damages awarded afterwards.]—Debtor had made a voluntary settlement. After the execution of the settlement damages were recovered against debtor in an action begun after the settlement in respect of a tort committed before the settlement:—*Semble:* the damages must be taken into account in estimating debtor's solvency at the date of the settlement.—CROSSLEY *v.* ELWORTHY (1871), L. R. 12 Eq. 158; 40 L. J. Ch. 480; 24 L. T. 607; 19 W. R. 842.

Annotations:—**Reld.** Mackay *v.* Douglas (1872), L. R. 14 Eq. 106; Taylor *v.* Coenen (1876), 1 Ch. D. 636; *Re* Butterworth *Ex p.* Russell (1882), 19 Ch. D. 588. **Mentd.** *Re* Wise, *Ex p.* Mercer (1886), 17 Q. B. D. 290, D. C.

7146. —— **Covenant to pay off mortgage on settled estate—Settlement subject to mortgage.**]—Debtor made a voluntary settlement of an estate, which was subject to a mtge., & covenanted with the trustees of the settlement that he would pay the interest on the mtge., &, when required, would pay off the principal. His assets, exclusive of the mortgaged estate, were sufficient to pay his debts other than the mtge. debt, but not sufficient to pay both. He afterwards became bkpt.:—*Held:* the settlement was void as against the trustee in bkpcy.—*Re* CONIBEER, *Ex p.* HUXTABLE (1876), 2 Ch. D. 54; 45 L. J. Bcy. 59; 34 L. T. 605; 24 W. R. 686, C. A.

7147. What assets considered—Goodwill & implements of trade—Intention to carry on business.]—In determining whether a trader, who has executed a voluntary settlement was, "at the time of making the settlement able to pay all his debts without the aid of the property comprised in such settlement," the value of the implements of his trade & of the goodwill of his business is not, if he was intending to continue his business, to be taken into account. At any rate, if that value is to be taken into account, it can only be such a value as would be realised at a forced sale.

A baker, being about to purchase a grocery business, which he intended to carry on in addition to the baker's business, made a voluntary settlement of the bulk of his property for the benefit of his wife & children. He afterwards bought the grocery business, & carried it on for about six months, but lost money by it. He then sold it for as much money as he had given for it, & carried on the baker's business alone, for three years after the execution of the settlement, when he filed a petition, his liabilities largely exceeding his assets. The debts which he owed at the date of the settlement had been all paid:—*Held:* in the circumstances, the settlement was void against the trustee.—*Re* BUTTERWORTH, *Ex p.* RUSSELL (1882), 19 Ch. D. 588; 51 L. J. Ch. 521; 46 L. T. 113; 30 W. R. 584, C. A.

Annotations:—**Reld.** *Re* Briggs & Spicer, [1891] 2 Ch. 127. **Mentd.** *Re* Holden, *Ex p.* Official Receiver (1887), 20 Q. B. D. 43, D. C.

b. ——.]—A., on the marriage of his son, B., settled an estate, to which it turned out he was not entitled. By the settlement, A. covenanted generally with F., the intended wife's father, for title to all the lands, & he & B. covenanted with the trustees for title & quiet possession, notwithstanding any acts done by A. or B. The settlement provided that, if A. should purchase the head rents & inheritance of any of the settled estates which were held for lives, his purchase should be subject to the trusts of the settlement, but that he should have power to charge with the purchase-money the estate so purchased. A. did so purchase, & he charged the estate with the purchase-money in favour of his daughter, D., without valuable consideration:—*Held:* such appointment was as valid against general creditors as the settlement of any other part of his property would have been, & would prevail against them, unless A. had at the time been indebted to the extent of insolvency.—MARTYN *v.* MACNAMARA (1843), 4 Dr. & War. 411; 2 Con. & Law. 541.—**IR.**

d. —— *Settlor indebted at time of execution.*]—Where a deed disposing of all the grantor's property was executed without valuable consideration by the grantor while indebted, & he, still owing some of the debts then due, became bkpt. shortly afterwards:—*Held:* the deed was void as against the assignees in bkpcy. of the grantor.—*Re* NOLAN (1873), 8 I. L. T. 55, 199.—**IR.**

e. —— ——.]—By a post-nuptial settlement, not executed in pursuance of an ante-nuptial agreement, property was put in settlement for the benefit of the settlor's wife & children. The settlor was afterwards adjudged bkpt., apparently within two years after the date of the settlement. The settlor was indebted at the time of its execution, & no evidence was given by the parties claiming under it that he was able to pay all his debts without the aid of the property put in settlement:—*Held:* the settlement was void as against the assignees under 1872 Act, s. 52.—JAMES *v.* MASON, *Re* CAMPBELL (1878), 12 I. L. T. 163.—**IR.**

f. —— *Whether necessary to prove fraud.*]—A settlement made by bkpt. in favour of his wife & children was set aside by the Bkpcy. Judge, on the ground that at the time of the settlement being executed the settlor could not meet his debts without the aid of the property put into settlement:—*Held:* it was not necessary to prove any fraud in the settlor, it being sufficient that he could not at the date of the instrument pay his creditors independently of the property so settled.—*Re* MOORE (1896), 31 I. L. T. 5.—**IR.**

h. *Settlor apparently solvent.*]—A settlement made by debtor, carrying on business as a contractor, of the bulk of his property, who, though apparently solvent at the time, became bkpt. within twelve months afterwards:—*Held:* void under 1883 Act, s. 76.—*Re* SAGGERS, *Ex p.* OFFICIAL ASSIGNEE (1886), 4 N. Z. L. R. 382.—**N.Z.**

j. —— *Subsequent assignment to secure third party's debts causing insolvency.*]—A settlement made by a man within three years of his bkpcy., but while he is solvent, is not avoided if he subsequently assigns his remaining property to secure another person's debts, & so becomes insolvent.—OFFICIAL ASSIGNEE *v.* HOLMAN (1886), 5 N. Z. L. R. 337.—**N.Z.**

7145 i. *What debts considered—Debts of business carried on by bankrupt as trustee.*]—A husband who had executed no ante-nuptial marriage contract, granted an assignation, whereby "in order in so far to supply that defect, & make provision" for his wife, he conveyed to her leasehold subjects, occupied by him as a residence, with immediate entry thereto, a policy of life insurance for £100, & his household furniture. These subjects, with a sum of £439, which he subsequently uplifted from bank & delivered to his wife, constituted his whole means. At the date of the assignation the husband's private estate was solvent, but he was liable for the debts of a mercantile business belonging to a trust-estate on which he was a trustee. The business was in financial difficulties. The trust estate & the estate of the husband were subsequently sequestrated: — *Held:* that the assignation was reducible at the instance of the trustee in his sequestration.—ROBERTSON'S TRUSTEES *v.* ROBERTSON (1901), 3 F. (Ct. of Sess.) 359; 38 Sc. L. R. 279; 8 S. L. T. 386.—**SCOT.**

7147 i. *What assets considered—Valuable property & good business.*]—FARQUHARSON *v.* DOWD (1905), 6 O. W. R. 760.—**CAN.**

Sect. 11.—*Avoidance of settlements: Sub-sects.* 5, 6 & 7.]

7148. —— Life interest under disputed settlement.]—Debtor executed in 1880 a voluntary settlement, under which he took a life interest. In 1881 he executed a second voluntary settlement, under which he also took a life interest worth £1,300. At that time his life interest under the former settlement was worth £1,000 & his debts amounted to £1,800. The life interest under the second settlement passed directly to debtor through trustees, who acted merely as conduit-pipes. In 1885 he became bkpt.:—*Held:* the second settlement was not void, since the life interest under it must be taken into account in estimating his solvency.—*Re* LOWNDES, *Ex p.* TRUSTEE (1887), 18 Q. B. D. 677; 56 L. J. Q. B. 425; 56 L. T. 575; 35 W. R. 549; 4 Morr. 139, D. C.

7149. Meaning of "insolvent"—6 Geo. 4, c. 16, s. 75.]—Upon a bill to set aside a settlement, made by a trader in favour of his children, on the ground that he was insolvent, at the time of the execution of the settlement:—*Held:* (1) the insolvency mentioned in the above sect. meant a total insolvency, such as a general inability to pay debts in the ordinary course of trade, or the entering into a composition with creditors, & notice of inability to meet a particular demand was not notice of insolvency; (2) evidence that bkpt. had accepted two bills prior to the date of the settlement, & which were from time to time renewed, & ultimately not paid, was not alone sufficient evidence of insolvency, within the sect.—CUTTEN *v.* SANGER (1828), 2 Y. & J. 459; 148 E. R. 998, Ex. Ch.

Annotations:—**Refd.** De Tastet *v.* Le Tavernier (1856), 1 Keen, 161; Bowser *v.* Colby (1841), 1 Hare, 109. **Mentd.** Birley *v.* Birley (1858), 27 L. J. Ch. 569.

SUB-SECT. 6.—"WHEREIN THE SETTLOR HAD NOT ANY ESTATE OR INTEREST."

See, now, 1914 Act, s. 42 (2).

7150. Covenant to pay money within specified dates—Covenant creating debt.]—By a settlement executed in contemplation of his marriage, a trader covenanted to pay the trustees of the settlement sums of money on specified dates, to be held by them upon trusts in favour of himself & his wife & children. The settlor became bkpt. before all the payments were due:—*Held:* the covenant was not void under 1869 Act, s. 91.—*Re* TONNIES, *Ex p.* BISHOP (1873), 8 Ch. App. 718; 42 L. J. Bcy. 107; 28 L. T. 862; 21 W. R. 716, L. JJ.

Annotations:—**Foll.** *Re* Knight, *Ex p.* Cooper (1885), 2 Morr. 223, D. C. **Mentd.** *Re* Carter & Kenderdine's Contract (1897), 66 L. J. Ch. 408, C. A.; *Re* Reis, *Ex p.* Clough (1904), 73 L. J. K. B. 929, C. A.

7151. —— ——.]—By a marriage settlement the settlor covenanted that he, during his life, or his representatives within twelve months after his death, would pay £5,000 to the trustees to be held by them on the trusts of the settlement. The settlor subsequently became bkpt.:—*Held:* a covenant for payment of a sum of money not specifically earmarked, was not within 1883 Act, s. 47 (2), as a covenant for the future settlement of money or property in which the settlor had no interest at the date of his marriage, & the trustees were entitled to prove against the estate.—*Re* KNIGHT, *Ex p.* COOPER (1885), 2 Morr. 223, D. C.

7152. Covenant to settle funds of wife lent to settlor.]—H. was married in 1864 to his wife, who

k. *Evidence of insolvency.*]—A trader being in debt made a voluntary settlement of all his property, except his stock & books & debts. He afterwards paid off the existing debt by means of money advanced by the same creditor, & such further debt remained unpaid when he became insolvent. In a suit by the official & trade assignees to set aside such settlement:—*Held:* evidence was admissible of other indebtedness, under a general allegation that the settlor was "also indebted to divers other persons." *Semble:* without such evidence, the continuous indebtedness would have been sufficient ground for setting aside the settlement.—GOODMAN *v.* BOULTON (1868), 5 W. W. & A'B. 86.—**AUS.**

m. —— *Burden of proof.*]—The *onus* of proof under Insolvency Statute (No. 379), s. 70, is upon those claiming under the settlement.—GRAY *v.* FARAM (1879), 5 V. L. R. 270.—**AUS.**

n. —— ——.]—In an action under Ordinance 6 of 1843, s. 83, to set aside an alienation of property made before insolvency, it is for pltf. to prove that at the time of the transaction challenged insolvent's liabilities fairly calculated exceeded his assets fairly valued. Thereafter the *onus* is upon the person upholding the transaction to show *bona fides* & just & valuable consideration.—MCLEOD'S TRUSTEES *v.* BENJAMIN (1877), Buch. 152.—**S. AF.**

p. —— *Statement by bankrupt.*]—FORD *v.* MILES (1878), R. E. D. 323.—**CAN.**

r. *Evidence of fraudulent intent.*]—The execution of a deed of assignment for the benefit of creditors, which, by reason of giving to the trustees of the deed a discretion as to the extent to which they will recognise preferential claims, is held not to be an act of insolvency within Insolvency Statute, 1871, s. 37 (1), as not being for the benefit of creditors generally, is not of itself evidence of an intent to defeat or delay creditors within s. 37 (ii). In order that such an assignment should be held void under s. 69 of the Act, some evidence, outside the deed itself, must be given to show such an intent.—DAVEY *v.* DANBY (1887), 13 V. L. R. 957.—**AUS.**

s. ——.]—The mere existence of a debt at the time of a settlement executed by a man in favour of his wife is not a sufficient reason to induce the ct. to set aside such settlement unless fraudulent intent on the part of debtor with reference to subsequent creditors can also be shown, and a creditor failing to show that such intent existed cannot impeach the settlement.—DANCY *v.* BROWN (1914), 31 O. L. R. 152; 19 D. L. R. 862; 6 O. W. N. 137.—**CAN.**

t. —— *Burden of proof.*]—A conveyance of land was made by insolvent to his brother, & the assignment to pltf. for creditors was made within sixty days of the impeached conveyance:—*Held:* the conveyance was as against pltf. presumed *primâ facie* to have been made with intent to defeat creditors & to be an unjust preference & the *onus* of rebutting the presumption was upon deft.—CRAWFORD *v.* MAGEE (1905), 6 O. W. R. 44.—**CAN.**

v. —— ——.]—Where a transaction is impeached on the ground of fraud, & the knowledge of the circumstances surrounding it is chiefly confined to the parties to it, it is sufficient for the parties attacking it to prove facts from which a jury might infer the want of *bona fides* to throw the *onus* of proof of *bona fides* on the persons supporting the transaction.—*Re* HODD, *Ex p.* OFFICIAL ASSIGNEE (1889), 7 N. Z. L. R. 337.—**N.Z.**

w. —— ——.]—Where the evidence showed that property had been purchased by a firm, & the firm afterwards sold it for a fractional part of its value to the wives respectively of members of the firm, & within three years became bkpt.:—*Held:* the transfer was void under 1883 Act, ss. 76, 77, in the absence of proof that the firm was at the date of the sale able to pay all its debts without the property in question.

Where, in the face of strong evidence to the contrary, it was alleged that the firm purchased & held the property in trust for the transferees:—*Held:* it lay upon the party making the allegation to establish by the most conclusive proof that the transaction was something different from what it seemed to be, & that the transferors had constituted themselves trustees of the property for the transferees.—*Re* BENJAMIN & JACOBS, *Ex p.* BENJAMIN & JACOBS (1890), 10 N. Z. L. R. 110.—**N.Z.**

x. —— *Statement by bankrupt.*]—A trader being in debt made a voluntary settlement of all his property, except his stock-in-trade & books & debts. In a suit by the official & trade assignees to set aside such settlement:—*Held:* evidence was admissible of a conversation by the settlor some time prior to the settlement showing a fraudulent intent, though it was in respect of an intended settlement of a somewhat different character, & was not put in issue by the bill.—GOODMAN *v.* BOULTON (1868), 5 W. W. & A'B. 86.—**AUS.**

7149 i. *Meaning of "insolvent"*—1883 *Act, s.* 76.]—*Held:* a trader was insolvent within Bkpcy. Act, 1883, s. 76, although having assets nominally considerably in excess of his liabilities, if from the nature of his liabilities he would have been unable to pay them at once if demanded.—*Re* MCLEOD (1885), 3 N. Z. L. R. 223.—**N.Z.**

—— *"Unable to pay his debts."*]—*See, further,* cases in Sect. 12, sub-sect. 3, *post.*

subsequently became entitled to money under the wills of her father & grandfather. That money she lent to her husband for the purposes of his business, upon the terms that he would execute a settlement of the money upon her, which was done. Upon the bkpcy. of H. a proof was tendered upon the settlement & rejected, on the ground (*inter alia*) that the deed was a voluntary settlement within 1869 Act, s. 91 :—*Held :* the settlement being a mere contract & not a dealing with property, was not within the sect.—*Re* HOME, *Ex p.* HOME (1885), 54 L. T. 301.

7153. Covenant to transfer all property which he should acquire during coverture.]—Bkpt., by a settlement made before his marriage, assigned a policy & some furniture to trustees for the benefit of his wife & the children of the marriage, & also covenanted that all other real or personal estate of which he should become seised, possessed or entitled during the coverture, should be transferred to the trustees upon trusts thereby declared. No trusts of the after-acquired property were declared in the settlement. After the marriage & before bkpcy., he purchased shares in a co. The settlor was solvent at the date of the settlement :—*Held :* the covenant was void, & the trustee under the bkpcy. was entitled to the shares.—*Re* CLINT, *Ex p.* BOLLAND (1873), L. R. 17 Eq. 115 ; 43 L. J. Bcy. 16 ; 29 L. T. 543 ; 22 W. R. 152.

Annotation :—**Dbtd.** *Re* Reis, *Ex p.* Clough, [1904] 2 K. B. 769, C. A. *Ex p. Bolland* is inconsistent with a line of authorities of which *Hardey v. Green* (1849), 12 Beav. 182, need alone be referred to (COZENS HARDY, L.J.). I do not think *Ex p. Bolland* ought any longer to be regarded as a standing authority (VAUGHAN WILLIAMS, L.J.).

7154. Covenant to settle succession to father—Whether appointed or not.]—Bkpt., who was entitled under his father's will to a share in his property, subject to a power for the widow to appoint among himself & the other children, on his marriage covenanted to settle his share whether appointed or unappointed. The widow appointed one-third to him & the remainder to other children : —*Held :* bkpt. had an interest at the date of the covenant, which was not void under 1869 Act.—*Re* ANDREWS' TRUSTS (1878), 7 Ch. D. 635 ; 26 W. R. 572.

Annotation :—**Consd.** *Re* Bulteel's Settlmts., Bulteel *v* Manley, [1917] 1 Ch. 251.

7155. Settlement of aliquot part of trust estate appointed at date of settlement—Appointment revoked & subsequent appointment of larger share—Later appointment of further share.]—The settlor at the date of his marriage was entitled in remainder to one-tenth share of trust funds comprised in two indentures of settlement under a revocable appointment by his father & mother made in pursuance of a special power of appointment, & was also entitled in remainder to a sum of £1,500 raisable out of the trust funds, subject to a hotchpot provision, under a similar but irrevocable appointment. By the settlement made on his marriage the settlor purported to assign to trustees the sum of £1,500 & " all that the tenth part or share, or other the part or share, parts or shares, to which he now is or eventually may become or be entitled of or in the trust property " comprised in the two indentures of settlement upon trusts in favour of the settlor, his wife, & children of the marriage. His father & mother afterwards revoked the appointment of the one-tenth share, & instead thereof revocably appointed to the settlor in remainder one-ninth share of the trust funds, & his mother, who had survived his father, afterwards revocably appointed to him in remainder one-ninth share. She died in 1913 without having revoked either of the last two appointments. The settlor became bkpt. in 1914, & subject to the hotchpot provision his trustee claimed the shares, which were still in the hands of the trustees of the two indentures of settlement, under 1913 Act, s. 13 :—*Held :* as to the amount of the one-tenth share in which the settlor had an interest at the date of his marriage, the settlement was unaffected by the sect., notwithstanding that that amount ultimately reached the trustees under a different title, but, as to the difference in amount between the one-tenth & first appointed one-ninth share & as to the secondly appointed one-ninth share, the settlement was void as against the trustee in bkpcy.—*Re* BULTEEL'S SETTLEMENTS, BULTEEL *v.* MANLEY, [1917] 1 Ch. 251 ; 86 L. J. Ch. 294 ; 116 L. T. 117 ; [1917] H. B. R. 105.

SUB-SECT. 7.—" EXECUTED AT THE DATE OF THE COMMENCEMENT OF THE BANKRUPTCY."

7156. " Becoming bankrupt."]—*Held :* the words " becoming bkpt." in 1883 Act, s. 47, meant the commission of an act of bkpcy. on which the receiving order was made.—*Re* REIS, *Ex p.* CLOUGH, [1904] 1 K. B. 451 ; 73 L. J. K. B. 929 ; 90 L. T. 62 ; 52 W. R. 302 ; 20 T. L. R. 167 ; 48 Sol. Jo. 193 ; 11 Mans. 229 ; *revsd.* on another point, [1904] 2 K. B. 769, C. A. ; *sub nom.* CLOUGH *v.* SAMUEL, [1905] A. C. 442, H. L.

Annotations :—**Apprvd.** *Re* Hart, *Ex p.* Green, [1912] 3 K. B. 6, C. A. **Mentd.** *Re* Magnus, *Ex p.* Salaman, [1910] 2 K. B. 1049, C. A. ; *Re* Midgley (1913), 108 L. T. 45, D. C. ; *Re* Lind, Industrials Finance Syndicate *v.* Lind, [1915] 2 Ch. 345, C. A.

7157. " Actually transferred "—Expressed intention to transfer.]—In 1866 A., soon after the birth of his son, T., purchased a pipe of port wine

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PART XX. SECT. 11, SUB-SECT. 6.

7153 i. *Covenant to transfer all property of a similar kind which he should acquire.*]—An ante-nuptial settlement of specified household furniture, etc., upon certain premises, contained a covenant by the settlor in consideration of the marriage that if at any time thereafter, while any chattels should remain subject to the settlement, any chattels belonging to the settlor of a kind similar to those intended to be thereby assigned, should be brought upon such premises & be used therein, then so often as the same should happen, the chattels so brought in should be deemed to be vested in, & should thereupon become the property of the trustee upon the same trusts as were declared concerning the chattels thereby assigned :—*Held :* upon such chattels afterwards being brought upon such premises they did not become property settled by a settlement made before & in consideration of marriage, within the exemption in Insolvency Statute, 1871, s. 70 ; & the settlement, as to so many of them as were brought within its operation within two years before the insolvency of the settlor might be set aside, without any proof of fraud in the settlor.—FRANKLYN *v.* DANBY (1886), 12 V. L. R. 863.—**AUS.**

a. *Settlement charging after-acquired property.*]—In 1817 A., not then a trader, on his marriage, covenanted that all his property, real & personal, as well that in possession as what he should thereafter acquire, should be charged with £3,000 as a provision for his wife & their children. Afterwards A. became a trader. In 1835 he was declared bkpt. On a bill filed by the wife & children :—*Held :* the covenant to charge after-acquired property created a valid charge on all his freeholds bought after the marriage, & should be specifically executed against his assignees in bkpcy.—LYSTER *v.* BURROUGHS (1837), 1 Dr. & Wal. 149.—**IR.**

b. ——.]—In 1883 A., a trader, by settlement executed on his marriage with B., assigned to trustees all property then belonging to him, or thereafter until the raising of £600 to be acquired by him, & it was thereby declared that all the future property of A. thereby expressed to be assigned should be subject to the trusts of the settlement, & to the powers, covenants, & provisions therein, although the same or any part thereof might not be capable of passing at law by the assignment thereinbefore contained :—*Held :* the settlement, in so far as it purported to charge the after-acquired property of A. not actually paid or transferred at the date of the adjudication was void as against his assignees under 1872 Act, s. 52.—*Re* M'CROHAN (1892), 31 L. R. Ir. 225.—**IR.**

Sect. 11.—*Avoidance of settlements: Sub-sects.* 7 & 8. *Sect.* 12: *sub-sect.* 1.]

for his son, & had it bottled & laid down in his cellar, & from that time it remained intact in the cellar & was known in the family & amongst their friends as T.'s wine. In 1885 A. became bkpt.:—*Held:* there was not sufficient evidence of an intention to make an immediate present gift of the wine to T., & it passed to the trustee in bkpcy.—*Re* RIDGWAY, *Ex p.* RIDGWAY (1885), 15 Q. B. D. 447; 54 L. J. Q. B. 570; 34 W. R. 80; 2 Morr. 248.

Annotations:—**Dbtd.** Cochrane *v.* Moore (1890), 25 Q. B. D. 57, C. A. **Mentd.** Kilpin *v.* Ratley, [1892] 1 Q. B. 582, D. C.; *Re* Stoneham, Stoneham *v.* Stoneham, [1919] 1 Ch. 149.

See, further, GIFTS.

7158. —— Actual legal transfer.]—*Held:* the words "actually transferred or paid" excluded constructive transfers, & 1883 Act, s. 47 (2), applied, unless an actual legal transfer pursuant to the contract or covenant had been made before the commencement of the bkpcy., the very object of the words being to draw the line somewhere short of the actual transfer.—*Re* REIS, *Ex p.* CLOUGH, [1904] 1 K. B. 451; 73 L. J. K. B. 929; 90 L. T. 62; 52 W. R. 302; 20 T. L. R. 167; 48 Sol. Jo. 193; 11 Mans. 229; *revsd.* on another point, [1904] 2 K. B. 769, C. A.; *sub nom.* CLOUGH *v.* SAMUEL, [1905] A. C. 442, H. L.

Annotations:—**Overd.** *Re* Magnus, *Ex p.* Salaman, [1910] 2 K. B. 1049, C. A. **Mentd.** *Re* Hart, *Ex p.* Green, [1912] 3 K. B. 6, C. A.; *Re* Midgley (1913), 108 L. T. 45, D. C.; *Re* Lind, Industrials Finance Syndicate *v.* Lind, [1915] 2 Ch. 345, C. A.

7159. —— Settlor altering position from beneficial owner to trustee.]—By a post-nuptial settlement the settlor declared that he or the trustees would stand possessed of his estate upon trust for sale, & hold the proceeds upon trust for his wife for life, & after her death to the settlor, if he should survive her, with trusts in favour for the issue of the marriage, & in default of issue, an ultimate trust for the settlor. At the date of the settlement the settlor was solvent, & able to pay his debts without the aid of the property comprised in the settlement, & the settlement was made in good faith. Within ten years after the date of the settlement the settlor was adjudicated bkpt.:—*Held:* the settlor had altered his position from beneficial owner to trustee, & the settlement was valid against his trustee in bkpcy.—SHRAGER *v.* MARCH, [1908] A. C. 402; 77 L. J. P. C. 105; 99 L. T. 33; 24 T. L. R. 641; 52 Sol. Jo. 580; 15 Mans. 310, P. C.

7160. —— Must be read with regard to nature of property—Transfer of furniture.]—Debtor by his marriage settlement settled the furniture in his residence upon trust for the use & enjoyment of his wife during her life, & covenanted that any furniture afterwards acquired by him during the life of his wife should form part of the settlement. Debtor & his wife, after many changes of residence, ultimately moved into a large house where they lived together until debtor's bkpcy., & debtor purchased a large amount of additional furniture for such house. There was no formal delivery of the additional furniture to the trustee of the settlement, but he occasionally visited debtor & his wife, & saw the furniture. After a receiving order had been made against debtor he removed all the furniture to a warehouse. The trustee in the bkpcy. claimed the after-acquired furniture, on the ground that it had not been "actually transferred" to the trustee of the settlement pursuant to the covenant:—*Held:* (1) the words "actually transferred" must be read with reference to the nature of the property; (2) in view of the fact that the furniture had been used by the wife in accordance with the trusts of the settlement, no formal transfer to the trustee of the settlement was necessary, but in the eye of the law there had been an actual transfer made in pursuance of the covenant by debtor to the trustee of the settlement & by the trustee of the settlement back to the wife, & the claim of the trustee in bkpcy. failed.—*Re* MAGNUS, *Ex p.* SALAMAN, [1910] 2 K. B. 1049; 80 L. J. K. B. 71; 103 L. T. 406; 54 Sol. Jo. 721; 17 Mans. 282, C. A.

SUB-SECT. 8.—"TRANSFER OF PROPERTY MADE IN PURSUANCE OF SUCH COVENANT OR CONTRACT."

7161. Covenant to settle all furniture—Settlement of original furniture—& furniture bought since marriage.]—A., previous to marriage, agreed to settle after marriage all his furniture on his wife for her sole use & benefit. At the time of the marriage A. had some furniture, & so had his wife, & some was purchased subsequently. Three years after the marriage A., when in debt, settled on his wife & children all the furniture then in his possession. Shortly afterwards he became bkpt., & his assignee claimed the furniture on behalf of the creditors:—*Held:* the whole of the furniture was subject to the trusts of the settlement.—BRASHIER *v.* WYATT (1867), 16 L. T. 275.

See also, No. 7160, *ante*.

7162. Covenant to convey leasehold estate free from encumbrances—Other estate substituted.]—By marriage articles, in 1865, an intending husband covenanted with trustees to pay off the incumbrances on a leasehold estate, & to convey it to them, free from incumbrances, upon trusts therein declared. In 1869, the husband, being pressed by the trustees to perform the covenant, & being unable to convey the estate freed from incumbrances, conveyed other lands in lieu thereof upon the same trusts. His interest in the substituted lands, was worth little more than his interest in the lands subject to the original articles. The husband, six months later, became bkpt. At the date of the conveyance legal proceedings were pending which resulted in an award against him of large damages:—*Held:* the settlement of 1869 was fraudulent & void, in so far as it conveyed property not included in the articles of 1865.—*Re* WIELAND, GATES *v.* FABIAN (1870), 19 W. R. 61.

7163. Proof of ante-nuptial settlement—Effect of recital.]—A recital in a post-nuptial deed of settlement, that the settlement is made in pursuance of a parol ante-nuptial agreement, is a memorandum in writing sufficient to satisfy Stat. Frauds, but it does not dispense with the necessity of proving that the recited ante-nuptial agreement was actually made.—*Re* GILLESPIE, *Ex p.* KNAPMAN *v.* GILLESPIE (1913), 20 Mans. 311.

SECT. 12.—AVOIDANCE OF PREFERENCE.

See, now, 1914 Act, s. 44.

SUB-SECT. 1.—IN GENERAL.

7164. What should be regarded—Since 1869 Act.]—*Held:* in determining whether a transaction amounted to a fraudulent preference, the ct. ought to have regard simply to the statutory definition contained in 1869 Act, s. 92, & the decisions on the subject before that Act might be useful as guides, but the standards laid down in them must not be substituted for that which was

laid down in the Act.—*Re* WILCOXON, *Ex p.* GRIFFITH (1883), 23 Ch. D. 69; 52 L. J. Ch. 717; 48 L. T. 450; 31 W. R. 878, C. A.

Annotations:—**Consd.** *Re* Bell, *Ex p.* Official Receiver (1892), 10 Morr. 15, D. C. **Refd.** *Re* Bird, *Ex p.* Hill (1883), 23 Ch. D. 695, C. A.; *Re* Washington Diamond Mining Co., [1893] 3 Ch. 95, C. A.; New, Prance & Garrard's Trustee *v.* Hunting, [1897] 1 Q. B. 607. **Mentd.** *Re* Goldsmid, *Ex p.* Taylor (1886), 35 W. R. 148, C. A.

7165. *S. P. Re* BIRD, *Ex p.* HILL (1883), 23 Ch. D. 695; 52 L. J. Ch. 903; 49 L. T. 278; 32 W. R. 177, C. A.

Annotations:—**Consd.** *Re* Bell, *Ex p.* Official Receiver (1892), 10 Morr. 15, D. C. **Refd.** *Re* Washington Diamond Mining Co., [1893] 3 Ch. 95, C. A.

7166. —— ——.]—Whether in any particular case a payment impeached in bkpcy. is a payment by way of undue preference or not, is a question of fact to be considered by a jury, if the case comes before a jury, by the ct., if the ct. performs the function of judging of the facts of the case. The mere insolvency of the person making the payment is insufficient. The mere fact that at the time of the payment the whole of his property would not be sufficient to pay the whole of his debts, is not sufficient. It is a circumstance, an ingredient in the case, to be considered with all the other circumstances of the case. The payment, however, must be made in contemplation of bkpcy. (LORD CAIRNS).—THURBURN *v.* STEWARD (1871), L. R. 3 P. C. 478; 7 Moo. P. C. C. N. S. 333; 40 L. J. P. C. 5; 19 W. R. 678; 17 E. R. 127, P. C.

Annotation:—**Mentd.** *Re* Doetsch, Matheson *v.* Ludwig, [1896] 2 Ch. 836.

7167. —— —— **That creditor was privy.**]—Although debtor may make a payment with a view to prefer a particular creditor, yet in order to constitute such payment a fraudulent preference

PART. XX. SECT. 12, SUB-SECT. 1.

a. *Discretion of court.*]—*Held:* the provision of 1883 Act, s. 79 (1), empowering the ct. to declare payments for antecedent debts made within three months before bkpcy. void, was directory & not mandatory, & the ct. might use its discretion in exercising the power there given.—*Re* BLOOMFIELD (1885), 3 N. Z. L. R. C. A. 177.—**N.Z.**

b. *Whether 48 Vict. c. 26, retrospective.*]—*Held:* the Act did not apply to a sale made before the Act came into force.—COATS *v.* KELLY (1890), 15 A. R. 81.—**CAN.**

c. *Whether Alberta Assignments Act retrospective.*]—*Held:* so far as it affected transactions completed before its coming into force, the Act was not retrospective. *Semble:* s. 49, so far as it gave a right of action to the assignee, to the exclusion of creditors, was retrospective, but only in respect of transactions "in fraud of creditors" or "in violation of this Act."—HORNE *v.* GALT (1908), 1 Alta. L. R. 392.—**CAN.**

7164 i. *What should be regarded.*]—Matters which are open & known or knowable by people generally, & without ingredients of secrecy, etc., are not contemplated by the Act against fraudulent preferences.—*Re* PURCELL (1915), 3 Nfld. L. R. 267. —**NFLD.**

7164 ii. ——.]—In determining whether a transaction is void as fraudulent, the substantial effect of it must be looked at, & where that effect is to create property not then in existence which would be available to pay all or some of the creditors, the transaction is not fraudulent.—MCKILLOP & CO. *v.* THE ROYAL BANK OF CANADA, [1917] 1 W. W. R. 1149; 33 D. L. R. 268; 10 Alta. L. R. 304; *Revsd. in part*, 56 S. C. R. 220; 2 W. W. R. 100; 40 D. L. R. 556.—**CAN.**

7164 iii. ——.]—In order to set aside a bill of sale on the ground of fraudulent preference, where the grantor has become bkpt. on a declaration of insolvency filed by him, it is necessary to show not only the implied fraud which would constitute it an act of bkpcy., but also either that the deed is fraudulent under 13 Eliz. c. 5, or that there is fraud in fact of such a nature as would render the deed impeachable not only as an act of bkpcy., but as a fraudulent preference. —MORRIS *v.* MCNEIL, O. B. & F. 55. —**N.Z.**

7164 iv. —— *New South Wales Insolvent Act (5 Vict. No. 17), s. 8.*]—*Held:* in order to bring a case within the above sect., there must be not merely a preference, but a fraudulent preference.—BANK OF AUSTRALASIA *v.* HARRIS (1861), 15 Moo. P. C. C. 97; 6 L. T. 115; 8 Jur. N. S. 181; 10 W. R. 383; 15 E. R. 429.—**AUS.**

7164 v. —— *Insolvent Act*, 1869.]—To avoid a transaction under s. 8 (4), not only must there be a contemplation of insolvency, but coupled with it a fraudulent preference of the creditor to whom the transfer or payment is made over the other creditors.—MCWHIRTER *v.* THORNE (1869), 19 C. P. 302.—**CAN.**

7164 vi. —— ——.]—A., a private banker, exchanged cheques with B. for mutual accommodation. A. used B.'s cheque. A cheque of A.'s had been dishonoured, & the holder called at A.'s office the same day, & a clerk, in the ordinary course of business, gave the holder B.'s cheque to pay the dishonoured cheque. The next day A. stopped payment:—*Held:* the transfer was not a fraudulent preference under Insolvent Act, 1869. —CITY BANK *v.* SMITH (1870), 20 C. P. 93.—**CAN.**

7164 vii. —— *R. S. O.* 1887 (*c.* 124), *s.* 2.]—The above sect. should be read as intended to invalidate any act fraudulent in the sense of being a violation of the statute, if it has the effect of defeating or delaying creditors or giving one or more of them a preference over others. *Semble:* the meaning of the sect. is, that when a person is in insolvent circumstances, if either the intent or the effect of the transaction is to prefer the creditor, that is all that is necessary to avoid it.—KENNEDY *v.* FREEMAN (1890), 15 A. R. 166.—**CAN.**

7164 viii. —— *Insolvency Act.*]—In deciding whether or not a payment made to a creditor amounts to an unfair preference, the cts. may fairly, where there is no other reason for impeaching the transaction as an unfair preference apart from Insolvency Act, refer to, & be guided by, Insolvency Act, which treats a transaction as an unfair preference only when it has occurred within a limited time before the insolvency proceedings.—*Re* HASTIE (1885), I. L. R. 11 Calc. 451; 2 B. Dig. 5686–7 (45).—**IND.**

7164 ix. —— 1884 *Act, s.* 27—1885 *Act, s.* 13.]—In order successfully to impeach any transaction as a fraudulent preference under 1884 Act, s. 27, as amended by 1885 Act, s. 13, it is necessary to show that debtor entered into the transaction in contemplation of bkpcy., & with the intention of giving a preference to the creditor.—*Re* ANDERSON (1889), 7 N. Z. L. R. 716.—**N.Z.**

7167 i. —— *That creditor was privy.*]—In order to defeat a transfer of property to a creditor on the ground of fraudulent preference the creditor must be shown to have concurred therein, & the burden of proof to establish the *mala fides* of the creditor rests upon complainant.—KOOP *v.* SMITH (1914), 20 B. C. R. 372.—**CAN.**

7167 ii. —— ——.]—Where there is lacking a knowledge of insolvency & intent to prefer or prejudice creditors in the part of either mtgor. or mtgee., the mtge., not being attacked within sixty days from the date of its execution, is not invalid under Assignments Act.

Where a mtgee. is a director & shareholder of a co. & the mtgor. a shareholder concurrence of intention will be presumed.—BARTHELS, SHEWAN & CO. *v.* WINNIPEG CIGAR CO. (1909), 2 Alta. L. R. 21; 10 W. L. R. 263. —**CAN.**

7167 iii. —— ——.]—To avoid a transaction as a fraudulent preference under 38 Vict. c. 5, s. 59 (Man.), both parties must be implicated in the attempted fraud.—TUCKER *v.* YOUNG, *Temp.* Wood, 186.—**CAN.**

7167 iv. —— —— *Character of creditor.*]—Action by an assignee, under Insolvent Act, 1875, to recover back from defts. a quantity of glue obtained from insolvents in contemplation of their insolvency, or the value of such glue. Defts. pleaded ignorance of the position of insolvents & perfect good faith on their own part:—*Held:* though the circumstances were suspicious they were not sufficiently so, considering the high character of defts., to characterise the transaction as fraudulent.—WHYTE *v.* MCARTHUR (1876), 2 Steph. Q. Dig. 671, 672 (23). —**CAN.**

7167 v. —— *That creditor knew of insolvency.*]—The fact that the grantors were to the knowledge of the grantee insolvent at the time of making the deed, is in itself insufficient to cause the deed to be set aside as a fraudulent preference under R. S. O. 1887 (c. 124). —HICKERSON *v.* PARRINGTON (1892), 18 A. R. 635.—**CAN.**

7167 vi. —— ——.]—Pltfs., sub-contractors for the stone & brickwork of a school, who were to receive payment from the principal contractors, procured an assignment to themselves of the balance due them by the contractors for their completed work, & payable to the contractors by the school board. The contractors were at the time unable to pay their debts, which pltfs. knew, & an attachment in insolvency issued against them within three months after the assignment of the claim:—*Held:* the transaction was an unjust preference under Insolvent Act, 1875, s. 133.—GRIFFITHS *v.* PERRY (1882), 6 A. R. 672.—**CAN.**

7167 vii. —— ——.]—A farmer mortgaged his farm to secure a debt due by him to the mtgee. & a small sum advanced at the time the mtge. was made. He knew at the time that he was unable to pay his debts in full, & that he was giving the mtgee. a preference over his other creditors.

Sect. 12.—*Avoidance of preference: Sub-sects.* 1 & 2.]

it must clearly appear that the creditor was conscious of or a participator in the fraud.—*Re* CRAWFORD, *Ex p.* PUTMAN (1874), 30 L. T. 335; 22 W. R. 569.

7168. —— Before 1869 Act.]—In order to constitute a fraudulent preference (1) the trader must contemplate his own immediate bkpcy.; (2) he must himself make the distribution; (3) the distribution must be different from what a Ct. of Bkpcy. would make. The absence of any one of these ingredients will prevent the distribution from being impeached as a fraudulent preference.

It is not necessary to show that the creditor preferred was in any way party to any fraud or undue action.—BOURNE *v.* GRAHAM (1856), 2 Jur. N. S. 1225.

Annotation:—**Mentd.** Gartsides *v.* Outram (1856), 28 L. T. O. S. 120.

7169. Onus of proof.]—The *onus* of proof lies upon those who impeach the payment as having been made by way of undue preference.—THURBURN *v.* STEWARD (1871), L. R. 3 P. C. 478; 7 Moo. P. C. C. N. S. 333; 40 L. J. P. C. 5; 19 W. R. 678; 17 E. R. 127, P. C.

Annotation:—**Mentd.** *Re* Doetsch, Matheson *v.* Ludwig, [1896] 2 Ch. 836.

7170. ——.]—The burden of proof in cases of fraudulent preference is on the person alleging that the payment is protected.—*Re* TATE, *Ex p.* TATE (1876), 35 L. T. 531; 25 W. R. 52, C. A.

7171. ——.]—Under 1914 Act, s. 44, the *onus* of proof of a fraudulent preference is on the trustee.—BULTEEL & COLMORE *v.* PARKER & BULTEEL'S TRUSTEE (1916), 32 T. L. R. 661.

7172. —— What must be proved.]—Where a payment is impeached by a trustee as constituting a fraudulent preference, the *onus* is on him not merely to show insolvency, but also to prove that the payment was made by bkpt. with a view to prefer the particular creditor.—*Re* LAURIE, *Ex p.* GREEN (1898), 67 L. J. Q. B. 431; 46 W. R. 491; 42 Sol. Jo. 346; 5 Mans. 48.

Annotation:—**Refd.** Bulteel & Colmore *v.* Parker & Bulteel's Trustee (1916), 32 T. L. R. 661.

7173. "Transfer or charge"—7 Geo. 4, c. 57, s. 32.]—Insolvent with a view to taking the benefit of the above Act, & by way of a fraudulent preference of the particular creditor, gave a warrant of attorney, under which all his goods were taken in execution & sold:—*Held:* the warrant of attorney so given & acted upon operated as a "transfer" of, or "charge" upon his estate, within the above sect., & the sale of the goods in the circumstances was an "assignment" of his

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The mtgee. was not aware at the time he took the mtge. that the mtgor. was in insolvent circumstances:—*Held:* the mtge. was not void against creditors, under R. S. O. 1887 (c. 124), s. 2.—GIBBONS *v.* MCDONALD (1890), 19 O. R. 290; 18 A. R. 159.—**CAN.**

7167 viii. ——.]—In an action to set aside a fraudulent preference it is not necessary to show notice to the transferee of debtor's insolvent condition; but, in any case, if the transferee had such a knowledge of debtor's financial position that an ordinary business man would conclude from it that debtor was unable to meet his liabilities, constructive notice of the insolvency should be imputed to him.—SCHWARTZ *v.* WINKLER (1902), 13 Man. L. R. 493.—**CAN.**

7167 ix. —— ——.]—The success of a creditors' action, attacking a transaction as a preference depends on proof of knowledge, of debtor's insolvency on the part of both parties, & the concurrence of intention to create an unlawful preference.—HORNE *v.* GALT (1908), 1 Alta. L. R. 392.—**CAN.**

7167 x. ——.]—A chattel mtge. given as security for a *bonâ fide* debt cannot be avoided under R. S. O. 1877 (c. 118), by simply showing that debtor was insolvent, & intended to give the mtgee. a preference, but there must be knowledge on the part of the creditor taking the mtge. so as to constitute a concurrence of intent on the part of debtor & creditor; & the amendment made by 47 Vict. c. 10, s. 3, does not affect the matter. —MCROBERTS *v.* STEINOFF (1886), 11 O. R. 369.—**CAN.**

7167 xi. —— ——.]—Circumstances in which:—*Held:* deft. bank had knowledge of their debtor's insolvent condition on or about July 13, & there had been a fraudulent preference given to the bank by insolvent in transferring over to it all his customers' paper not yet due.—STEVENSON *v.* CANADIAN BANK OF COMMERCE (1893), 23 S. C. R. 530.—**CAN.**

7167 xii. —— ——.]—G. had assisted S. with loans & also guaranteed his credit at the D. bank to the extent of $3,000. His own cheque at the bank having been refused payment, until the indebtedness of S. of $1,900 was settled, the latter transferred to G. goods pledged in the I. bank, G. paying what was due to both banks. Shortly after S. absconded, being insolvent. G.'s cheque was not refused from any doubt of S.'s solvency but because the bank had heard that S. was dealing with another bank:—*Held:* G. had no reason to suppose, when the goods were transferred, that S. was insolvent, & he had satisfied the *onus* placed upon him of showing that he had not intended to hinder or defraud the creditors of S.—BALDOCCHI *v.* SPADA (1907), 38 S. C. R. 577.—**CAN.**

7167 xiii. ——.]—Action to annul a sale made by G. to R., of all real estate belonging to G., in Quebec, for $54,000, on Feb. 23, 1878. G. was a member of the firm of G. L. & Co. & when the sale was made, the firm was hopelessly insolvent, & it was alleged that the sale was in reality collusively made for the purpose of covering the debt of the firm to R. R. pleaded that the firm was represented to him at the time of the sale to be solvent, that he had reason to believe that such statement was true, & that the whole transaction was in good faith & caused no loss to the creditors of G. or to the firm:—*Held:* there was not sufficient evidence to establish that the sale was intended illegally & fraudulently to give R. an advantage over the other creditors of G. L. & Co., nor that R. knew on Feb. 23, 1878, of the insolvency of the firm.—ROSS *v.* LAIRD (1889), Cass. Dig. (2 ed.) 351.—**CAN.**

7167 xiv. —— ——.]—A mtge. given a creditor to secure a past debt, the mtgee. being aware that the mtgor. was in insolvent circumstances:—*Held:* fraudulent & void as against the other creditors of the mtgor.—RUSSELL *v.* KLOEPFER, LTD. (1914), 26 O. W. R. 80; 6 O. W. N. 102; 16 D. L. R. 874.—**CAN.**

7167 xv. —— *Through his agent.*]—W. knew he was insolvent when he made the impeached chattel mtge. to defts., & so did their agent. Defts. not having rebutted the *onus* on them, the mtge. was set aside in part. —HONSINGER *v.* KUNTZ (1909), 14 O. W. R. 233.—**CAN.**

d. —— *That creditor expected debtor's bankruptcy.*]—*Held:* under 1885 Act, s. 13, a payment or a transaction was void against the official assignee, if it had the effect of a preference, & debtor made or entered into it, willingly or unwillingly, in contemplation of bkpcy., whether or not the creditor expected his debtor's bkpcy.—CASTENDYCK & FOCKE *v.* MCLELLAN'S OFFICIAL ASSIGNEE (1887), 6 N. Z. L. R. 67.—**N.Z.**

f. —— *That both parties contemplated debtor's insolvency.*]—Two mtges. were created by debtor in favour of a creditor, whose claim consisted of promissory notes than current. Debtor was in insolvent circumstances, & both debtor & creditor contemplated debtor going into insolvency, which he did shortly afterwards:—*Held:* the mtges. were void as an "unjust preference" under Insolvent Acts, 1864 & 1869.—PAYNE *v.* HENDRY (1873), 20 Gr. 142.—**CAN.**

g. —— *Valuable consideration given.*]—Where valuable consideration has been given, its inadequacy is not a matter the ct. will go into except in so far as it is evidence that the transaction was a sham.—*Re* HUME, *Ex p.* THE OFFICIAL ASSIGNEE (1909), 28 N. Z. L. R. 793.—**N.Z.**

7169 i. *Onus of proof.*]—In an action by creditors & by the assignee for the general benefit of creditors to recover from defts., also creditors, sums of money paid by insolvent to defts. before the assignment under the terms of an alleged secret agreement:—*Held:* the *onus* of proof was on pltfs.—LANGLEY *v.* VAN ALLEN (1901), 20 C. L. T. Occ. N. 437; 32 O. R. 216.—**CAN.**

7169 ii. ——.]—A bank claimed the proceeds of a draft drawn by W. Co. under an assignment executed by the co. in favour of the bank. Defts. claimed the assignment to be void as a fraudulent preference under Alberta Assignments Act, 1907 (c. 6):—*Held:* their claim failed, as they did not support it by evidence.—IMPERIAL BANK OF CANADA *v.* WESTERN SUPPLY & EQUIPMENT CO. (1918), 39 D. L. R. 803.—**CAN.**

h. *"Unjust preference"—Insolvent Act,* 1869, *s.* 89.]—The words "unjust preference" in Insolvent Act, 1869, s. 89, are equivalent to the words "fraudulent preference" in English 1869 Act.

An "unjust preference" is one that prevents an equal distribution of insolvent's property among all his creditors.—MCLEOD *v.* WRIGHT (1877), 1 P. & B. 68.—**CAN.**

effects within that sect.—SHARPE *v.* THOMAS (1830), 6 Bing. 416; 4 Moo. & P. 87; 8 L. J. O. S. C. P. 132; 130 E. R. 1341.

Annotations :—**Refd.** Billiter *v.* Young (1856), 6 E. & B. 1, Ex. Ch.; Jeffries *v.* Alexander (1860), 8 H. L. Cas. 595, H. L.

Nature of property passing to trustee, generally.]—*See* Part II., *ante*.

Fraudulent conveyances & fraudulent preferences as acts of bankruptcy.]—*See* Part II., Sect. 2, sub-sects. 2 & 3, *ante*.

Protected transactions.]—*See* Sect. 13, *post*.

SUB-SECT. 2. PARTIES TO TRANSACTION—PROPERTY TRANSFERRED.

7174. Must be debtor & creditor.]—*Held :* 1869 Act, s. 92, applied only to transactions between a debtor & persons who were, in the strict sense of the words, his creditors.—*Re* SMITH, FLEMING & Co., *Ex p.* KELLY & Co. (1879), 11 Ch. D. 306; 48 L. J. Bcy. 65; 27 W. R. 830, C. A.

Annotation :—**Mentd.** *Re* Blackpool Motor Car Co., Hamilton *v.* Blackpool Motor Car Co., [1901] 1 Ch. 77.

7175. ——.]—*Held :* in order that a payment or transfer of property should amount to a fraudulent preference within 1883 Act, s. 48, it was essential that the relation of debtor & creditor should have existed between the parties when the payment or transfer was made.—*Re* GOLDSMID, *Ex p.* TAYLOR (1886), 18 Q. B. D. 295; 56 L. J. Q. B. 195; 35 W. R. 148; 3 T. L. R. 109, C. A.

Annotations :—**Refd.** *Re* Lane, *Ex p.* Gaze (1889), 23 Q. B. D. 74; Pratt *v.* Inman (1889), 6 T. L. R. 91; New, Prance & Garrard's Trustee *v.* Hunting, [1897] 1 Q. B. 607; *Re* Lake, *Ex p.* Dyer, [1901] 1 K. B. 710, C. A. **Mentd.** *Re* Hutchinson, *Ex p.* Ball (1887), 35 W. R. 264, C. A.; *Re* Mills, *Ex p.* Official Receiver (1887), 58 L. T. 235, D. C.; Sharp *v.* Jackson, [1899] A. C. 419, H. L.; *Re* Warren, *Ex p.* Trustee, [1900] 2 Q. B. 138; *Re* Blackpool Motor Car Co., Hamilton *v.* Blackpool Motor Car Co., [1901] 1 Ch. 77.

7176. —— **Transfer against bankrupt's instructions—To creditor of transferor.**]—E., carrying on business on his own account in America, & being also a partner in the firm of T. & Co., in England, drew bills on T. & Co., which he employed T. & B., another American firm, to sell for him, undertaking to provide T. & Co. with remittances to meet them at maturity. T. & B., in accordance with their usual course of dealing with E., indorsed the bills & sold them, giving to E. bills on their agent in England for the amount. E., being on the eve of insolvency, sent the bills so received from T. & B. to the English firm of T. & Co., with instructions to accept the bills drawn by himself & to hold the remittance for the purpose of meeting the payment thereof. On receipt of the remittance T. & Co. accepted the bills drawn by E., &, disregarding the instructions, handed the bills of T. & B., to L., in accordance with a previous promise made to him, in order to enable him to meet some liabilities incurred by him on behalf of T. & Co. :—*Held :* the transaction did not amount to a voluntary preference by E. in favour of T. & B.—THAYER *v.* LISTER (1861), 30 L. J. Ch. 427; 4 L. T. 50; 9 W. R. 360.

Annotation :—**Mentd.** Miller *v.* Barlow (1871), 14 Moo. Ind. App. 209, P. C.

7177. Whether relationship of debtor & creditor exists.]—In Sept. remittances to the amount of £5,300 were sent by a firm at Glasgow to a firm in London, to enable the latter to take up bills of exchange, drawn by the Glasgow firm upon & accepted by the London firm, which were to become due on Oct. 5, the arrangement between the two firms being that the Glasgow firm should provide the funds to meet the bills at maturity. The London firm kept a banking account at the Bank of England, for the purpose of meeting all their acceptances, & intended that the £5,300 should be paid to that account, but, through the mistake of a clerk, only £3,300 was paid there, £2,000 being paid to the L. Bank, where the London firm kept their general banking account. On Oct. 2 the London firm found that they were insolvent, & called in an accountant to investigate their affairs, & on Oct. 3 they announced to their creditors that they had suspended payment. On Oct. 2 they drew a cheque for £5,300 on the Bank of England, to which they then supposed that all the remittances of the Glasgow firm had been paid, intending to repay it to the Glasgow firm, but their solrs. advised them that it was doubtful whether they could legally do so, & the £5,300 was thereupon placed in a third bank in the joint names of two of the partners of the London firm. On Oct. 3 they discovered the mistake of their clerk, & attempted to withdraw the £2,000 from the L. Bank, but could not do so, because that bank claimed a lien on the balance of their account. The Glasgow firm took up the bills at maturity, & the £3,300 was paid to them, but the £2,000 was placed in the hands of the accountant, pending the decision of the rights of the parties. On Nov. 1 the London firm filed a liquidation petition, under which the accountant was appointed trustee of their property. They

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PART XX. SECT. 12, SUB-SECT. 2.

7174 i. *Must be debtor & creditor—Promissory note paid to indorsee of creditor.*]—Defts. discounted at a bank a promissory note, which A. had given them, & on maturity it was paid to the bank out of A.'s money within thirty days of his insolvency. In an action by the assignee to recover the amount from defts. as being a payment within Insolvent Act, 1875, s. 134 :—*Held :* they were not liable, as the payment was not made to them, but to the bank, who were the actual creditors.—MILLER *v.* HARVEY (1882), 6 A. R. 203.—**CAN.**

7174 ii. —— *Sale to obtain money to be used in making voluntary preference.*]—An actual sale made on the eve of insolvency, with an intention known to the purchaser of using the purchase-money for the purpose of making a voluntary preference, or to defeat or delay some of the vendor's creditors, is not void as a fraudulent preference under Insolvency Statute, 1871 (No. 379), s. 71.—*Re* WARD (1888), 14 V. L. R. 733.—**AUS.**

7174 iii. —— *Advance to pay creditor.*]—A solr., acting for a creditor, obtained for debtor on the security of a chattel mtge. a loan from another client. The solr., out of the money advanced paid off the creditor. Debtor afterwards assigned :—*Held :* the mtge. could not be impeached.—GIBBONS *v.* WILSON (1889), 17 O. R. 290; 17 A. R. 1.—**CAN.**

7174 iv. ——————.]—A security given by a person in insolvent circumstances to secure an actual advance made without notice or knowledge of the insolvency, & in good faith, is not impeachable, because the money advanced is, pursuant to the direction of insolvent, paid over to one of his creditors, who thereby obtains a preference.—JOHNSON *v.* HOPE (1890), 17 A. R. 10; *N. F. Schwartz* v. *Winkler*, 13 Man. L. R. 505.—**CAN.**

7174 v. —— ——.]—Insolvent made a promissory note for £150 in favour of S. The note was indorsed by S. & the amount thereof was paid by him to defts., the holders of the note, shortly after the due date. Insolvent had handed the £150 to her son, who gave it to S. to enable him to pay off the note, & S. had thereupon paid the amount to defts., receiving the note, which he had ever since retained. No steps had been taken by insolvent to recover the note from S. At the time of the payment insolvent clearly contemplated the sequestration of her estate. In an action to recover the £150 as being a payment made with intent to prefer defts. :—*Held :* it was the intention of insolvent to prefer S., the payment having been made for his benefit, & the action against defts. in respect of the note failed.—VAN DER MERWE'S ESTATE *v.* AFRICAN BANKING CORPN. (1909), 26 S. C. 83; 19 C. T. R. 205.—**S. AF.**

7174 vi. —— *Lease assigned to trustee for creditor.*]—The assignment of a lease by the lessee to a trustee for a *bonâ fide* creditor of the assignor with the intention of thereby evading the claims of the creditors of the *cestui que trust*, is not a fraudulent assignment within 5 Will. 4, c. 3, s. 8.—DOE d. BIGGARD *v.* MILLARD (1840), 1 Ont. Dig. 480.—**CAN.**

Sect. 12.—*Avoidance of preference: Sub-sect.* 3.]

had not committed any act of bkpcy. before the filing of the petition:—*Held:* as the London firm never intended to misappropriate the £2,000, the relation of debtor & creditor never arose in respect of it between them & the Glasgow firm, & the London firm could properly have employed, & ought to have employed, the £2,000 in meeting the bills on Oct. 5, & the trustee must pay the £2,000 to the Glasgow firm.—*Re* SMITH, FLEMING & Co., *Ex p.* KELLY & Co. (1879), 11 Ch. D. 306; 48 L. J. Bcy. 65; 27 W. R. 830, C. A.

Annotation:—**Refd.** *Re* Blackpool Motor Car Co., Hamilton *v.* Blackpool Motor Car Co., [1901] 1 Ch. 77.

7178. —— Between co-trustees in regard to trust funds.]—The relation between co-trustees in regard to trust funds is not that of debtor & creditor, & a voluntary payment by a trustee to make good a breach of trust does not constitute a fraudulent preference.—*Re* GOLDSMID, *Ex p.* TAYLOR (1886), 18 Q. B. D. 295; 56 L. J. Q. B. 195; 35 W. R. 148; 3 T. L. R. 109, C. A.

Annotations:—**Refd.** *Re* Lane, *Ex p.* Gaze (1889), 23 Q. B. D. 74; Pratt *v.* Inman (1889), 6 T. L. R. 91; New's Trustee *v.* Hunting (1896), 4 Mans. 6; *Re* Lake, *Ex p.* Dyer, [1901] 1 K. B. 710, C. A. **Mentd.** *Re* Hutchinson, *Ex p.* Ball (1887), 35 W. R. 264, C. A.; *Re* Mills, *Ex p.* Official Receiver (1887), 58 L. T. 235, D. C.; Sharp *v.* Jackson, [1899] A. C. 419, H. L.; *Re* Warren, *Ex p.* Trustee, [1900] 2 Q. B. 138; *Re* Blackpool Motor Car Co., Hamilton *v.* Blackpool Motor Car Co., [1901] 1 Ch. 77.

7179. —— Between trustee & cestui que trust.]—Payments made previous to bkpcy. in restitution of a breach of trust by a person "unable to pay his debts as they become due" cannot be recovered on the ground of fraudulent preference, since the relation of debtor & creditor does not exist betweeen a trustee & his *cestui que trust.*—*Re* HUTCHINSON, *Ex p.* BALL (1886), 35 W. R. 264; 3 T. L. R. 324, C. A.

Annotations:—**Refd.** New, Prance & Garrard's Trustee *v.* Hunting, [1897] 1 Q. B. 607; *Re* Lake, *Ex p.* Dyer, [1901] 1 K. B. 710, C. A.

7180. —— ——.]—*Qu.:* whether the relation of debtor & creditor exists as between a defaulting trustee & his *cestui que trust* so as to set aside a transaction as a fraudulent preference.—*Re* LAKE, *Ex p.* DYER, [1901] 1 K. B. 710; 70 L. J. K. B. 390; 84 L. T. 430; 49 W. R. 291; 17 T. L. R. 296; 45 Sol. Jo. 310; 8 Mans. 145, C. A.

7181. —— Who is a "creditor."]—Bkpt. had received an accommodation acceptance, which he had discounted with his bankers. Shortly before the date of the act of bkpcy. he paid in to his bankers money to meet the accommodation acceptance:—*Held:* any person, who at the date of a payment to him would, in the event of debtor becoming a bkpt., be entitled to prove & share in the distribution of bkpt.'s estate, was a "creditor" within 1883 Act, s. 48, & the acceptor of the accommodation bill, although only a surety, was a "creditor" within the sect., & the payment was a fraudulent preference.—*Re* PAINE, *Ex p.* READ, [1897] 1 Q. B. 122; 66 L. J. Q. B. 71; 75 L. T. 316; 45 W. R. 190; 13 T. L. R. 13; 41 Sol. Jo. 30; 3 Mans. 309.

Annotations:—**Consd.** *Re* Blackpool Motor Car Co., Hamilton *v.* Blackpool Motor Car Co., [1901] 1 Ch. 77. **Refd.** *Re* Pawson, [1917] 2 K. B. 527. **Mentd.** New, Prance & Garrard's Trustee *v.* Hunting, [1897] 76 L. T. 196; *Re* Warren, *Ex p.* Trustee, [1900] 2 Q. B. 138.

7182. —— ——.]—The word "creditor" means any person, who at the date when the charge or payment is made is entitled, if bkpcy. supervenes, to prove in the bkpcy. & share in the distribution of bkpt.'s estate.—*Re* BLACKPOOL MOTOR CAR Co., LTD., HAMILTON *v.* BLACKPOOL MOTOR CAR Co., LTD., [1901] 1 Ch. 77; 70 L. J. Ch. 61; 49 W. R. 124; 45 Sol. Jo. 60; 8 Mans. 193.

Annotation:—**Refd.** *Re* Lake, *Ex p.* Dyer, [1901] 1 K. B. 710, C. A.

7183. Security given by bankrupt's agent—Acting under power of attorney.]—B. borrowed a sum of money of a co., of which he was chairman. Being in difficulties he gave F., the secretary of

7179 i. *Whether relationship of debtor & creditor exists—Between trustee & cestui que trust.*]—W. having become insolvent, & wishing to secure to an estate, of which he was an exor., money which he had used for his own purposes, gave his co-exors. a mtge. on his property:—*Held:* there was no preference, as the persons for whose benefit the security was given were not creditors of the grantor, but stood in the relation of trustee & *cestui que trust.*—MOLSONS BANK *v.* HALTER (1890), 18 S. C. R. 88; 16 A. R. 323. —**CAN.**

j. —— *Between debtor & surety—Who has taken security for indorsements.*]—A bill of sale & a warrant of attorney to confess judgment were given by insolvent to deft. a few days before he assigned to pltf., for the benefit of his creditors. The object of the securities was to permit deft. recording them, if he apprehended that some creditor would take proceedings against debtor. Deft. had indorsed as security a large amount of insolvent's paper:—*Held:* upon the giving of the securities the relationship of principal & surety became that of debtor & creditor, & the bill of sale & the judgment entered on the warrant of attorney were void as against pltf.—MCLEOD *v.* WIGHTMAN (1906), 1 E. L. R. 260.—**CAN.**

k. —— —— *Who has not paid.*]—To avoid a transfer as a fraudulent preference under R. S. O. 1887 (c. 124), s. 2, the person to whom it is made must be a creditor in respect of the transaction attacked, & a surety for insolvent, who has not paid the debt for which he is surety, is not a creditor within the Act.—HOPE *v.* GRANT (1890), 20 O. R. 623.—**CAN.**

7181 i. —— *Creditor only becoming so in impeached transaction.*]—A. sold to B. his interest in land, there being an amount due thereon, to obtain a title, part of which A., & the remainder B., was to pay. B. gave to A. property worth £100, & among it a horse, for his interest in the land, but to secure the payment by A. of his share (£42 19*s.* 4*d.*) B. took from A. a mtge. on the horse:—*Held:* the mtge. was not void, as being a preferential assignment under C. S. U. C., c. 26, s. 18, it being a contemporaneous security for the purchase money of property taken at the time of the sale. —ROSS *v.* ELLIOTT (1883), 11 C. P. 221.—**CAN.**

7181 ii. —— ——.]—Declaration in detinue & trover for goods. Plea, that J., the owner, being unable to meet his engagements, & in contemplation of insolvency, mortgaged the goods to pltf., & within thirty days thereafter made a voluntary assignment in insolvency to deft., the official assignee, & that pltf. obtained an unjust preference over J.'s other creditors. Pltf. replied that J. being a retail dealer, & wanting goods to carry on his business, asked pltf. to indorse notes to enable him to purchase them, that pltf. consented, on condition that J. on receiving the goods should secure him against loss by a mtge. thereon, & on the other goods in J.'s store, who was to sell them at his store only, & out of the proceeds retire the notes, & if he should sell otherwise pltf. might sell the goods for his own protection, that pltf. indorsed, & J. with the notes purchased goods, which he mortgaged to pltf. as agreed on, with other goods, for the *bonâ fide* & sole consideration of perfecting the agreement, that J. afterwards without pltf.'s consent, assigned to deft., who took with notice of the mtge.:—*Held:* the replication was good, for pltf. only became a creditor by the actual transaction, in which he gave the equivalent in the new goods purchased procured on his credit, & in the circumstances the mtge. was not avoided. —MATHERS *v.* LYNCH (1869), 27 U. C. R. 244; 28 U. C. R. 354.—**CAN.**

7181 iii. —— ——.]—Insolvent agreed to pledge oxen to his creditors B. & S., but did not deliver the cattle. At a time when he contemplated sequestration, insolvent induced his father, applt., to give his promissory note for the amount due to B. & S., who thereupon ceded their right to the cattle, which were delivered by insolvent to applt.:—*Held:* B. & S. received an undue preference, there had been no undue preference of applt., who had become a creditor only by virtue of the transaction impeached.—GOOSEN *v.* GOOSEN'S TRUSTEES (1884), 1 Buch. A. C. 414. —**S. AF.**

7183 i. *Security given by bankrupt's agent—Acting under power of attorney.*]—In an action to have a bond, passed by virtue of an irrevocable power of attorney, set aside as an undue preference, pltf. must prove that insolvent was aware that the bond was being or was about to be passed, & that when the bond was passed he desired the result of the passing of the bond to be the preference of the bondholder over his other creditors. It is the state of mind of insolvent at the date when the transaction was virtually entered into, & not when the power was given, which must be inquired

the co., a power of attorney to execute all deeds for him that might be necessary, & shortly afterwards, in Aug., he left the country & never returned. On Nov. 1 F. executed a mtge. to secure the sum of money B. had borrowed of the co., & on Dec. 4 B. was adjudicated bkpt.:—*Held:* the execution of the mtge. by F. as attorney for B. was a fraudulent preference.—*Re* BOWLES' MORTGAGE (1874), 22 W. R. 817; *affd.* without touching this point, 31 L. T. 365, L. JJ.

7184. Property transferred must be that of bankrupt.]—In pursuance of an agreement made by bkpt. before bkpcy., his bankers placed money to a special account, as security against bills drawn by bkpt. & accepted by the bankers. The sum was claimed by the assignees as being the property of bkpt. & paid by him to his bankers by way of fraudulent preference:—*Held:* by the agreement the amount of the special account was rightly in the hands of the bankers, & formed no part of bkpt.'s estate, & no fraudulent preference, in such circumstances, could arise.—CHARTERED BANK OF INDIA, AUSTRALIA & CHINA *v.* EVANS (1869), 21 L. T. 407, P. C.

7185. Property not arising from—"Any conveyance or transfer or charge, etc."]—Debtor, who carried on business as a manufacturing jeweller, & owed his wife £1,425, in Sept., 1913, executed an assignment of his existing & future book debts, to secure payment of the debt. After the execution of the assignment he dealt with his book debts without accounting to his wife for them, & in Dec. he prepared a balance sheet, in which the book debts then owing in his business were included as part of his assets. On May 11, 1915, debtor's bankers issued a writ against him for money owing to them, & on May 19 the wife's solr. sent out notices to the book debtors, whose names then appeared in the assignment of Sept., 1913, to pay to him the debts owing by them, this being the first step taken by or on behalf of the wife in connection with the assignment. After the date of the assignment a number of persons became debtors & their names were added to the schedule, & in the case of three debtors, A., B., & C., whose names appeared in the schedule in Sept., 1913, their indebtedness was increased by £620 between May 10 & May 22, 1915. On May 26, 1915, debtor executed a deed of assignment for the benefit of his creditors generally. In June a petition in bkpcy. was filed, the assignment being laid as an act of bkpcy., & a receiving order was made, & a trustee appointed. In Aug. the wife's solr. recovered from A., B., & C. £543, which with sums recovered from other debtors made a total of £598 10*s.* 6*d.*:—*Held:* the assignment of Sept., 1913, was good & valid when it was made, & the debts coming into existence after May 10, 1915, came into existence not by virtue of any conveyance or transfer or charge, payment made or obligation incurred between bkpt. & his wife which could be attacked under 1914 Act, s. 44, but they passed to the wife by operation of the assignment of Sept., 1913, which could not be good in part & bad as to the residue, & the trustee was not entitled to be paid over the £598 10*s.* 6*d.* recovered by the wife.—*Re* ROOKER, *Ex p.* ROOKER, [1916] W. N. 253, D. C.; *affd.*, [1916] W. N. 293, C. A.

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into.—DU PLOOY'S TRUSTEE *v.* NETHERLANDS BANK (1913), T. P. D. 522. —**S. AF.**

7183 ii. —— ——.]—Where a power to pass a bond, in consideration of receiving additional time for payment of a debt, was given in Oct., but the bond was not actually passed until Jan., owing to an unavoidable delay in securing transfer:—*Held:* in considering whether debtor contemplated the sequestration of his estate at the time he gave the bond, the time to be looked at was Oct., & not Jan.—SLATER'S TRUSTEE *v.* SMITH & CO. (1885), 5 E. D. C. 9.—**S. AF.**

7183 iii. —— —— *Contrary to wishes of bankrupt.*]—In May, 1913, C., being then solvent, applied to B., the manager of a local branch of a bank for a loan of £600. An arrangement was made whereunder C., having obtained the advance, as security therefor deposited with the bank the title deeds of his property & gave B. an irrevocable power of attorney in blank to pass a bond over such property for the amount of the loan. On Mar. 13, 1914, B., knowing that C. was then insolvent, without the consent of C. & in spite of objection on his part, filled in the blank power with the name of an attorney & instructed the latter to pass a bond over the property for £600. The bond was passed on the same day, & on Mar. 18 C.'s estate was sequestrated. Thereafter the trustees in C.'s estate, brought an action to set aside the bond as an undue preference:—*Held:* as C. did not consent to the passing of the bond on Mar. 13 he could not be held to have intended on that date to prefer the bank, & pltfs.' claim failed.—CHIN'S TRUSTEES *v.* NATIONAL BANK OF SOUTH AFRICA, LTD. (1915), App. D. 353.—**S. AF.**

7183 iv. — — *Without knowledge of bankrupt.*]—Alienation of property, which, if made by insolvent himself, would be liable to be set aside as an undue preference does not constitute an undue preference, if made by insolvent's agent without the former's knowledge or authority.—DESAI'S TRUSTEE *v.* HACK (1910), T. P. D. 499.—**S. AF.**

7183 v. —— —— ——.]—On June 4, 1914, insolvent gave a power to defts., empowering them to pass a bond over certain immovable property to the amount of his indebtedness. There was no evidence to show any collusive arrangement that the power of attorney should only be used in case of insolvency. On Dec. 2, 1914, without the knowledge of insolvent, defts. passed the bond. On Mar. 12, 1915, insolvent surrendered his estate:—*Held:* as there was no evidence of an intention to prefer on insolvent's part, an application for absolution from the instance must be granted.—QUINN'S TRUSTEES *v.* AFRICAN BANKING CORPN., LTD. (1915), E. D. L. 411; 7 Biss. & Sm. 303.—**S. AF.**

7184 i. *Property transferred must be that of bankrupt.*]—A. being indebted to B., & B. to deft., it was arranged that deft. should take A. as his debtor, crediting B. with the amount which A. owed to B., & B. discharging A.; & A. gave deft. his note for the amount. This took place within thirty days before B. made an assignment in insolvency:—*Held:* the transaction was not avoided by Insolvent Act, 1864, s. 8 (4), for the note never was insolvent's property, & so never passed to the assignee.—MCGREGOR *v.* HUME (1870), 28 U. C. R. 380.—**CAN.**

7184 ii. —— *Land in name of third party.*]—Assignments Act, ss. 39 & 40, dealing with fraudulent preferences apply to a conveyance to a creditor of an insolvent of land belonging to the latter, but standing in the name of another, by whom the conveyance was executed.—KILGOUR *v.* ZASLAVSKY & ROSENFELD (1914), 30 W. L. R. 303; 7 W. W. R. 446; 25 Man. L. R. 14, 22; 19 D. L. R. 420.—**CAN.**

7184 iii. —— *Interest in future profits under contract.*]—An interest in the profits expected to be earned under a contract for the performance of work was assigned, by way of security, to deft.:—*Held:* as the subject of the assignment did not consist of assets which could be reached by creditors at the time when it was made, the assignment did not come within the Act respecting assignments & preferences.—BLAKELY *v.* GOULD (1897), 27 S. C. R. 682; 20 A. R. 153.—**CAN.**

7184 iv. *S. P.* MCKILLOP & CO. *v.* ROYAL BANK OF CANADA, [1917] 1 W. W. R. 1149; 33 D. L. R. 268; 10 Alta. L. R. 304; *Revsd. in part*, 56 S. C. R. 220; 40 D. L. R. 556; 2 W. W. R. 100.—**CAN.**

m. *Property transferred covered by Executions Act, R. S. M.* 1902 (*c.* 58), *s.* 29.]—A chattel mtge., although given in circumstances entitling a creditor to have it set aside as a fraudulent preference under Assignments Act, R. S. M. 1902 (c. 8), s. 41, will, nevertheless, be held valid as to any goods covered by it which would, under Executions Act, R. S. M. 1902, (c. 58), s. 29, be exempt from seizure under execution.—BATES *v.* CANNON (1908), 8 W. L. R. 575; 18 Man. L. R. 7.—**CAN.**

n. *Book debts.*]—*Held:* book debts were a species of property included in 48 Vict. c. 26, s. 2, & an assignment thereof by debtor to creditors was void as giving them a preference over other creditors.—KLOEPFER *v.* WARNOCK (1890), 18 S. C. R. 701.—**CAN.**

o. *"Goods," "goods & chattels"—Chattels real "goods"—Whether chattels real included.*]—The word "goods" in Insolvency Act (5 Vict. No. 9), s. 37, does not include chattels real.—TUCKETT *v.* ALEXANDER (1861), 1 W. & W. 87.—**AUS.**

Sect. 12.—*Avoidance of preference: Sub-sect.* 3.]

SUB-SECT. 3. IN CONTEMPLATION OF BANKRUPTCY.

7186. Whether necessary to be shown.]—If a person in trade pays a sum of money to one of his creditors, & his affairs are in such a state that he may reasonably believe bkpcy. probable, but not inevitable, at the time he makes such payment, it is fraudulent within the bkpcy. laws.

A. paid B. & others, his bankers, on Dec. 14, a sum of money which he owed them, as the balance of his account, & on the 15th was arrested, & went to prison & committed an act of bkpcy. by lying there for two months:—*Held:* his assignees might recover back the money so paid.—POLAND *v.* GLYN (1823), 4 Bing. 22, n.; 2 Dow. & Ry. K. B. 310; 12 Moore, C. P. 109, n.; 1 L. J. O. S. K. B. 72; 130 E. R. 675.

Annotations:—**Consd.** Flook *v.* Jones (1826), 4 Bing. 20. **Folld.** Guthrie *v.* Crossley (1826), 2 C. & P. 301. **Refd.** Atkinson *v.* Brindle (1835), 1 Hodg. 336; Wood *v.* Smith (1838), 4 M. & W. 522; *Re* Hunt, *Ex p.* Simpson (1844), De G. 9, Ct. of R.

7187. ——.]—To defeat a payment or transfer made to a creditor the assignees must show it to be fraudulent as against the body of creditors, by proving it to be in contemplation of his bkpcy.—VAN CASTEEL *v.* BOOKER (1848), 2 Exch. 691; 18 L. J. Ex. 9; 12 L. T. O. S. 65; 154 E. R. 668.

Annotations:—**Consd.** Turner *v.* Liverpool Docks' Trustees (1851), 6 Exch. 543, Ex. Ch.; Edwards *v.* Glyn (1859), 2 E. & E. 29; Graham *v.* Candy (1862), 3 F. & F. 206. **Refd.** The Marie Joseph (1864), 5 New Rep. 96; Smith *v.* Hudson (1865), 6 B. & S. 431. **Mentd.** Jenkyns *v.* Brown (1849), 14 Q. B. 496; Sheridan *v.* New Quay Co. (1858), 4 C. B. N. S. 618; Browne *v.* Hare (1859), 4 H. & N. 822, Ex. Ch.; Gumm *v.* Tyrie (1864), 4 B. & S. 680; Joyce *v.* Swann (1864), 17 C. B. N. S. 84; Bills *v.* Smith (1865), 11 Jur. N. S. 155; Moakes *v.* Nicholson (1865), 34 L. J. C. P. 273; Berndtson *v.* Strang (1867), L. R. 4 Eq. 481; Schotsmans *v.* L. & Y. Ry. Co. (1867), 2 Ch. App. 332, L. C. & L. J.; Gabarron *v.* Kreeft (1875), L. R. 10 Exch. 274; Ogg *v.* Shuter (1875), L. R. 10 C. P. 159; Mirabita *v.* Imperial Ottoman Bank (1878), 3 Ex. D. 164, C. A.; Colonial Insce. of New Zealand *v.* Adelaide Marine Insce. (1886), 12 App. Cas. 128, P. C.; The Parchim, [1918] A. C. 157, P. C.

7188. ——.]—A delivery of goods to one, to whom a debt was due, would only be a fraudulent delivery, if the transfer of the goods was made voluntarily & in contemplation of bkpcy.—SCOTT *v.* THOMAS (1834), 6 C. & P. 611.

7189. ——.]—To be a fraudulent preference the payment must be both voluntary & in contemplation of bkpcy.—BROWN *v.* KEMPTON (1849), 13 L. T. O. S. 11; *affd.* (1850), 19 L. J. C. P. 169, Ex. Ch.

Annotations:—**Consd.** Edwards *v.* Glyn (1859), 2 E. & E. 29; Graham *v.* Candy (1862), 3 F. & F. 206; *Re* Craven & Marshall, *Ex p.* Tempest (1870), 6 Ch. App. 70, L. JJ.; *Re* Bell, *Ex p.* Official Receiver (1892), 10 Morr. 15, D. C. **Refd.** Hale *v.* Allnutt (1856), 18 C. B. 505; Strachan *v.* Barton (1856), 11 Exch. 647; *Re* Cherry, *Ex p.* Matthews (1871), 25 L. T. 276; *Re* Collett, *Ex p.* Boyle (1871), 25 L. T. 550, L. JJ.; Smith *v.* Pilgrim (1876), 2 Ch. D. 127.

7190. ——.]—Debtor mortgaged a ship to one creditor, leaving himself scarcely any assets, & at the time of the mtge. both the mtgor. & creditor knew that the mtgor. was practically bkpt.:—*Held:* such mtge. was executed by way of fraudulent preference, & was void.—THE HEART OF OAK (1869), 39 L. J. Adm. 15; 21 L. T. 727; 3 Mar. L. C. 317.

Annotation:—**Mentd.** The Mullingar (1872), 26 L. T. 326.

7191. ——.]—R., a trader, executed a bill of sale, by which he assigned all his property to J., a creditor, & then became bkpt. on his own petition:—*Held:* as there was no contemplation of bkpcy. at the time of the assignment, there was no intention to defeat & delay creditors so as to render the transaction voidable at the option of the assignees.—JONES *v.* HARBER (1870), L. R. 6 Q. B. 77; 40 L. J. Q. B. 59; 23 L. T. 606; 19 W. R. 248.

7192. —— **Transaction due to pressure by creditor.**]—Where the act of delivering goods by a trader, to secure deft., who was under acceptances for him payable at a future day, was clearly not voluntary on the trader's part, but made in consequences of the urgency of deft.:—*Held:* it

PART XX. SECT. 12, SUB-SECT. 3.

r. *Definition & meaning.*]—"Contemplation of sequestration" means expectation of insolvency, & not merely a probability of future insolvency.—SLATER'S TRUSTEE *v.* SMITH & Co. (1885), 5 E. D. C. 9.—**S. AF.**

s. ——.]—The words "contemplating sequestration" in Ord. 6 of 1843, s. 84, mean that the ct., judging of the fact, must be satisfied that the payment was made in the view & in the expectation of supervening bkpcy., & in order to disturb what would be the proper distribution of assets under that bkpcy. Whether it was made with that intention, or not, is not only a question of fact, but, being a question of intention, the intention must be arrived at by considering the probable motives which would arise to influence the person making the payment towards making it, or towards retaining the money in his own possession.—THURBURN *v.* STEWARD (1871), L. R. 3 P. C. 478, 518; 7 Moo. P. C. C. N. S. 333; 40 L. J. P. C. 5; 19 W. R. 678; 17 E. R. 127, P. C.—**S. AF.**

t. ——.]—The words "in contemplation of insolvency" in Insolvent Act, 1869, s. 89, are to be construed by the *quo animo* of the grantor.—MCLEOD *v.* WRIGHT (1877), 1 P. & B. 68.—**CAN.**

7186 i. *Whether necessary to be shown.*]—In order to constitute a fraudulent preference, it is not sufficient that a payment or security was voluntary, & made at a time when the trader was in insolvent circumstances. It is necessary to show that it was made in contemplation of bkpcy.—*Re* RYAN (1853), 3 I. Ch. R. 33.—**IR.**

7186 ii. ——.]—Trover by assignees. Plea, justifying under a judgment & execution against bkpt. before bkpcy. Replication, that the judgment was recovered on a confession of judgment given "in contemplation of bkpcy., & for the purpose of giving one of several creditors a preference, & with the intent to delay & defeat other creditors":—*Held:* sufficient, without adding that it was given within a month of the commission.—BRENT *v.* PERRY (1883), 5 U. C. R. 538; 7 U. C. R. 24.—**CAN.**

7186 iii. ——.]—D. & W., merchants of Quebec, held a mtge. from H. on a steamboat then in course of construction. H. became insolvent, & on filing their claim the creditors allowed D. & W. to take the vessel at their valuation on giving promissory notes for the balance. The notes were not paid at maturity, & on July 13, 1877, D. & W. transferred their hypothec on the vessel to applt. for $6,500, the transfer being registered the same day. On the strength of such transfer D. & W. obtained delay from the bank for the payment of notes due them. On Dec. 3, 1878, a writ of attachment in insolvency issued against them. The assignee sued the bank to set aside the transfer of the hypothec, as having been made at a time when D. & W. were insolvent to the knowledge of the bank:—*Held:* there was no proof of the essential allegations of pltf., that on July 13, 1877, the date of the execution of the transfer, the bank had reason to believe that the transfer was made in contemplation of insolvency.—STADACONA BANK *v.* WALKER (1880), 10 R. L. O. S. 381.—**CAN.**

7186 iv. ——.]—M., a merchant in insolvent circumstances, although not aware of that fact, sold his stock-in-trade & deposited the cheque received for the price to the credit of his account with a private banker to whom he was indebted, at the time, upon an overdue promissory note that had been, without his knowledge, charged against his account a few days before the sale. Within two days after making the deposit, M. gave the banker his cheque to cover the amount of the note:—*Held:* the transaction was a payment to a creditor within R. S. O. 1897 (c. 147), s. 3 (1), which was not void as against creditors.—ROBINSON, LITTLE & Co. *v.* SCOTT & SON (1907), 39 S. C. R. 281.—**CAN.**

7186 v. ——.]—*Held:* under Jamaica Insolvent Act, s. 67, a transfer of property made by a party in insolvent circumstances, within a period of six months before a declaration of insolvency, was absolutely void, although there was no evidence of any fraudulent preference.—NUNES *v.* CARTER (1866), L. R. 1 P. C. 342; 4 Moo. P. C. C. N. S. 222; 36 L. J. P. C. 12; 15 W. R. 239, P. C.—**JAMAICA.**

7192 i. —— *Transaction due to pressure by creditor.*]—C. having purchased, through M., a cargo of maize, & being able to pay a portion only of the purchase money, M., in order to aid C. in paying the residue, procured mercantile firms to accept bills of exchange amounting to £6,000, drawn by C., the acceptors being guaranteed by M. against all liability. C. discounted the bills with a bank. At the

was immaterial to consider whether the trader had his bkpcy. in contemplation at the time.—CROSBY *v.* CROUCH (1809), 11 East, 256; 2 Camp. 166; 103 E. R. 1003.

Annotations:—**Consd.** Bills *v.* Smith (1865), 6 B. & S. 314. **Refd.** Cook *v.* Rogers (1831), 7 Bing. 438; Belcher *v.* Prittie (1834), 10 Bing. 408; Strachan *v.* Barton (1856), 11 Exch. 647. **Mentd.** Van Casteel *v.* Booker (1848), 2 Exch. 691.

7193. —— ——.]—In 1834, D. & T. agreed to become partners for a term of years. D. was to bring in £3,000 capital, & the profits were to be equally divided, but the business was to be carried on in the name of T. alone. The capital was, in fact, advanced by D.'s uncles, J. & W. In May, 1836, the partnership was dissolved, when there was found due to D. £1,175 on account of profits, & £7,400 on account of capital. D. then advanced sufficient money to make up the sum of £8,000, to secure which T. executed to him a bond, dated Jan. 2, 1837, in the penal sum of £16,000, & conditioned for the payment of £8,000 by annual instalments of £1,000 each. The £1,175, & an instalment of £1,000, & the interest, were duly paid, but in Mar., 1842, there being a large arrear upon the bond, joint & several bonds by D. & T. were given to J. for £3,000, & to W. for £4,000. At the time the bonds were executed T. was in failing circumstances, but there was no evidence that he then contemplated bkpcy. In July he was declared a bkpt.:—*Held:* (1) pressure for payment, & the fact of the insufficiency of a man's property to pay all his debts, were not alone sufficient to invalidate a security then given for an existing debt; (2) J. was a creditor in his own right for valuable consideration upon the estate of T. for the amount due on the bond for £3,000.—*Re* TODD, *Ex p.* WOOD (1843), 1 L. T. O. S. 262; 7 Jur. 981, Ct. of R.

7194. —— ——.]—C. was pressed for payment of an old debt by P. & in Aug., 1872, agreed to remit to her £2,350 in Nov. The course of business was for P. to send C. flax at the time when he sent her bills. On Nov. 4 C. remitted £4,000, of which £2,350 was carried to the old debt, & the balance treated as other remittances. At the time of the remittance C. could not pay all his debts out of his own money, but at that time, as in Aug., he had no thought of stopping payment:—*Held:* no fraudulent preference.—*Re* CRAWFORD, *Ex p.* KEVAN (1874), 9 Ch. App. 752, L. JJ.

Annotation:—**Refd.** *Re* Wincham Shipbuilding, etc., Co., Poole, Jackson & Whyte's Cases (1878), 26 W. R. 588.

See, also, Nos. 7216, 7217, *post.*

7195. —— **Transaction after resolution to suspend payment.**]—Cash & notes were delivered over by the partners of a country bank, who at the time were in failing circumstances & had suspended payment, & a few days afterwards became bkpts., to a partner of a London banking-house, their correspondents, who had come down for the alleged object of rendering them assistance. Part of the cash & notes was delivered upon the faith that assistance would be given, & the other part without any such expectation:—*Held:* the cash & notes were recoverable by the assignees, as money had & received to their use, although there was no idea, at the time of delivery, of giving an undue preference, & no contemplation of an act of bkpcy.—SIMPSON *v.* SIKES (1817), 6 M. & S. 295; 105 E. R. 1253.

7196. —— ——.]—Payment of a debt by a cheque, made without pressure, after a resolution come to by debtors to suspend payment of their debts generally:—*Held:* in the circumstances, a fraudulent preference, whether the debtors contemplated actual bkpcy. or not.—*Re* HUNT, *Ex p.* SIMPSON (1844), De G. 9; 14 L. J. Bcy. 1; 4 L. T. O. S. 143; 8 Jur. 1150, Ct. of R.

7197. —— **Action directed to try issue.**]—Where the ct. had some doubt whether a trader, when he made the distribution impeached, was actually contemplating his own bkpcy., an action was directed to be brought for the opinion of a jury.—BOURNE *v.* GRAHAM (1856), 2 Jur. N. S. 1225.

Annotation:—**Mentd.** Gartsides *v.* Outram (1856), 28 L. T. O. S. 120.

7198. Question of fact for jury.]—Whether a trader in embarrassed circumstances, who delivers goods to a creditor in discharge of his debt, does it in contemplation of bkpcy. is a question of fact

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instance of the manager, who was aware that C. was in pecuniary difficulties, but who did not apprehend bkpcy., C., in Jan., 1873, deposited with him trade bills as a security to the bank for the bills for £6,000 previously discounted. On Feb. 3, the manager, at the instance of M., applied to C. in reference to M.'s liability on his guarantee, & it was arranged that, after satisfying the obligations to the bank, the proceeds of the trade bills should be held by the bank as a security for M. The bills guaranteed by M. came to maturity on Feb. 7, & were taken up by the acceptors, to whom M. had become liable, & on Mar. 14, C. was adjudicated bkpt.:—*Held:* the dealing with the trade bills did not amount to a fraudulent preference.—*Re* CAREW (1873), 8 I. L. T. 90.—**IR.**

7192 ii. —— ——.]—Within six months of his insolvency, debtor delivered under pressure to a creditor a number of stock in satisfaction of his claim, knowing that such action would ruin him. The creditor had been taking payment at the time of other accounts owing to him in stock to a greater amount than in cash, & insolvent had previously made payment by delivering stock & skins:—*Held:* the presumption that at the time of delivery debtor contemplated sequestration had not been rebutted, & the transaction must be set aside as an undue preference.—VERMEULEN'S TRUSTEE *v.* BARNETT & DINN (1910), 27 S. C. 216; 20 C. T. R. 349.—**S. AF.**

a. —— *Transaction in pursuance of previous agreement.*]—D. entered into an agreement to deliver to B., in satisfaction of a debt of £70, his entire crop of brandy as soon as it was distilled. At that time D. did not contemplate sequestration. On May 26 & June 2, 1908, he delivered brandy to B. in pursuance of the agreement. On June 4 his estate was provisionally sequestrated. In an action by D.'s trustee to recover from B. the value of the brandy so delivered:—*Held:* in order to determine whether or not there had been an undue preference, it must be ascertained whether D., at the time of delivery of the brandy, was contemplating sequestration.—DU TOIT'S ESTATE *v.* BARRY BROTHERS (1909), 19 C. T. R. 101.—**S. AF.**

b. —— —— *Remittance on account of sum secured by marriage settlement.*]—P., a merchant domiciled in England, a member of a firm in the Cape of Good Hope, executed in England a settlement on his marriage with an English woman, whereby he covenanted to pay the trustees of the settlement £13,000 for his wife's benefit, & to secure same by a mtge. on his real estate in that colony. At the time of the settlement P. was perfectly solvent. The settlement was not registered in the colony. P. afterwards went to the Cape, & by a bond hypothecated his real estate there to his wife to secure the £13,000 in satisfaction of the settlement. That bond was registered in the colony. P. also, while there, remitted £7,000 to the trustees on account of the £13,000 secured by the settlement. P.'s firm at the Cape was some time afterwards adjudicated bkpt. in that colony, & P. was also made a bkpt. in respect to his separate estate:—*Held:* the payment of the £7,000 was not an undue preference in contemplation of bkpcy., within Ord. 6 of 1843, s. 84.—THURBURN *v.* STEWARD, p. 858, *ante.*—**S. AF.**

See, also, cases in Sect. 11, *ante.*

c. —— *When presumed.*]—When the ct. finds property has been conveyed away, mortgaged, or removed, shortly before the failure of bkpt. or insolvent, it will draw the inference, unless the contrary appears in evidence, that it was done in contemplation of bkpcy., or insolvency.—*Re* WARREN (1867), 1 I. L. T. 692.—**IR.**

7198 i. *Question of fact for jury.*]—In an action of trover by an assignee for goods transferred thirty-nine days before the assignment, pltf. put in evidence a bill of sale made by insolvent about two months previously to the assignment, for the purpose of proving contemplation of insolvency on the part of insolvent at the time of making the transfer. The circumstances connected with the bill of sale were explained so satisfactorily to the mind of the judge, that he withdrew the consideration of it from the jury:—*Held:* it should have been left to the jury to say what effect should be given to the bill of sale.—FORREST

Sect. 12.—*Avoidance of preference: Sub-sect.* 3.]

for the jury.—FIDGEON *v.* SHARPE (1814), 5 Taunt. 539; 1 Marsh. 196; 128 E. R. 800.

Annotations:—**Consd.** Poland *v.* Glyn (1823), 2 Dow. & Ry. K. B. 310. **Refd.** Flook *v.* Jones (1826), 4 Bing. 20; Gibbins *v.* Phillips (1828), 2 Man. & Ry. K. B. 238; Atkinson *v.* Brindle (1835), 1 Hodg. 336; Stanger *v.* Wilkins (1855), 19 Beav. 626; Strachan *v.* Barton (1856), 11 Exch. 647.

7199. *S. P.* FLOOK *v.* JONES (1826), 4 Bing. 20; 12 Moore, C. P. 96; 5 L. J. O. S. C. P. 21; 130 E. R. 674.

7200. ——.]—A. being in insolvent circumstances, & having sold his goods by public auction, the proceeds remaining in the hands of the auctioneer, deft., under pretence of having issued a fiat of bkpcy. against A., prevailed upon the auctioneer to pay over to him the amount of his debt, & subsequently procured the assent of A. to such payment. A., more than three months afterwards, petitioned for his discharge under Insolvent Debtors Act, 1826 (c. 57). In an action by his assignee to recover back the sum so paid: —*Held:* it ought to have been left to the jury to say whether the transaction did not amount to a voluntary charging of his estate by the insolvent, & whether he did not at the time contemplate taking the benefit of the Act.—WAINWRIGHT *v.* MILES (1833), 3 Moo. & S. 211.

Annotation:—**Refd.** Becke *v.* Smith (1836), 2 M. & W. 191.

7201. ——.]—To determine whether a fraudulent preference has been given by bkpt. to one of his creditors by a payment, it will be for the jury to say whether the payment was made when debtor knew that he must be a bkpt. & in contemplation of bkpcy.—GREEN *v.* BRADFIELD (1844), 1 Car. & Kir. 449.

See, also, No. 7189, *ante.*

7202. Onus of proof.]—A creditor claimed to be an equitable mtgee. He had advanced money to bkpt. & the deposit of deeds took place sixteen days before the issue of the fiat. There was no pressure to justify the deposit, & there was no satisfactory evidence that it was not issued in contemplation of bkpcy.:—*Held:* where the deposit was so close upon the bkpcy., the ct. always required satisfactory evidence that it was not made in contemplation of bkpcy., & the claim must be dismissed.—*Re* LEACH, *Ex p.* MORGAN (1840), 1 Mont. D. & De G. 116, Ct. of R.

Annotation:—**Refd.** *Re* Lindon, *Ex p.* Clouter (1843), 7 Jur. 135, Ct. of R.

See, also, Nos. 7169 *et seq.*, *ante.*

7203. Admissibility of evidence—Declaration of bankrupt as to his circumstances.]—In an action to recover back money paid as a fraudulent preference, the ct. received the declarations of insolvent, to show the circumstances & condition he was in at the time of the payment.—HERBERT *v.* WILCOCKS (1829), Mood. & M. 355, n.; *subsequent proceedings*, 3 Moo. & P. 515.

(ASSIGNEE) *v.* ALMON (1880), 3 R. & C. 110.—**CAN.**

7198 ii. ——.]—In actions of undue preference, in order to answer the question whether or not insolvent contemplated sequestration, the ct. looks at the whole of the evidence, & carefully considers all the circumstances in which the challenged payment was made. The question of contemplation is a question of fact, to which an answer must be found in the evidence, or in such reasonable inferences as may be drawn from the evidence.—GOOSEN *v.* GOOSEN'S TRUSTEES (1884), 1 Buch. A. C. 414.—**S. AF.**

7202 i. *Onus of proof.*]—The *onus* of proof in an action to set aside a conveyance as a fraudulent preference is on the party who alleges the insolvency of the grantor.—CLARKE *v.* SUTHERLAND, [1917] 3 W. W. R. 624; 37 D. L. R. 368.—**CAN.**

7202 ii. —— *Transaction within thirty days of insolvency.*]—Under 1869 Act, s. 89, the presumption that transactions within thirty days of the assignment are made in contemplation of insolvency is not conclusive, but may be rebutted.—CAMPBELL *v.* BARRIE (1872), 31 U. C. R. 279.—**CAN.**

7202 iii. —— ——.]—*Held:* under Insolvent Act, 1875, s. 118, a pledge or lien given to a creditor, was null & void, a demand of assignment, followed by an assignment, having been served within thirty days after the pledge was given, the creditor, upon whom the burden of proof lay under that sect., not having shown that the pledge had not been made in contemplation of insolvency.—BANK OF BRITISH NORTH AMERICA *v.* WORRALL (1877), R. E. D. 12.—**CAN.**

7202 iv. ——.]—Where a sale or transfer of goods is made to a creditor within thirty days before the issuing of a writ of attachment in insolvency, the statutory presumption raised by 1875 Act, s. 133, that it is done in contemplation of insolvency is not displaced by merely showing that the sale or transfer was *bonâ fide*, or that the creditor did not know or had not probable cause for believing insolvent was unable to meet his engagements. —EVANS *v.* ROSS (1880), 30 C. P. 121.—**CAN.**

7202 v. —— *Transaction more than thirty days before insolvency.*]—Where a mtge. to secure an antecedent debt was given by a trader more than five months before the issue against him of a writ of attachment, under 1869 Act: —*Held:* as the burden of proving that the mtge. was given in contemplation of insolvency was upon the assignee of the estate, in which he had wholly failed, & as fraud was not to be presumed unless the conveyance was made within thirty days of the issuing of the attachment, the mtge. was not void as being a fraudulent preference. —*Re* RAYMOND, *Ex p.* JONES (1878), 2 P. & B. 136.—**CAN.**

7202 vi. ——.]—It is incumbent on a party, seeking to impeach as an unjust preference a transaction between debtor & his creditors occurring more than thirty days before insolvency, to prove that such transaction took place in contemplation of insolvency.—SUTER *v.* MERCHANTS BANK (1876), 24 Gr. 365.—**CAN.**

7202 vii. ——.]—*Held:* the *onus* was on the assignee in insolvency of proving that the impeached transfer was made in contemplation of insolvency, it not having been made within thirty days of the issue of attachment.—MCWHIRTER *v.* THORNE (1869), 19 C. P. 302.—**CAN.**

7202 viii. —— ——.]—W., a private banker, discounted at an exorbitant rate notes received by D., whose indebtedness on new transactions amounted to a large sum of money, but he entered into new business, after obtaining goods on credit to the amount of $4,000 or $5,000, upon a representation to the suppliers that, although without any available capital, he had experience in business. Shortly after he commenced his new business, being threatened with foreclosure proceedings, he applied to W., who advanced $300, part of which was applied in paying overdue interest on the mtge., & the surplus in retiring a note held by W., & he executed a mtge. to W. D. became insolvent about four months afterwards, & a suit was brought by the assignee, impeaching the mtge.:—*Held:* pltf. had not satisfied the *onus* cast upon him by Insolvent Act of showing that insolvent, at the time of the mtge., contemplated that his embarrassment must of necessity terminate in insolvency.—MCCRAE *v.* WHITE (1883), 9 S. C. R. 22.—**CAN.**

7202 ix. —— *Transaction within six months of sequestration.*]—Act 38 of 1884, s. 8, does not disturb the interpretation put on the words "contemplation of sequestration" by the Privy Council in *Thurburn* v. *Stewart, supra*, but merely raises a presumption of fact in certain specified circumstances in favour of such contemplation of sequestration, which presumption may be rebutted by evidence.—SLATER'S TRUSTEE *v.* SMITH & CO. (1885), 5 E. D. C. 9.—**S. AF.**

7202 x. —— ——.]—J., four months before he surrendered his estate as insolvent, & at a time when he was unable to pay his debts, passed a general bond in favour of F. to secure past advances & future credit:—*Held:* as F. failed to prove that at the time insolvent passed the bond he did not contemplate the sequestration of his estate & did not intend unduly to prefer F., the bond must be set aside as an undue preference in so far as it purported to secure past advances.—JORDAAN'S TRUSTEE *v.* FLETCHER & CO. (1884), 11 S. C. 43.—**S. AF.**

7203 i. *Admissibility of evidence—Declarations of bankrupt—Letters to bankrupt.*]—In an action by an assignee to set aside a mtge. given by insolvent within three months before the sequestration of his estate as being a fraudulent preference, insolvent's schedule & affidavit are inadmissible to show the state of his finances at the time of giving the mtge. Proofs of debt & letters making claim against insolvent estate are not evidence to show the existence of creditors at the time of giving the mtge. where the claims have not been adjudicated upon by the assignee, but if they have been accompanied by uncancelled promissory notes signed by debtor, such notes may be admitted to show his inability to pay his debts as they became due at the time when the mtge. was executed.—GRIEVE *v.* BODEY (1894), 20 V. L. R. 269.—**AUS.**

7204. —— To show knowledge of insolvency.]—In trover by an assignee a written statement, made by bkpt. before his bkpcy., of his debts & credits, is evidence as showing that he knew of his own insolvency.—SCOTT *v.* THOMAS (1834), 6 C. & P. 611.

7205. —— Conduct of bankrupt in other transactions.]—In actions by assignees to recover property from creditors, on the ground of a fraudulent preference, the conduct of bkpt. in transactions with other parties is very material to show that he contemplated bkpcy.—KINNEAR *v.* WALMISLEY (1862), 2 F. & F. 756.

7206. Sufficiency of evidence—Knowledge that trade must cease—Knowledge of inability to pay creditors in due course.]—Though debtor contemplates that his trade must cease & that he cannot pay his creditors, unless they give him time, he does not necessarily contemplate bkpcy.—FIDGEON *v.* SHARPE (1814), 5 Taunt. 539; 1 Marsh. 196; 128 E. R. 800.

Annotations:—**Distd.** Poland *v.* Glyn (1822), 1 L. J. O. S. K. B. 72. **Refd.** Flook *v.* Jones (1826), 4 Bing. 20; Gibbins *v.* Phillips (1828), 2 Man. & Ry. K. B. 238; Atkinson *v.* Brindle (1835), 1 Hodg. 336; Stanger *v.* Wilkins (1855), 19 Beav. 626; Strachan *v.* Barton (1856), 11 Exch. 647.

7207. —— Probability of bankruptcy.]—Although a trader has reason to believe, from the state of his affairs, that bkpcy. may be probable, yet, in order to render a payment made to a particular creditor void on the ground of a fraudulent preference, he must have an act of bkpcy. in contemplation at the time of such payment.—FLOOK *v.* JONES (1826), 4 Bing. 20; 12 Moore, C. P. 96; 5 L. J. O. S. C. P. 21; 130 E. R. 674.

7208. —— —— Contemplation of insolvency.]—In order to constitute a fraudulent preference, so as to avoid a payment made by a trader, it must be a voluntary preference & made in actual contemplation of bkpcy.; it is not enough to show that the party was in such a state of insolvency & embarrassment as to render bkpcy. a probable event.

A voluntary payment or delivery can only be a fraud upon the bkpcy. laws, where the party making it contemplates at the time the issuing of a fiat against him, but the mere contemplation of insolvency does not necessarily involve a contemplation of bkpcy.—ATKINSON *v.* BRINDALL (1835), 2 Bing. N. C. 225; 2 Scott, 369; 1 Hodg. 336; 5 L. J. C. P. 73; 132 E. R. 88.

Annotation:—**Refd.** Aldred *v.* Constable (1843), 4 Q. B. 674.

7209. —— Insolvency at time of grant.]—A party who seeks to avoid a payment, or transfer of goods, on the ground that it was voluntarily made by a trader in contemplation of bkpcy., must show, not merely that the trader was insolvent when it was made, but also that he then contemplated bkpcy.—MORGAN *v.* BRUNDRETT (1833), 5 B. & Ad. 289; 2 Nev. & M. K. B. 280; 2 L. J. K. B. 195; 110 E. R. 798.

Annotations:—**Consd.** Atkinson *v.* Brindall (1835), 2 Bing. N. C. 225; Gibson *v.* Boutte (1836), 3 Scott, 229; *Re* Hunt, *Ex p.* Simpson (1844), De G. 9, Ct. of R.; Strachan *v.* Barton (1856), 11 Exch. 647. **Refd.** Aldred *v.* Constable (1843), 4 Q. B. 674; Brown *v.* Kempton (1850), 19 L. J. C. P. 169; Thoyts *v.* Hobbs (1852), 7 Exch. 810; Mercer *v.* Peterson (1867), 36 L. J. Ex. 218; Marks *v.* Feldman (1870), L. R. 5 Q. B. 275, Ex. Ch. **Mentd.** *Re* Barrell, *Ex p.* Bailey (1853), 3 De G. M. & G. 534, L. JJ.

7210. —— Knowledge that bankruptcy inevitable—Bankrupt's hope to be extricated without bankruptcy.]—Where a voluntary payment has been made by a trader to a particular creditor, if his condition & conduct be such as to evince clearly a contemplation on the part of the trader an insolvent trader in liquidation of antecedent debts are void as fraudulent preferences under 1884 Act, s. 27, as amended by 1885 Act, s. 13, even though debtor believed, but without fair grounds, that he could stave off bkpcy.—KINROSS' OFFICIAL ASSIGNEE *v.* ROBJOHNS, KINROSS' OFFICIAL ASSIGNEE *v.* RICHARDSON (1889), 8 N. Z. L. R. 224.—**N.Z.**

7207 i. —— *Probability of insolvency—If pending action decided against debtor.*]—Prior to insolvency insolvent was charged with a criminal offence, a conviction on which would, to his knowledge, render him liable to an action for heavy damages. While on his trial insolvent ceded bonds to one of his creditors, knowing that such cession would, in all probability, make him insolvent, if damages were awarded against him:—*Held:* such cession was in fraud of creditors.—SCHARFF'S TRUSTEE *v.* SCHARFF (1915), T. P. D. 463; 7 Biss. & Sm. 301.—**S. AF.**

7208 i. —— *Immediate contemplation of bkpcy.*]—To constitute a fraudulent preference, the transaction must be made in immediate contemplation of bkpcy., & must be altogether voluntary on the part of bkpt.—*Re* BEVERLY & GIBSON (1870), I. R. 4 Eq. 198; 4 I. L. T. Jo. 229.—**IR.**

7209 i. —— *Insolvency at time of grant.*]—C., a trader, being insolvent, gave to H. a bill of sale transferring all his stock-in-trade, goods & chattels of every description contained in his two stores, & all that he might subsequently place therein, as a security for a past debt. C. shortly afterwards made an assignment under Insolvent Act, 1869:—*Held:* the bill of sale was void, as it must be taken to have been made in contemplation of insolvency.—PUGSLEY *v.* HEGAN (1878), 2 P. & B. 1.—**CAN.**

7210 i. —— *Knowledge that insolvency inevitable.*]—A chattel mtge. to two of

7206 i. *Sufficiency of evidence—Knowledge that trade must cease.*]—A transfer of goods by a party afterwards becoming insolvent to a creditor in payment of his claim, is a fraudulent preference & void, if the necessary result of the transfer is to cause debtor to close up his business & prevent him from paying his other creditors, & the words, "in contemplation of insolvency" do not necessarily mean contemplation of assignment under Insolvent Act.—MARSH (ASSIGNEE) *v.* SWEENY (1875), 2 Pug. 454.—**CAN.**

7206 ii. —— *Inability to pay debts as they become due.*]—The fact that debtor, unable for the moment to pay all his debts as they become due, makes a payment to a creditor, is not conclusive evidence that the payment is a fraudulent preference within Insolvency Act, 1874, s. 107.—GOW *v.* WHITE (1908), 5 C. L. R. 865.—**AUS.**

7206 iii. —— *Admission of inability to pay creditors.*]—Insolvent, who admits that on a certain date he was unable to pay his creditors, unless they gave him time, may on that ground alone be presumed to have contemplated sequestration.—VAN HEERDEN'S TRUSTEES *v.* WAGENAAR (1906), E. D. C. 142.—**S. AF.**

d. —— *Bonâ fide belief in ability to carry on business.*]—A co. being indebted to L. & B. in a large amount, made an agreement to give a mtge. At the time of the transaction the co. believed that by getting time from this creditor they would be able to carry on their business & avoid failure, but the co. were subsequently compelled to stop payment:—*Held:* the mtge. was not a preference of the debt over those of other creditors, & not a fraudulent preference under R. S. O. 1877 (c. 118).—LONG *v.* HANCOCK (1885), 12 S. C. R. 532.—**CAN.**

f. —— ——.]—When the impeached conveyances were made H. was insolvent & unable to pay his debts as they accrued due, & he was well aware that he was unable to meet his liabilities, but he honestly in his own mind believed that he could pull through, if only given an opportunity. The intent of the grantees was to secure a preference:—*Held:* the absence on the part of debtor of an intent to prefer was fatal to the creditors' claim to set aside the conveyances.—CANADIAN JOHNS MANVILLE, LTD. *v.* KNIGHT BROTHERS & CO., LTD., CANADIAN JOHNS MANVILLE, LTD. *v.* KNIGHT (1917), 12 O. W. N. 211.—**CAN.**

g. —— ——.]—On Apr. 16, 1891, the day but one before insolvent held a meeting of his creditors, he sent R5,000 to A. & Co. in England. That firm had accepted bills of insolvent which he was bound to take up, but the earliest did not fall due until May 20. His practice had been to remit money a day or two before bills became due. Insolvent knew he was in difficulties, but believed he could surmount them, & the R5,000 were sent rather with a view to keep up his English connection than with the fraudulent intent of giving an undue preference:—*Held:* the transaction was not an undue preference.—*Re* HORMARJI ARDESIR HORMARJI (1892), I. L. R. 17 Bom. 313.—**IND.**

k. —— ——.]—A transfer of goods made by debtor, unable to pay his debts, to a creditor, partly with the view of giving the creditor a preference but chiefly to keep his business going, & received by the creditor with the view of obtaining a preference:—*Held:* void under 1884 Act, s. 27, as amended by 1885 Act, s. 13.—MYNOTT'S OFFICIAL ASSIGNEE *v.* MOA DAIRY FACTORY CO. (1887), 6 N. Z. L. R. 177.—**N.Z.**

l. —— *Unfounded belief in ability to carry on business.*]—Payments by

Sect. 12.—*Avoidance of preference: Sub-sect.* 3.]

that his embarrassments must of necessity end in bkpcy., the jury will not be warranted in coming to any other conclusion than that the transaction is fraudulent; but inasmuch as every man has, down to the time of committing an act of bkpcy., the sole right of dominion over his property, such a payment cannot be held to be a fraudulent preference where bkpt. at the time of making it appears to entertain a *bonâ fide* hope or expectation that he may be extricated from his difficulties without being made a bkpt.—GIBSON *v.* BOUTTS (1836), 3 Scott, 229.

Annotations:—**Consd.** Aldred *v.* Constable (1843), 4 Q. B. 674; *Re* Hunt, *Ex p.* Simpson (1844), De G. 9, Ct. of R.

7211. —— —— Issue of notice under Judgments Act, 1838 (c. 110), s. 8, demanding payment of debts.]—A., a trader, being in embarrassed circumstances, offered his creditors a composition of 7*s.* 6*d.* in the pound, which was refused by the majority of them, & by B. among the number. B. filed an affidavit in the Ct. of Bkpcy., &, on Mar. 13, served on A. a copy thereof & a notice, demanding payment pursuant to the above sect., & he also served a notice on an auctioneer, who had advertised the sale of A.'s goods, not to proceed with the sale. The goods were sold, & out of the proceeds a payment was made, on Apr. 5, to deft., a creditor, of the amount of the composition of his debt:—*Held*: this was a fraudulent preference.—GIBSON *v.* MUSKETT (1842), 4 Man. & G. 160; 3 Scott, N. R. 419; 10 L. J. C. P. 301; 11 L. J. C. P. 225; 134 E. R. 66.

Annotation:—**Refd.** Aldred *v.* Constable (1843), 4 Q. B. 674.

7212. —— Inference from circumstances.]—A fraudulent preference in contemplation of bkpcy. may be inferred by a jury from circumstances, without proof that a distinct act of bkpcy. was contemplated.—ALDRED *v.* CONSTABLE (1843), 4 Q. B. 674; 12 L. J. Q. B. 253; 1 L. T. O. S. 169; 7 Jur. 509; 114 E. R. 1052; *subsequent proceedings* (1844), 6 Q. B. 370.

Annotations:—**Distd.** Green *v.* Bradfield (1844), 1 Car. & Kir. 449. **Refd.** Marshall *v.* Lamb (1843), 5 Q. B. 115; Brown *v.* Kempton (1850), 19 L. J. C. P. 169. **Mentd.** Van Casteel *v.* Booker (1848), 2 Exch. 691.

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his principal creditors, made by a trader when unable to pay his debts in full & knowing himself to be on the eve of insolvency, covering all his property except a leasehold interest & his book debts:—*Held*: void.—ANDERSON *v.* SHOREY (1885), 1 B. C. R. pt. II. 325.—**CAN.**

7210 ii. —— ——.]—P. & Co., in Dec., 1873, of their own accord, executed a mtge., whereby deft. was to be secured from loss on indorsements of their paper, but deft. did not become aware of the mtge. until some time in 1874, & his information then was not derived from P. & Co., or any person authorised by them. The mtge. was not recorded until Mar. 20, 1875, when P. & Co. knew they would have to go into bkpcy., & on Mar. 22, they made an assignment under Insolvent Act, 1869:—*Held*: the mtge. was void, being made in contemplation of insolvency—LORDLY (ASSIGNEE OF PRYOR) *v.* YEOMANS (1876), R. E. D. 113.—**CAN.**

7210 iii. —— ——.]—A mtge. bond hypothecating immovable & other property, given in favour of a creditor at a time when from the hopeless state of debtor's affairs he must have known that sequestration was substantially inevitable:—*Held*: void under Ord. 6 of 1843, s. 84, as being an undue preference.—SMITH *v.* CARPENTER (1869), 12 Moo. P. C. 101; Buch. 206; 14 E. R. 849.—**S. AF.**

7212 i. —— *Inference from circumstances.*]—In a bill impeaching a conveyance as fraudulent against creditors the insolvency of the grantor is not shown by alleging: (1) that at the time of the making of the deed the grantor was indebted to pltf. & others in large sums of money; (2) & was not at the time of making such deed, or at any time since, able to pay his creditors & others; & (3) was & is in fact insolvent.—WESTERN CANADA LOAN CO. *v.* SNOW (1890), 6 Man. L. R. 317.—**CAN.**

7212 ii. —— ——.]—*Held*: the assignor being unable to meet the demands of his creditors for payment must be deemed insolvent.—KLŒPFER *v.* WARNOCK (1890), 18 S. C. R. 701.—**CAN.**

7212 iii. ——.]—Debtor, twenty-three days before making a judicial abandonment of his estate, transferred practically all his stock-in-trade & movable property to a creditor, being at the time largely indebted to other creditors:—*Held*: it might be presumed that debtor was in a state of insolvency.—GILMOUR *v.* LETOURNEUX (1892), 1 Q. L. R. 294.—**CAN.**

7212 iv. ——.]—Debtor is legally insolvent when he has not sufficient property to pay all his debts, if sold under legal process, & commercially insolvent when he has not the means to pay off & discharge his commercial obligations as they become due in the ordinary course of business (ROSE, J.).—RAE *v.* MCDONALD (1887), 13 O. R. 352.—**CAN.**

7212 v. —— —— *Assets less than liabilities must be shown.*]—MANTHA *v.* SIMARD (1883), 6 L. N. 195.—**CAN.**

7212 vi. —— ——.]—Where at the time of an impeached transaction the assets showed a surplus of more than $10,000 over liabilities:—*Held*: there could not be a finding of insolvency under Assignments Act (Alta.).—INTERNATIONAL HARVESTER CO. *v.* CAMPBELL (1916), 33 W. L. R. 726: 9 W. W. R. 1183.—**CAN.**

7212 vii. —— *Assets all mortgaged or under warehouse receipts.*]—At the time of the impeached mtge. there was a surplus of assets over liabilities, but all the assets were either mortgaged or under warehouse receipts:—*Held*: the mtgor. could not be deemed to be insolvent at the time of the making of the mtge. within 48 Vict. c. 26.—DOMINION BANK *v.* COWAN (1888), 14 O. R. 465.—**CAN.**

7212 viii. —— —— *Most of debtor's paper under protest & real estate mortgaged.*]—On Sept. 11, M. & R., her husband, made a chattel mtge. to the D. bank to secure a previous indebtedness of R. to the bank. No future day was named for the payment, & the proviso for possession until default was struck out. A writ of attachment in insolvency was issued against R. on Oct. 4, 1875, & the assignee took possession of the mortgaged chattels then in debtor's possession. The bank claimed the chattels under the mtge. Debtor had long previously been embarrassed, most of his paper was under protest, his real estate was also mortgaged to the bank & others, & no pressure was shown to obtain the mtge., & no promise was made of any future advance:—*Held*: in the circumstances, the chattel mtge. was fraudulent & void as against creditors.—*Re* HURST (1876), 6 P. R. 329.—**CAN.**

7212 ix. —— —— *Notes overdue & judgments recorded.*]—B., being indebted to the M. bank, made an arrangement, in pursuance of which he addressed a letter to the Accountant of the Railway Department on Oct. 22, 1878, instructing him to send any cheque coming to him from the department to the care of M., cashier of the bank. B. was then in insolvent circumstances, with notes lying overdue at the bank, & judgments recorded against him:—*Held*: the arrangement was made in contemplation of insolvency, & was within 1875 Act, s. 133.—CREIGHTON *v.* MERCHANTS BANK (1882), 3 R. & G. 139.—**CAN.**

7212 x. —— —— *Unsatisfied judgments & executions.*]—A chattel mtge. was given when the mtgor. was not insolvent, he having real estate, & a claim against a railway co. for which two years previously he had refused $100,000, but there were several unsatisfied judgments & executions against him. The jury found that the mtge. was given by the mtgor. being insolvent, with intent to give pltf. a preference over his other creditors:—*Held*: there was evidence to go to them of mtgor's insolvency.—HERSEE *v.* WHITE (1869), 29 U. C. R. 232.—**CAN.**

7212 xi. ——.]—Insolvency is not established by the fact of unsatisfied executions against alleged insolvent, where there is no evidence that he has not other property within or without the province.—CLARKE *v.* SUTHERLAND, [1917] 3 W. W. R. 50; 37 D. L. R. 368.—**CAN.**

7212 xii. —— —— *Pending creditor's actions & executions.*]—ADAMS *v.* MCCALL (1866), 25 U. C. R. 219.—**CAN.**

7212 xiii. —— —— *Issue of debtor's summons.*]—Mere insolvency on the part of a mtgor. of chattels is not sufficient to make the deed void as a fraudulent preference, but where the party is in embarrassed circumstances, & was served with a debtor's summons immediately before the deed was executed, it is almost conclusive that he had bkpcy. in contemplation.—*Re* HANKS (1858), 31 L. T. O. S. 208.—**IR.**

7212 xiv. —— —— *Secret transfer at night.*]—Although a trader may in certain circumstances legally prefer one creditor to another, & pay him by a transfer of goods, yet such a transfer at night, & in a surreptitious manner, is *primâ facie* evidence that the trader contemplated bkpcy.—*Re* JOHNSON (1861), 14 Ir. Jur. 124.—**IR.**

m. —— *"Insolvent circumstances"—What amounts to.*]—A man whose liabilities are not wholly matured, & who can sell his property on terms which will enable him to pay those which have matured & the others as they mature, should not be deemed to be in insolvent circumstances.—BERTRAND *v.* CANADIAN RUBBER CO. (1897), 12 Man. L. R. 27.—**CAN.**

7213. Proper questions & direction to jury.]—A trader in perilous circumstances, & likely to become bkpt., owed his son £12,000, which had, upon his son's marriage, been settled on the son's wife. At the request of his son he conveyed property to the trustees under his son's marriage settlement, as a security for or in discharge of the debt due from him to his son. The transfer was not registered, or otherwise made public, till after his bkpcy. In his examination bkpt. stated that he did not contemplate bkpcy. when he executed the assignment, & that he had no intent to defeat or delay his creditors, but executed it solely at the request of his son. The questions left to the jury were, (1) was the assignment spontaneous & made with a view to prefer his son, (2) whether bkpt. knew, or must have had reason to suppose, that bkpcy. was inevitable. The jury having found that the assignment was not made voluntarily by way of fraudulent preference, the ct. refused to grant a new trial.—BELCHER *v.* PRITTIE (1834), 10 Bing. 408; 4 Moo. & S. 295; 3 L. J. C. P. 85; 131 E. R. 962.

Annotations :—**Consd.** Stanger *v.* Wilkins (1855), 19 Beav. 626. **Mentd.** Bannatyne *v.* Leader (1841), 10 Sim. 350.

7214. ——.]—Proof having been given of bkpt. having executed a security while in embarrassed circumstances, & under expectations of being imprisoned & compelled to go up to London from the country, where he traded, the judge told the jury that, if bkpt. contemplated only insolvency & a discharge by Insolvent Debtors' Ct., there was no fraudulent preference in contemplation of bkpcy. :—*Held :* a misdirection.—ALDRED *v.* CONSTABLE (1843), 4 Q. B. 674; 12 L. J. Q. B. 253; 1 L. T. O. S. 169; 7 Jur. 509; 114 E. R. 1052; *subsequent proceedings* (1844), 6 Q. B. 370.

Annotations :—**Distd.** Green *v.* Bradfield (1844), 1 Car. & Kir. 449. **Reid.** Marshall *v.* Lamb (1843), 5 Q. B. 115; Brown *v.* Kempton (1850), 19 L. J. C. P. 169. **Mentd.** Van Casteel *v.* Booker (1848), 2 Exch. 691.

7215. ——.]—A tenant being indebted to his landlord for rent, & being in insolvent circumstances, proposed & executed to deft., in Apr., 1850, a bill of sale of his farming stock & furniture, & in June, 1851, petitioned the Insolvent Ct. for protection from process. In an action by the assignees, the judge directed the jury to consider whether insolvent executed the bill of sale with the view or intention of petitioning the Insolvent Ct. for protection at any time when he might apprehend proceedings would be or were taken

n. —— —— ——.]— Debtor should be held to be "in insolvent circumstances" within Assignments Act, R. S. M., 1902 (c. 8), s. 40, if he does not pay his way & is unable to meet the current demands of his creditors, & if he has not the means of paying them in full out of his assets realised upon a sale for cash or its equivalent, or when he is not in a condition to pay his debts in the ordinary course as persons carrying on trade usually do.—EMPIRE SASH & DOOR CO. *v.* MARANDA (1911), 21 Man. L. R. 605.—**CAN.**

o. —— —— *Same as "unable to pay his debts in full"—What must be shown.*]—The expressions "insolvent circumstances" & "unable to pay his debts in full," are co-extensive terms, & in order to come within their meaning it is not necessary to show a state of insolvency, in the strict legal & commercial acceptation of the term, but merely to prove debtor's inability to pay his way, & meet the demands of his creditors, & his want of means to pay them in full out of his existing assets.—HART *v.* ALLEN (1907), 40 N. S. R. 352.—**CAN.**

q. —— —— —— ——.]—The words "unable to pay his debts in full" & "insolvent circumstances," both refer to the same financial condition, *i.e.*, to a condition in which debtor is placed when he has not sufficient property, subject to execution, to pay all his debts if sold under legal process at a sale fairly & reasonably conducted.—DOMINION BANK *v.* COWAN (1888), 14 O. R. 465.—**CAN.**

r. —— *"Unable to pay his debts as they become due."*]—The words "unable to pay his debts as they become due from his own money" in Queensland Insolvency Act, 1874, ss. 107, 108, mean that debtor must at the time in question have had sufficient cash in hand or been able to obtain, by sale or pledge of his available assets, command of sufficient money to satisfy all debts that were anticipated to fall due & become ascertained in the reasonably immediate future.—BANK OF AUSTRALASIA *v.* HALL (1907), 4 C. L. R. 1514.—**AUS.**

s. —— *"Unable to pay his debts in full"—Note protested.*]—The words "unable to pay his debts in full," in 43 Vict. c. 10, are satisfied by proof of a promissory note of the grantors having been protested.—ANDERSON *v.* SHOREY (1885), 1 B. C. R., pt. II., 325.—**CAN.**

t. —— —— *Notes habitually renewed.*]—In order that a bill of sale of a trader's goods shall be held to be void under Insolvent Act, 1875, s. 130, it must be shown that debtor was at the time unable to meet his engagements, & it is not enough that he was in the habit of renewing his promissory notes as they fell due.—BARRY *v.* LOGAN (1882), 22 N. B. R. 185.—**CAN.**

x. —— *"Forced sale."*]—In considering whether debtor is insolvent within Assignment Act, R. S. M., 1913, c. 12, the "forced sale" which is made the test of the insolvency should be a sale made on the day of the date of the impugned instrument, under legal process, & with the safeguards the Manitoba procedure has provided.—BROWN *v.* LEONOFF (1915), 31 W. L. R. 621.—**CAN.**

z. *Valuation of assets—Test to be applied.*]—As to a valuation of the assets of alleged insolvent, the inquiry should be whether a man of business capacity would value the assets as being sufficient to pay the creditors in full.—HART *v.* ALLEN (1907), 40 N. S. R. 352.—**CAN.**

a. —— ——.]—In determining whether debtor is insolvent, etc., his assets or effects are not to be estimated at what they might bring at a forced sale under execution, but at the fair value in cash on the market at any ordinary sale (CAMERON, C.J.).—RAE *v.* MCDONALD (1887), 13 O. R. 352.—**CAN.**

b. —— *Debtor's furniture taken into account.*]—*Re* WALTON, OFFICIAL ASSIGNEE *v.* MCKAY BROTHERS (1909), 28 N. Z. L. R. 948.—**N.Z.**

c. *Valuation of liabilities—What liabilities included.*]—"Debts" in Queensland Insolvency Act, 1874, ss. 107, 108, include every liability that would have been provable in insolvency, if debtor had been adjudicated insolvent at the time in question, & includes a liability under a pending action.—BANK OF AUSTRALASIA *v.* HALL (1907), 4 C. L. R. 1514.—**AUS.**

d. —— ——.]—Evidence of the value of the right of dower is properly admissible in determining the value of debtor's liabilities.

Two debts were to relatives, secured by mtge. & promissory notes. A direction that the debts should not be included in estimating debtor's liabilities, because under his control: —*Held :* wrong.—RAE *v.* MCDONALD (1887), 13 O. R. 352.—**CAN.**

7213 i. *Proper questions & direction to jury.*]—D. & Co. being largely indebted to various creditors, & having notes lying overdue at the bank to the amount of $7,000, with others maturing, took from M. four promissory notes, dated Oct. 26, 1870, for lumber sold to him, three of which notes, to the aggregate amount of $3,835 they indorsed to defts., to meet a note for $3,000 indorsed by defts., dated July 26, 1870. The notes so transferred were discounted, & the proceeds applied to the payment of the $3,000 note, leaving a balance of $835, which was retained by defts., though nothing was then due them by D. & Co., & was used to retire a note of D. & Co. that subsequently became due. One month after the $3,000 became due, D. & Co., on Nov. 29, 1870, made a voluntary assignment, their liabilities being upwards of $100,000. The jury were instructed that if, when the notes were transferred, D. & Co. had reason to believe & did believe that their affairs were in such a situation that insolvency would in all probability ensue, though there was a possibility of their tiding over their difficulties, the transfer would be in contravention of Insolvent Act, 1869, & be deemed to be made in contemplation of insolvency, & was invalid if made to give defts. a preference over other creditors :—*Held :* such instruction was correct.—HARVIE *v.* WYLDE (1875), R. E. D. 515.—**CAN.**

f. *Creditor's knowledge of debtor's insolvency—When presumed.*]—Knowledge of debtor's insolvency by the creditor may be presumed from the fact that the creditor had been doing business with him for several years & had an intimate knowledge of his affairs, that insolvent was indebted to him in a large amount, & that the creditor held overdue paper of insolvent, & was aware that he was indebted to other parties.—GILMOUR *v.* LETOURNEUX (1892), 1 Q. L. R. 294.—**CAN.**

g. —— ——.]— Transactions :—*Held :* bad, as debtor's insolvent condition must have been known to the preferred creditor.—TUDHOPE *v.* NORTHERN BANK OF CANADA (1909), 10 W. L. R. 122.—**CAN.**

k. —— *Insolvency of debtor not notorious.*]—MAYRAND *v.* SALVAS (1874), 6 R. L. O. S. 60.—**CAN.**

l. —— ——.]—EASTERN TOWNSHIPS BANK *v.* PICARD (1913), Q. R. 23 K. B. 488.—**CAN.**

Sect. 12.—*Avoidance of preference: Sub-sects.* 3 & 4, *A.*]

against him :—*Held :* this was a misdirection, the question being, not whether insolvent had a general intention at some future time of petitioning the Insolvent Ct., but whether he had the present intention of so doing.—THOYTS *v.* HOBBS (1852), 7 Exch. 810 ; 21 L. J. Ex. 340 ; 19 L. T. O. S. 169 ; 155 E. R. 1177.

7216. Effect of failure to establish—Whether transaction avoided.]—B. purchased goods to export to Russia, where he already had goods, from which he expected a surplus of £18,000 after paying all his debts. Receiving no remittances from Russia & seeing no prospect of advantage in sending out more goods, & finding he must stop payment, he restored the last purchased goods to the vendors, he then fully expecting that his creditors would give him time, & having neither intention nor suspicion of being made a bkpt. On a commission issuing :—*Held :* the vendors might retain the goods so restored.—FIDGEON *v.* SHARPE (1814), 5 Taunt. 539 ; 1 Marsh. 196 ; 128 E. R. 800.

Annotations :—**Refd.** Poland *v.* Glyn (1822), 1 L. J. O. S. K. B. 72 ; Flook *v.* Jones (1826), 4 Bing. 20 ; Gibbons *v.* Phillips (1828), 2 Man. & Ry. K. B. 238 ; Atkinson *v.* Brindle (1835), 1 Hodg. 336 ; Stanger *v.* Wilkins (1855), 19 Beav. 626 ; Strachan *v.* Barton (1856), 11 Exch. 647.

7217. —— ——.]—A., who with B. carried on a banking business known as the N. Bank, on Aug. 3 gave a charge to the trustees of a settlement to secure the amount standing to the current account of the trustees. The charge was given pursuant to a verbal agreement made between A. & B. & one of the trustees on Aug. 1. The bank closed its doors on Aug. 22, A. & B. were subsequently made bkpt., & the trustee in bkpcy. claimed that the charge was void as being a fraudulent preference. In an action by the trustees of the settlement for a declaration that the charge was valid, A. gave evidence that he had no idea on Aug. 1 that the bank would be compelled to close its doors :—*Held :* the charge was valid, & pltfs. were entitled to the declaration asked for.—BULTEEL & COLMORE *v.* PARKER & BULTEEL'S TRUSTEE (1916), 32 T. L. R. 661.

See, also, Nos. 7193 *et seq., ante.*

SUB-SECT. 4. "WITH A VIEW OF GIVING SUCH CREDITOR A PREFERENCE."

A. In General.

7218. Equivalent to "voluntarily"—Before 1869 Act.]—*Semble :* the words in 1869 Act, s. 92, "with a view of giving such creditor a preference over the other creditors" had a meaning equivalent to the technical meaning of the word "voluntarily" in the cases before the Act.—*Re* CHERRY, *Ex p.* BOLLAND (1871), 7 Ch. App. 24 ; 25 L. T. 646 ; 20 W. R. 136, L. JJ.

Annotation :—**Mentd.** *Re* Wilcoxon, *Ex p.* Griffith (1883), 23 Ch. D. 69, C. A.

7216 i. *Effect of failure to establish—Whether transaction avoided.*]—Between Jan. 1, 1905, & May 26 of the same year the account of A., an hotel keeper, was overdrawn to an amount varying from £459 to £576. The overdraft was secured by two guarantees to the extent of £450. Early in 1905 A. decided to sell the business, & shortly after Apr. 18 informed the manager that the business had been sold for £850, which would be sufficient to pay off the bank & all his other creditors, & that he desired the purchase money to be paid into the bank, & A. signed an order directing the agents to pay the money into the bank. The total purchase money in fact amounted to £950, made up of cash £350 & three bills of £200 each. The purchaser's solrs. refused to pay the money until a debt of another creditor for £140 had been paid, & one of the bills was discounted, the debt discharged out of the proceeds, & the balance paid into the bank. The purchase money was then paid into A.'s account on May 26, & the two promissory notes lodged for collection, A. signing a letter of lien over them in favour of the bank. The bills were discounted & part of the proceeds employed in wiping out A.'s overdraft, & the balance in paying certain creditors. The bank cancelled & gave up the guarantees. A.'s estate was compulsorily sequestrated on Aug. 3. Practically the whole of A.'s assets consisted of the hotel & business, & at the time of the sale he believed that the proceeds would be sufficient to pay all his debts. As a matter of fact, there were debts to the extent of £335 remaining unpaid. The remaining assets amounted to £142, & consisted chiefly of book debts, of which but a small portion had been recovered by the assignee in insolvency :—*Held :* the payment to the bank was not a fraudulent preference. —MCDONALD *v.* BANK OF VICTORIA, [1906] V. L. R. 199.—AUS.

7216 ii. —— ——.]—K. had a line of discount with defts. of $20,000, for which $5,000 collaterals were deposited as security. Afterwards his indebtedness to the bank was nearly doubled, & the agent insisted upon obtaining additional security by deposit of further collaterals, which some months before the insolvency were deposited : —*Held :* the transfer to defts. of the securities as collateral was valid, pltf. having failed to establish that K. contemplated insolvency.—NELLES *v.* MONTREAL BANK (1883), 7 A. R. 743. —CAN.

7216 iii. ——.]—Where a transfer of property by debtor, which gave a creditor a preference over the other creditors, was not made in contemplation of insolvency, & was not unjust : —*Held :* it was valid.—MCEDWARDS *v.* PALMER (1878), 2 A. R. 439.—CAN.

7216 iv. —— ——.]—At the time of making a mtge. to secure advances to a business the business was embarrassed, but the mtge. was not made in contemplation of insolvency, & the jury negatived fraud in the transaction, though they found that the conveyance had the effect of impeding, obstructing & delaying creditors. The ct. upheld the conveyance.—FRASER *v.* ADAMS (1876), R. E. D. 235.—CAN.

7216 v. —— ——.]—On a bill filed to impeach the deposit of warehouse receipts with a bank as an unjust preference, the ct. being satisfied that the transaction took place in good faith, & not in the contemplation of insolvency :—*Held :* the bank were entitled to hold their lien on such of the receipts as were deposited more than thirty days before the assignment in insolvency, but in respect of such of them as were deposited within the thirty days the bank could not claim any lien or priority.—SUTER *v.* MERCHANTS BANK (1876), 24 Gr. 365. —CAN.

7216 vi. —— ——.]—H., on entering into partnership with B., assigned to B. all his stock-in-trade in consideration of B. accepting a bill drawn by H. upon B. in favour of H.'s bankers, & handed to them in part payment of H.'s overdraft with them. The partnership having been formed, B. assumed control of H.'s stock-in-trade assigned to him, effected sales, & applied the proceeds towards meeting the acceptance given to the bank. Shortly afterwards H.'s old stock-in-trade was assigned to the firm, & an acceptance of the firm, falling due on the same date & for the same amount as that given by B. to the bank, was substituted for such latter with the bank. Rather more than three months after the formation of the partnership & the original assignment to B., both H. & B. & their firm became bkpt. :— *Held :* there had been no fraudulent preference of the bank, the transaction not having been entered into in contemplation of bkpcy.—*Re* HARPER, BLACK & CO., Mac. 944.—N.Z.

PART XX. SECT. 12, SUB-SECT. 4.—A.

m. *What should be considered.*]—In giving the impeached chattel mtge. it appeared that the dominant motive of debtor was to make an arrangement for continuing his business, deft. having induced him to give it by promise of assistance in carrying him along & in arranging with other creditors, although not in any definite way enforceable in a ct. of law :—*Held :* the ct. need not determine whether the preferred creditor was acting *bonâ fide* or really anticipated that the other creditors could be arranged with & the business continued, it being only debtor's mental attitude that should be considered.—CODVILLE *v.* FRASER (1902), 14 Man. L. R. 12. —CAN.

n. ——.]—G. assigned a judgment which he had recovered :—*Held :* by reason of his insolvency, the assignment was void.—DAVIDSON *v.* DOUGLAS (1868), 15 Gr. 347.—CAN.

o. *Whether necessary to be shown —Creditor in fact preferred.*]—A payment within sixty days of insolvency is not void under Insolvent Act, s. 31, if it merely has the effect of preferring the payee to another creditor. The preference must be fraudulent to make it void.—SHELDRICK *v.* ATTKEN & BOSTOCK, AITKEN & BOSTOCK *v.* SIMPSON (1869), 6 W. W. & A'B. 59. —AUS.

p. —— ——.]—49 Vict., c. 45, s. 2 (R. S. M., c. 7, s. 33), does not make void a conveyance or mtge. merely because its effect is to give one creditor a preference over other creditors, but there must be an intent

7219. "Voluntarily"—7 Geo. 4, c. 57.]—*Held:* the word "voluntarily" in the above Act denoted either an assignment without sufficient valuable consideration to induce a party to act *bonâ fide* under its influence, or a spontaneous assignment without pressure in favour of a particular creditor.—ARNELL *v.* BEAN (1831), 8 Bing. 87; 1 Moo. & S. 151; 1 L. J. C. P. 38; 131 E. R. 334.

Annotations:—**Apld.** Margareson *v.* Saxton (1835), 1 Y. & C. Ex. 525. **Distd.** Binns *v.* Towsey (1838), 7 Ad. & El. 869. **Refd.** Davies *v.* Acocks (1835), 2 Cr. M. & R. 461.

7220. —— ——.]—A conveyance made to a creditor for a valuable consideration sufficiently strong in itself to influence debtor to make it, is not "voluntary" within 7 Geo. 4, c. 57, s. 32, though part of the consideration consists of a pre-existing debt.—MARGARESON *v.* SAXTON (1835), 1 Y. & C. Ex. 525; 5 L. J. Ex. Eq. 1; 160 E. R. 214.

7221. —— **Must move from debtor.**] — A voluntary & fraudulent preference is an act moving from the trader, whereby he elects to favour a particular creditor.—REED *v.* AYTON (1817), Holt, N. P. 503.

7222. —— **Must originate with debtor.**]—To constitute a fraudulent preference to a particular creditor, the act done must originate with debtor himself.—MORGAN *v.* BRUNDRETT (1833), 5 B. & Ad. 289; 2 Nev. & M. K. B. 280; 2 L. J. K. B. 195; 110 E. R. 798.

Annotations:—**Refd.** Strachan *v.* Barton (1856), 11 Exch. 647. **Mentd.** Atkinson *v.* Brindall (1835), 2 Bing. N. C. 225; Gibson *v.* Boutts (1836), 3 Scott, 229; Aldred *v.* Constable (1843), 4 Q. B. 674; *Re* Hunt, *Ex p.* Simpson (1844), De G. 9, Ct. of R.; Brown *v.* Kempton (1850), 19 L. J. C. P. 169, Ex. Ch.; Thoyts *v.* Hobbs (1852), 7 Exch. 810; *Re* Barrell, *Ex p.* Bailey (1853), 3 De G. M. & G. 534; Mercer *v.* Peterson (1867), 36 L. J. Ex. 218; Marks *v.* Feldham (1869), 10 B. & S. 371, Ex. Ch.

7223. —— **Whether presumed from shortness of time—Between transaction & bankruptcy.**]—Bkpt., within three weeks of the issue of the fiat, gave a creditor a memorandum, whereby he agreed to execute a valid assignment of all his interest in two leases, the memorandum to be considered in the meanwhile as a "continuing security" for all money due or to become due up to £1,500. One of the leases had previously been deposited with the creditor, & bkpt. had agreed in writing to deposit the other lease as security for £600:—*Held:* the fact of the transaction taking place within three weeks of the fiat was not sufficient to raise an inference that it was a fraudulent preference.—*Re* OGBOURNE, *Ex p.* HEATHCOATE (1842), 2 Mont. D. & De G. 711; 6 Jur. 1001, Ct. of R.

Annotation:—**Mentd.** *Re* Carter & Justins, *Ex p.* Sheffield Union Banking Co. (1865), 13 L. T. 477.

7224. —— **Spontaneous act—Whether pressure necessary.**]—Pressure is not necessary to prevent an assignment from being an act of bkpcy., as a fraudulent preference. It is sufficient that the assignment is not the spontaneous act of bkpt., & the circumstance of the grantee having been the grantor's solr. makes no difference in this to prefer.—ROE *v.* MASSEY MANUFACTURING CO. (1892), 8 Man. L. R. 126.—**CAN.**

r. —— ——.]—Under R. S. M., c. 7, s. 33, as amended by 63 & 64 Vict. c. 3, s. 1, there must be the intent on the part of debtor to prefer the particular creditor, in order to set aside the impeached conveyance.—CODVILLE *v.* FRASER (1902), 14 Man. L. R. 12. —**CAN.**

s. —— *Contemplation of insolvency proved.*]—There can be no undue preference unless there is an intention to prefer the creditor as well as contemplation of sequestration, & proof of contemplation of sequestration does not entirely dispense with proof of an intention to prefer. —DU PLOOY'S TRUSTEE *v.* PLEWMAN (1890), 7 S. C. 332.—**S. AF.**

t. —— *Insolvency proved.*]— A transfer of goods & payments made by an insolvent trader in liquidation of antecedent debts:—*Held:* void as fraudulent preferences under 1884 Act, s. 27, as amended by 1885 Act, s. 13, even though debtor might have had no desire to prefer the creditor. —KINROSS' OFFICIAL ASSIGNEE *v.* ROBJOHNS, KINROSS' OFFICIAL ASSIGNEE *v.* RICHARDSON (1889), 8 N. Z. L. R. 224.—**N.Z.**

w. *Creditor acting bonâ fide & without knowledge of insolvency.*]—A mtge. given within three months of insolvency by debtor, who knows that he is hopelessly insolvent, to a creditor to secure past advances with a view of giving such a creditor preference over his other creditors is not void under Insolvency Stat., 1871 (No. 379), against the trustee of the estate, if such creditor takes the mtge. *bonâ fide*, & such *bona fides* is not affected by his knowledge that debtor was considerably pressed for money & his desire to be first in the field, if he has no certainty of his being insolvent, nor any idea that debtor desires to prefer him to other creditors.—DAVEY *v.* BULLOCK (1891), 17 V. L. R. 3. —**AUS.**

x. *Concurrence of intention of debtor & creditor.*]—Transfer of money was set aside, as there was intent to prefer as to both creditor & debtor.—JAGGER *v.* TURNER & CO. (1909), 12 W. L. R. 588.—**CAN.**

z. ——.]—Under Yukon Ordinance, c. 38, C. O., 1902, s. 2, in order to render a preferential assignment made by a person in insolvent circumstances void, there must be knowledge of the insolvency on the part of both parties & concurrence of intention to obtain an unlawful preference over the other creditors.—BENALLACK *v.* BANK OF BRITISH NORTH AMERICA (1905), 36 S. C. R. 120.—**CAN.**

a. *S. P.* ROSS BROTHERS, LTD. *v.* PEARSON (1905), 1 W. L. R. 338, 575; 2 W. L. R. 259.—**CAN.**

b. ——.]—A transfer of goods made within sixty days of an execution on such goods, the transferor being insolvent at the time to the knowledge of all the parties concerned:—*Held:* an unjust preference, & void under N. S. Assignments Act.—SCHLESINGER *v.* CROWE (1914), 14 E. L. R. 158.—**CAN.**

c. —— *What evidence necessary to prove.*]—The trial judge found that a mtgee. did not know of insolvents' inability to meet their engagements, but it was notorious, & that he had probable cause for believing it, so that the mtge. must be presumed to be made with intent to defraud creditors, & as a conclusion from those facts, he found that such intent was known to the mtgee.:—*Held:* the finding of the facts was sustained by the evidence, but the conclusion was not warranted.—*Re* ANDREWS (1878), 2 A. R. 24.—**CAN.**

7222 i. "*Voluntarily*"—*Must originate with debtor.*]—L. being in insolvent circumstances asked A. to procure discounts for him, which A. agreed to do on condition that he should retain a part of the proceeds of the paper which should be brought to him, & apply it to the indebtedness of L. to him, & to several other creditors whom A., represented. Securities having been thus transferred to A. by L.:—*Held:* as the idea of the transfer as made was proposed by A., & he & not L., was the originator of the scheme, whereby he & the creditors represented by him were preferred, the transfers were not made "voluntarily," & "with intent" to give such creditors a preference over the other creditors, & could not be set aside.—WHITNEY *v.* TOBY (1885), 6 O. R. 54.—**CAN.**

7224 i. —— *Spontaneous act.*]—Insolvents being unable to pay their debts, as they became due, prompted mtgees. to take possession:—*Held:* a fraudulent preference.—*Re* COLLINS BROTHERS, *Ex p.* WHITE, [1903] S. R. Q. 47.—**AUS.**

7224 ii. —— ——.]—The instruments to be avoided as having the effect of a preference are only those which are the spontaneous acts of debtor.—STEPHENS *v.* MCARTHUR (1890), 6 Man. L. R. 496; 19 S. C. R. 446. —**CAN.**

7224 iii. —— ——.]—To render a transaction void as a preference, it must be the result of the pure voluntary act of debtor.—BERTRAND *v.* PARKES (1892), 8 Man. L. R. 175.—**CAN.**

7224 iv. —— ——.]—To constitute a chattel mtge. a preference it must be "the spontaneous act or deed" of insolvent, & must have been given of his own mere motive & as a favour or bounty proceeding voluntarily from himself.—ADAMS *v.* HUTCHINGS (1893), 3 Terr. L. R. 206.—**CAN.**

7224 v. —— ——.]—A trader assigned teas to a creditor, who had no intimation that he was embarrassed when the assignment was made, & had not applied for the assignment:—*Held:* a fraudulent preference.—*Re* M'COOTE (1861), 14 Ir. JUR. 188.—**IR.**

7224 vi. —— ——.]—The effect of 1872 Act, s. 53, is that, as far as relates to the question of preferring a creditor, the old law, requiring the act of preference to be the voluntary & spontaneous act of debtor, still applies.—DEERING *v.* ROBERTS, *Re* DOMVILE (1878), 12 I. L. T. 118.—**IR.**

7224 vii. —— —— *Whether pressure necessary.*]—Two days before a person was adjudicated an insolvent & his

Sect. 12.—*Avoidance of preference: Sub-sect.* 4, *A.*]

respect.—JOHNSON *v.* FESEMEYER (1858), 3 De G. & J. 13: 44 E. R. 1174.

Annotations:—**Consd.** Smith *v.* Pilgrim (1876), 2 Ch. D. 127. **Refd.** The Heart of Oak (1869), 39 L. J. Adm. 15. **Mentd.** Pearson *v.* Benson (1860), 28 Beav. 598; *Re* Nurse, *Ex p.* Foxley (1868), 3 Ch. App. 515, L. JJ.; National Bank of Australasia *v.* United Hand in Hand & Band of Hope Co. (1879), 4 App. Cas. 391, P. C.; Ward *v.* Sharp (1884), 53 L. J. Ch. 313.

7225. —— Presumed where no pressure—Rebuttal of presumption.]—A payment to a particular creditor without a demand made by debtor, on the eve of bkpcy., out of a fund which would otherwise be distributable among his creditors, is not necessarily a fraudulent preference, for though such a payment would *primâ facie* raise the presumption that debtor fraudulently intended to defeat the bkpcy. law, from which fraudulent intention alone arises the invalidity of the payment, yet that presumption may be rebutted by other circumstances.—BILLS *v.* SMITH (1865), 6 B. & S. 314; 5 New Rep. 364; 34 L. J. Q. B. 68; 11 Jur. N. S. 155; 13 W. R. 407; 122 E. R. 1211.

Annotations:—**Refd.** *Re* Softley, *Ex p.* Hodgkin (1875), L. R. 20 Eq. 746; *Re* Vautin, *Ex p.* Saffery, [1900] 2 Q. B. 325. **Mentd.** Jones *v.* Harber (1870), 19 W. R. 248.

7226. —— Real dominant motive must be considered.]—In order that a payment or transfer of property should amount to a fraudulent preference it is essential that it should have been made with a view of giving a preference to the creditor. It is not sufficient that the creditor was in fact preferred. The ct. must consider as a question of fact what was the real or dominant motive of bkpt. in making the payment or transfer.—*Re* GOLDSMID, *Ex p.* TAYLOR (1886), 18 Q. B. D. 295; 56 L. J. Q. B. 195; 35 W. R. 148; 3 T. L. R. 109, C. A.

Annotations:—**Folld.** *Re* Hutchinson, *Ex p.* Ball (1887), 35 W. R. 264, C. A.; *Re* Mills, *Ex p.* Official Receiver (1888), 58 L. T. 871, C. A. **Consd.** *Re* Lane, *Ex p.* Gaze (1889), 23 Q. B. D. 74, D. C. **Folld.** New, Prance & Garrard's Trustee *v.* Hunting, [1897] 2 Q. B. 19, C. A. **Consd.** *Re* Blackpool Motor Car Co., Hamilton *v.* Blackpool Motor Car Co., [1901] 1 Ch. 77. **Folld.** *Re* Lake, *Ex p.* Dyer, [1901] 1 K. B. 710, C. A. **Refd.** *Re* Blackburn, Buckley's Case, [1899] 2 Ch. 725; Sharp *v.* Jackson, [1899] A. C. 419; *Re* Warren, *Ex p.* Trustee, [1900] 2 Q. B. 138, D. C. **Mentd.** Pratt *v.* Inman (1887), 6 T. L. R. 91.

7227. —— Motive cannot negative inference.]—Debtor, who had formed the opinion that the law of fraudulent preference was unfair to an unpaid vendor, returned goods to a creditor, considering that he was acting under a moral obligation:—*Held:* the transaction could not be tested by debtor's "motive," which could not negative the inference of fraudulent preference.—*Re* FLETCHER, *Ex p.* SUFFOLK (1891), 8 T. L. R. 80; 9 MORR. 8, D. C.

Annotation:—**Apld.** *Re* Blackburn, Buckley's Case, [1899] 2 Ch. 725.

See also, Nos. 7186 *et seq.*, *ante*.

7228. Must be substantial, effectual or dominant object of transaction—Need not be sole object.]—In order that a payment of money or a transfer

property had vested in the official assignee, such person had, not spontaneously, but in consequence of being pressed, assigned to a particular creditor certain property:—*Held:* such assignment was not "voluntary," & was not fraudulent & void as against the official assignee.—SHEO PRASAD *v.* MILLER, MILLER *v.* SHEO PRASAD (1879), I. L. R. 2 All. 474; I. L. R. 6 All. 84; 10 L. R. Ind. App. 98, P. C.—**IND.**

7225 i. —— *Presumed where no pressure.*]—L. made a chattel mtge. on his stock-in-trade in favour of defts., being then in insolvent circumstances:—*Held:* as the giving of the mtge. was entirely at L.'s suggestion, & there was no pressure on the part of the mtgees., the mtge. was void as against L.'s assignee for creditors.—BERTRAND *v.* CANADIAN RUBBER CO. (1897), 12 Man. L. R. 27.—**CAN.**

d. —— *Payment by direction of holders of valid bill of sale.*]—F. obtained an overdraft in deft. bank on a bond, with H. & C. as sureties, & gave H. & C. a bill of sale over his goods as security for payment of the overdraft. After default had been made by F. under the bond, F. instructed S., an auctioneer, to sell his goods. H. & C.'s attorney, B., thereupon wrote to S. calling his attention to the bill of sale, & directing him to hold the proceeds for H. & C. B., acting on behalf of H. & C., wrote to the bank asking that all money paid in after that date should be applied in reduction of the overdraft. S. paid the proceeds of sale into F.'s account at the bank. At that time there was another account in the bank opened by H. & C. for the liquidation of the overdraft. Within sixty days after the payment into the bank, F. sequestrated his estate. F.'s official assignee brought an action to recover the amount of the proceeds of the sale of F.'s goods received by them. The jury found that on the day when the first payment was made to the bank F. was insolvent, & defts. knew it:—*Held:* the payment must not be regarded as a voluntary payment by F., but as a payment made by direction of H. & C., who then had dominion over the goods by virtue of their bill of sale, & made with the view of meeting the security of H. & C., & the payments up to the amount secured by the bill of sale were good as against F.'s official assignee.—LYONS *v.* BANK OF NEW SOUTH WALES (1882), 3 N. S. W. L. R. 385.—**AUS.**

f. —— *Ord.* 6 *of* 1843, *s.* 84.]—Ord. 6 of 1843, s. 84, does not require, as English law does, that in order to constitute fraudulent preference the transaction should be voluntary.—SMITH *v.* CARPENTER (1869), 12 Moo. P. C. 101; Buch. 206; 14 E. R. 849, P. C.—**S. AF.**

g. "*Fraudulent*"—*Refers to intent to give preference.*]—The word "fraudulent" in the expression "fraudulent preference" does not refer to "fraud" in the ordinary sense, but to the fact that a payment has been made with a view of giving one creditor a preference over the others.—*Re* COHEN, [1908] V. L. R. 171.—**AUS.**

k. —— *What is.*]—When the consideration expressed on the face of an assignment is larger than the actual debt due by debtor to the assignee, it is not necessarily fraudulent.—TARRATT *v.* SAWYER (1835), 1 Thom. (1st ed.) 20; (2nd ed.) 46.—**CAN.**

l. —— —— *Assignment of joint & separate property—For benefit of joint creditors.*]—Under Debtors & Creditors Act, 1876, an assignment of the joint property of a trading firm, & of the separate property of the members of the firm, for the benefit of the joint creditors of the firm is a fraud, if there are separate property & separate creditors, but if there is no separate property to be affected by the deed, the deed cannot be avoided by the trustee in bkpcy. of the assignors.—FRASER'S CREDITORS' TRUSTEE IN BANKRUPTCY *v.* BROWNE & BEAUMONT (1882), 2 N. Z. L. R. C. A. 8.—**N.Z.**

m. —— *Presumption of fraud.*]—Where debtor transfers the whole, or nearly the whole, of his property to one creditor for an antecedent debt, the law presumes an intent to defeat or delay the other creditors, but such presumption does not arise where a material portion is left, unassigned; it then becomes necessary to prove the intention by some act of debtor.—HASKER *v.* MOORHEAD, HASKER *v.* BLACKWOOD, HASKER *v.* M'MULLEN (1876), 2 V. L. R. 160.—**AUS.**

n. —— —— *Rebuttal.*]—An action was brought by assignees to have certain mtges. declared void as being given in contemplation of bkpcy. & with intent fraudulently to defeat & delay creditors. *Semble:* even before the amendment of Insolvent Act, 1875, s. 133, by the insertion of the words *primâ facie*, the presumption of fraud could be rebutted.—LONGWORTH *v.* MERCHANTS BANK OF HALIFAX (1877), R. E. D. 255.—**CAN.**

o. "*Fraudulent disposition*"—*Collection Act.*]—It was contended that a bill of sale given by deft. to S. was a fraudulent preference & was a fraudulent disposition of deft.'s property within the above Act:—*Held:* the disposition intended to be cover by the Act must have been one fraudulent in fact & not one which the Act relating to assignments declared to be invalid because it contravened its provisions.—SHORT *v.* BENT (1904), 40 N. S. R. 628.—**CAN.**

p. "*Good faith*"—*Insolvency Act*, 1871, *s.* 71.]—*Semble:* "good faith" in the above sect. means that the creditor & purchase had no notice that any fraud or preference was intended by debtor.—MICHAEL *v.* OLDFIELD (1887), 13 V. L. R. 793.—**AUS.**

7228 i. *Must be substantial, effectual or dominant object of transaction.*]—In order that a disposition of property made by debtor in insolvent circumstances to one of his creditors may be a fraudulent preference within Insolvency Act, 1890 (Vict. No. 1102), s. 73, the giving of a preference must be the susbtantial object which debtor desires to achieve. The motive or reason which induces that desire is irrelevant.—MUNTZ *v.* SMAIL (1909), 8 C. L. R. 262.—**AUS.**

of property made by debtor in favour of one of his creditors should be void as a fraudulent preference under 1869 Act, s. 92, it is sufficient that the preferring the creditor should have been the substantial, effectual, or dominant view with which debtor made it; it is not necessary that it should have been his sole view.—*Re* BIRD, *Ex p.* HILL (1883), 23 Ch. D. 695; 52 L. J. Ch. 903; 49 L. T. 278; 32 W. R. 177, C. A.

Annotations:—**Consd.** *Re* Washington Diamond Co., [1893] 3 Ch. 95, C. A. **Refd.** *Re* Bell, *Ex p.* Official Receiver (1892), 10 Morr. 15, D. C.

7229. Question of fact for jury—Depending on intention of debtor—At time of transaction.]—Whether or not a voluntary payment made by a trader in insolvent circumstances & on the verge of bkpcy. to a particular creditor is void as being a fraud upon the bkpcy. laws, is a question of fact for the jury depending on the mind & intention of the party at the time of making the payment, to be collected from the surrounding circumstances.—GIBSON *v.* BOUTTS (1836), 3 Scott, 229.

Annotations:—**Refd.** Aldred *v.* Constable (1843), 4 Q. B. 674. **Mentd.** *Re* Hunt, *Ex p.* Simpson (1844), De G. 9, Ct. of R.

See, also, No. 7198 *et seq., ante.*

7230. Question of law rather than of fact.]—The question whether a fraudulent preference was given appears to be one of law rather than of fact.—GIBSON *v.* MUSKETT (1842), 4 Man. & G. 160; 3 Scott, N. R. 419, 427; 11 L. J. C. P. 225; 134 E. R. 66.

Annotation:—**Refd.** Aldred *v.* Constable (1843), 4 Q. B. 674.

7231. When inquiry ordered—Time short between transaction & bankruptcy.]—Where security was made by insolvent debtor, whose effects were under execution, not two months before bkpcy., upon a previous application of a creditor ignorant of those circumstances, the ct. thought it valid, but permitted the assignees to bring an action. —*Ex p.* SCUDAMORE (1796), 3 Ves. 85; 30 E. R. 907, L. C.

Annotation:—**Mentd.** Rodick *v.* Gandell (1852), 1 De G. M. & G. 763, L. C.

7232. —— —— Application for order of sale by equitable mortgagee.]—Where it appears that the space of time between an alleged deposit by way of equitable mtge. by bkpt. & the issuing of the fiat was very short, & the affidavits in support of a petition by the mtgee. for an order of sale are deficient in explanation, the ct. will, at the request of the assignees, order an inquiry as to the nature of the transaction.—*Re* LINDON, *Ex p.* CLOUTER (1843), 3 Mont. D. & De G. 187; 7 Jur. 135, Ct. of R.

7233. —— —— ——.]—Where the petition of an equitable mtgee. states that the deposit took place only nine days before the issuing of the fiat, & there is nothing to rebut the presumption of fraudulent preference, the ct. will not make the usual order, but will direct the property to be sold, & the proceeds paid into ct., subject to further order.—*Re* WALKER, *Ex p.* AINSWORTH (1838), 2 Deac. 563; 7 L. J. Bcy. 33, Ct. of R.

7234. —— Small suspicious circumstances—Positive proof of bona fides.]—Various small circumstances of suspicion, if all on one side, may throw so much doubt on an alleged mtge. transaction as to induce the ct. to direct an issue; but where they are met by positive evidence the other way, such small circumstances will not induce the ct. to direct an issue, but, on the contrary, are tokens that the transaction impugned has not been fraudulently covenanted.

Such facts as that the party setting up the mtge.

7228 ii. ——.]—A person, whose liabilities exceeded his assets, having for many years carried on business, his position slowly improving or not getting appreciably worse, yielded to the pressure of one of his creditors, who was also his largest customer, & made a payment to that creditor:—*Held:* as it had not been shown that his dominant view in making the payment was to prefer the creditor, or that the payment was not made with a view of carrying on his business, it had not been shown that there was a fraudulent preference.—*Re* COHEN (AN INSOLVENT), [1908] V. L. R. 171. —**AUS.**

7228 iii. ——.]—In giving the impeached chattel mtge. it appeared that the dominant motive of debtor was to make an arrangement for continuing his business, deft. having induced him to give it by promises of assistance in carrying him along & in arranging with other creditors, although not in any definite way enforceable in a ct. of law:—*Held:* while the effect of the conveyance might be to place that creditor in a more advantageous position than other creditors, & debtor might recognise at the time that such would be the effect, yet if he gave it for some other purpose or in the hope that he might thus be enabled to avoid insolvency, it could not be considered that he gave it with intent to give a preference, & the security should stand.—CODVILLE *v.* FRASER (1902), 14 Man. L. R. 12. —**CAN.**

7228 iv. ——.]—To avoid a transaction under Presidency Towns Insolvency Act, s. 56, it must have been entered into with the dominant view of preferring the particular creditor.—OFFICIAL ASSIGNEE OF MADRAS *v.* MEHTA & SONS (1919), I. L. R. 42 Mad. 510.—**IND.**

7228 v. ——.]—1892 Act, s. 79, has restored the law as to fraudulent preferences to its condition under English 1869 Act, s. 92, & a desire to prefer the particular creditor must be the dominant, or, at least, an operative & effective motive of debtor.—*Re* REIMER, *Ex p.* OFFICIAL ASSIGNEE (1896), 15 N. Z. L. R. 198.—**N.Z.**

7228 vi. ——.]—To constitute a fraudulent preference it is not sufficient to show that a particular creditor was in fact preferred, or that the result of the payment was so to prefer him. The real question for the ct. to consider under 1892 Act, s. 79, is what has been the substantial, effective, or dominant view of debtor in making the payments he did, & where it was the practice of debtor on receiving payment of money to distribute it among his creditors as far as it would go, & he did not know he was in a bkpt. state, it will not be inferred that debtor had necessarily any intention to prefer the creditors to whom the money was paid.—*Re* ABURN (1908), 27 N. Z. L. R. 442. —**N.Z.**

7228 vii. ——.]—I., the owner of a valuable mealie growing farm, leased land to P., as security for a debt due on a promissory note. The lease was decided on at a meeting called with the object of finding security. I. when he went to the meeting was prepared, if necessary, to pass a bond as security. He desired & hoped to avoid insolvency & also expected assistance from an uncle:—*Held:* the contract did not constitute an undue preference, as there was no evidence of intention to prefer, I.'s dominant motive being to avoid insolvency.—RAUBENHEIMER *v.* DU PLESSIS (1918), O. P. D. 37.—**S. AF.**

7228 viii. —— *Need not be sole object.*]—The act of debtor is brought within the statutory definition of the offence of fraudulent preference, if, being unable to pay his debts from his own money, he voluntarily make an assignment of property within three months before his insolvency with a view, *i.e.* a real operative view or intent, though it may not be his sole view or intent, of giving one of his creditors a preference or advantage over his other creditor.—MICHAEL *v.* OLDFIELD (1887), 13 V. L. R. 793.—**AUS.**

7228 ix. ——.]—If a payment be made from a mixed motive, though one object of the payment be to prefer the creditor, the payment is not a fraudulent preference.—TAYLOR'S ASSIGNEES *v.* THOMPSON (1869), I. R. 4 C. L. 129; 4 I. L. T. Jo. 272.—**IR.**

7229 i. *Question of fact for jury.*]—Upon the construction of 38 Vict. c. 5, s. 59 (Man.):—*Held:* the questions of *bona fides,* valuable consideration, preference & fraud were for the jury, & were not questions of law.—TUCKER *v.* YOUNG, *Temp.* Wood, 186.—**CAN.**

7229 ii. ——.]—Where a bill of sale is given to a creditor in preference of other creditors, the question of fraud or no fraud is one that belongs entirely to the jury.—TARRATT *v.* SAWYER (1835), 1 Thom. 20.—**CAN.**

7229 iii. —— *Pressure alleged.*]—Under Ord. 6 of 1843, s. 84, the question of intention in making an alienation or payment is left open, to be determined upon all the circumstances & facts of the case, by the ct. or a jury, as well with respect to pressure by a creditor to induce debtor to give security to him in preference to the general body of creditors, as in other respects.—SMITH *v.* CARPENTER (1858), Buch. 206; 12 Moo. P. C. C. 101; 14 E. R. 849, P. C.—**S. AF.**

Sect. 12.—*Avoidance of preference: Sub-sect.* 4, *A.*]

refused to allow a former statement of his own on oath to be referred to in ct., that the receipt indorsed on the alleged mtge. did not correspond with the consideration for such mtge. as expressed in the body of the deed, that certain books & other documents were alleged to be no longer in existence, & the books were produced in a mutilated state, & even a certain amount of laches, were disregarded on the face of positive evidence in the mtgee.'s favour.—DAVISON *v.* ROBINSON (1857), 3 Jur. N. S. 791; *subsequent proceedings* (1858), 6 W. R. 673, L. C.

7235. Onus of proof—Circumstances suspicious.]—On the petition of a mtgee. by deed of an equity of redemption for a sale, etc., it appeared that twenty-two years previously bkpt. had given petitioners a bond, on which no interest had ever been paid. In Feb., 1834, bkpt. gave a mtge. for the sum, & in June, 1834, he became bkpt.:—*Held:* the petition must be dismissed, the circumstances being so suspicious, that the comr. was right in requiring further information before he made the usual order for sale.

There is good ground for presuming the mtge. to have been a voluntary preference, so as to call on petitioners to show it was not; & this they have not done (SIR J. CROSS).—*Re* DAVY, *Ex p.* DEWDNEY (1835), 4 Deac. & Ch. 181; 2 Mont. & A. 72, Ct. of R.

7236. —— Transaction in fulfilment of prior promise.]—When a bill of sale comprising the whole of the grantor's property is given on the eve of his bkpcy. to secure a pre-existing debt, & it is attempted to support it by an agreement alleged to have been made at the time when the money was advanced, the ct. will require a very clear explanation of the delay in the execution of the bill of sale, & the *onus* is on the person who sets up the prior agreement to prove, not only its existence, but its *bona fides.*—*Re* BARKER, *Ex p.* KILNER (1879), 13 Ch. D. 245; 41 L. T. 520; 44 J. P. 264; 28 W. R. 269, C. A.

Annotations:—**Consd.** *Re* Jackson & Bassford, [1906] 2 Ch. 467. **Refd.** *Re* Hemingway, *Ex p.* Hauxwell (1883), 23 Ch. D. 626, C. A.

7237. —— Insolvency proved.] — Where a payment is impeached by a trustee as constituting a fraudulent preference & insolvency is shown, the *onus* of proof shifts from the trustee, & it is for the creditor receiving payment to prove that such payment was not made with a view to prefer him.—*Re* EATON & Co., *Ex p.* VINEY, [1897] 2 Q. B. 16; 66 L. J. Q. B. 491; 4 Mans. 111.

Annotations:—**N.F.** *Re* Laurie, *Ex p.* Green (1898), 46 W. R. 491. **Refd.** Bulteel & Colmore *v.* Parker & Bulteel's Trustee (1916), 32 T. L. R. 661.

See, also, Nos. 7169 *et seq., ante.*

Whether bankruptcy contemplated.]—*See* Nos. 7186 *et seq., ante.*

7235 i. *Onus of proof—Circumstances suspicious.*]—In order to work a fraudulent preference of a creditor, under R. S. O., 1877 (c. 118), there must be a concurrence of intent to do so on the part of both debtor & creditor; & the rule of the ct. is not to act upon mere suspicion, in the absence of affirmative evidence of fraud or of controlling circumstantial evidence leading to that conclusion.—BURNS *v.* MACKAY (1885), 10 O. R. 167.—**CAN.**

q. —— *Transaction not sufficiently established by uncorroborated testimony of parties thereto.*]—MORTON *v.* NIHAN (1880), 5 A. R. 20.—**CAN.**

r. —— *Contemplation of sequestration & intent to prefer proved.*]—When once contemplation of sequestration & intention to prefer have been proved, it lies upon the creditor, who seeks the protection of Ord. 6 of 1843, s. 86, to establish beyond any doubt that the impeached transaction took place in the usual & ordinary course of trade or business.—DU PLOOY'S TRUSTEE *v.* PLEWMAN (1890), 7 S. C. 332. —**S. AF.**

s. *S. P.* DOUBELL'S TRUSTEE *v.* HATTINGH & CO. (1903), 17 E. D. C. 124.—**S. AF.**

t. —— —— *Transaction in usual course of business.*]—It is not in the usual & ordinary course of trade & business for a person who, shortly prior to insolvency, is being pressed with writs by two judgment creditors, to ignore their claims & discharge another ordinary debt in respect of which no extraordinary pressure is brought to bear upon him.—DOUBELL'S TRUSTEE *v.* HATTINGH & CO. (1903), 17 E. D. C. 124.—**S. AF.**

u. —— —— ——.]—The fact of a payment having been made in the usual & ordinary course of business affords a protection under Ord. 6 of 1843, s. 86, even if there is sufficient proof of an intention to prefer to satisfy the requirements of s. 84, unless the existence of a collusive arrangement, etc., is also proved.

It is not enough to show that in the village in which the parties carried on their business such transactions as the one impeached were common, or that as between themselves they had had similar dealings before. The creditor must show that the usual or ordinary course of trade or business among men of business & repute in the commercial world has been followed, & if it appears that there has been a departure from the course followed by reputable men of business in similar circumstances the protection of s. 86 cannot be invoked. —DU PLOOY'S TRUSTEE *v.* PLEWMAN (1890), 7 S. C. 332.—**S. AF.**

v. *Presumption of intent to prefer —Creditor actually preferred.*]—In an action to set aside a transaction as a fraudulent preference under 38 Vict. c. 5, s. 59 (Man.):—*Held:* the transaction was not fraudulent, though its effect might be to defect or delay creditors, if that was not its object. —TUCKER *v.* YOUNG, *Temp.* Wood, 186.—**CAN.**

x. —— ——.]—Although 63 & 64 Vict. c. 3, s. 1, amending R. S. M., c. 7, s. 33, declares that a *primâ facie* presumption of an intent to prefer is to arise from the effect of a chattel mtge. given to a particular creditor, that does not justify the ct. in looking only to the effect, & refusing to attach any weight to the proved facts as to the actual intent. The presumption, being only *primâ facie,* may be rebutted by evidence.—CODVILLE *v.* FRASER 1902), 14 Man. L. R. 12.—**CAN.**

y. —— ——.]—The effect of a chattel mtge. being to give A. a preference over other creditors of B., the presumption is that it was made with intent to give such preference over the other creditors, who were injured & delayed by it.—MCCURDY *v.* GRANT (1900), 32 N. S. R. 520.—**CAN.**

z. —— ——.]—Within six months of his insolvency, debtor delivered to a creditor a number of stock in satisfaction of his claim, knowing that such action would ruin him:—*Held:* as debtor knew the result of the transaction would be to prefer deft., he must be taken to have intended to prefer him, & the transaction must be set aside as an undue preference.—VERMEULEN'S TRUSTEE *v.* BARNETT & DINN (1910), 27 S. C. 216; 20 C. T. R. 349.—**S. AF.**

a. —— ——.]—When insolvent knows that the effect of a transaction will be unduly to prefer one creditor before others it must be presumed that he intended to prefer such creditor by that transaction.—VAN HEERDEN'S TRUSTEES *v.* WAGENAAR (1906), E. D. C. 142.—**S. AF.**

b. —— —— *Transaction attacked within sixty days.*]—Where an instrument made by a person in insolvent circumstances has the effect of giving one creditor a preference over others, & the instrument is attacked within sixty days after it is made, there is under 54 Vict. c. 20, an incontrovertible statutory presumption that the instrument has been made with intent to give an unjust preference, & it is void.—COLE *v.* PORTEOUS (1892), 19 A. R. 111.—**CAN.**

c. —— —— ——.]—When an attacking assignee proceeds within the time-limit of Assignments Act, s. 40 or s. 41, he gets the assistance of s. 42, & the transaction is deemed to be one, which has the effect of giving a creditor a preference within ss. 40 & 41, if thereby a creditor is placed in a position to realise payment of his debt greater proportionately than could be realised by unsecured creditors; & the sect. excludes all question of the intention or motive of debtor, or pressure by the creditor, or the creditor's knowledge of debtor's circumstances or of the effect of the transaction.—EMPIRE SASH & DOOR CO. *v.* MARANDA (1911), 19 W. L. R. 78. —**CAN.**

d. —— —— ——.]—E. executed a chattel mtge. in favour of deft., & afterwards made an assignment under Assignments & Preferences Act, for the general benefit of creditors, to pltf. In an action brought within sixty days after the making of the chattel mtge., the trial judge found that $2,500 was actually advanced by deft. to E. at the time she made the chattel mtge., & he also found facts which brought the case within s. 5 (1) of the Act, unless the advance was made *bonâ fide* within s. 6 (1); but he did not find that deft. took the impeached security with intent to defeat, hinder, or delay creditors, & he did not find that the security was not given in consideration of a present

7238. What evidence admissible—Answers of bankrupt at public examination.]—Answers made by bkpt. on his public examination ought not to be given effect to as evidence to invalidate a deed as a fraudulent preference.—NEW, PRANCE & GARRARD'S TRUSTEE *v.* HUNTING, [1897] 2 Q. B. 19; 66 L. J. Q. B. 554; 76 L. T. 742; *affd.* without touching this point, *sub nom.* SHARP *v.* JACKSON, [1899] A. C. 419, H. L.

Annotations:—**Mentd.** Hermoux *v.* Harbord (1898), 14 T. L. R. 243; *Re* Blackburn, Buckley's Case, [1899] 2 Ch. 725; *Re* Vautin, *Ex p.* Saffery, [1900] 2 Q. B. 325; *Re* Blackpool Motor Car Co., Hamilton *v.* Blackpool Motor Car Co., [1901] 1 Ch. 77; *Re* Lake, *Ex p.* Dyer, [1901] 1 K. B. 710, C. A.; Taylor *v.* London & County Banking Co., London & County Banking Co. *v.* Nixon, [1901] 2 Ch. 231, C. A.; *Re* Pidcock, Perry *v.* Pidcock (1907), 51 Sol. Jo. 514; Wigan *v.* English & Scottish Law Life Assce. Assocn., [1909] 1 Ch. 291; *Re* Cozens, Green *v.* Brusley, [1913] 2 Ch. 478; Radcliffe *v.* Abbey Road & St. John's Wood Permanent Bldg. Soc. (1918), 87 L. J. Ch. 557.

See, further, Part XVI., Sect. 3, sub-sect. 3, *ante*.

7239. —— Other acts of fraudulent preference.]—In an action by a trustee, claiming that a certain transaction amounts to a fraudulent preference, evidence of other acts of fraudulent preference is admissible to show debtor's intent.—*Re* RAMSAY, *Ex p.* DEACON, [1913] 2 K. B. 80; 82 L. J. K. B. 526; 108 L. T. 495; 20 Mans. 15.

7240. What questions admissible—Communications between bankrupt & his clerk.]—A trader on the day after he stopped payment directed his clerk to carry a £200 note, which he took from his cash-box, to a particular creditor. The clerk was asked what he said to bkpt. upon receiving the note:—*Held:* the question was a proper one, as the inquiry was into bkpt.'s motives, for which purpose it might be important to hear the answers which he gave to the witness.—GUTHRIE *v.* CROSSLEY (1826), 2 C. & P. 301, N. P.

7241. —— Whether creditor had not claimed after bankruptcy.]—In an action of trover against assignees, it appeared that the goods had been assigned by bkpt. to B., who assigned them to C., to whom the purchase-money, as was contended, was advanced by pltf., to whom C. subsequently transferred the goods by bill of sale. In order to show that the transactions were fictitious, a question was asked, "whether C. had not made a claim to these goods after the bkpcy.":—*Held:* the question could properly be asked, as the claim was an act done by one of the parties to the alleged fraud.—FORD *v.* ELLIOTT (1849), 4 Exch. 78; 18 L. J. Ex. 447; 154 E. R. 1132.

7242. Proper questions & direction to jury—Bankrupt being insolvent—But not expecting to become bankrupt.]—Where bkpt. in the habit of supplying his son with money to pay his bills, gave him £200 for that purpose just before he stopped payment, being at the time insolvent, but not expecting to become bkpt.:—*Held:* the question for the jury, in an action by his assignees

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actual *bonâ fide* payment in money:—*Held:* the express findings were sufficient to negative the *bona fides* of the transaction.—STRUTHERS *v.* CHAMANDY (1918), 42 O. L. R. 508; 14 O. W. N. 61.—**CAN.**

e. —— *Transaction within thirty days of insolvency.*]—On Oct. 18 insolvents sold goods to C., taking his note for the price, which on the same day was taken to a bank, & there left to be applied in payment of notes made by insolvents & indorsed by deft. On the 20th insolvents made a voluntary assignment:—*Held:* the transaction being within thirty days before the assignment, was a transfer to deft. by way of payment, giving him an unjust preference, & void.—CHURCHER *v.* COUSINS (1870), 28 U. C. R. 540.—**CAN.**

f. —— ——.]—Insolvent, within thirty days of his insolvency, executed a mtge. to deft. for alleged money advances:—*Held:* the mtge. was fraudulent as against creditors.—DAVIDSON *v.* HOUSE (1878), 43 U. C. R. 592.—**CAN.**

g. —— *Transaction within sixty days of insolvency.*]—Defts., the son-in-law & the brother-in-law of insolvent, lent insolvent money at higher than statutory rates without security, taking notes for the amounts. Within sixty days of the assignment, defts. becoming dissatisfied with the notes took the impeached conveyances:—*Held:* they were void as fraudulent preferences.—FALLS *v.* GIBB, FALLS *v.* YOUNG (1906), 8 O. W. R. 397.—**CAN.**

h. —— ——.]—An assignment by way of further security made within sixty days of insolvency, no advance being made then or subsequently:—*Held:* void against creditors, though made *bonâ fide*.—BROLEY *v.* CANADIAN BANK OF COMMERCE (1908), 1 Sask. L. R. 448; 8 W. L. R. 910; 9 W. L. R. 331.—**CAN.**

j. —— —— *Continuation of former transaction.*]—*Held:* the contention that the impeached security, which was given less than sixty days before the making of assignment, could not prevail against the assignment, failed, as the security was but a continuation of a former security of the like character held by the creditor for the indebtedness.—TOWNSHEND *v.* NORTHERN TOWN BANK (1912), 20 O. W. R. 961; 3 O. W. N. 1105; 26 O. L. R. 291; 4 D. L. R. 91.—**CAN.**

k. —— —— *Rebuttal of presumption.*]—A mtge. in satisfaction of a prior indebtedness given by a wife to her husband within sixty days of a creditors' action, or at a time when the wife was, to her own knowledge & that of her husband, insolvent:—*Held:* a fraudulent preference, & there was a presumption against the husband of the intent to give it which was not rebutted by the facts.—MCNEIL *v.* DAWSON (1902), 1 O. W. R. 24.—**CAN.**

l. —— —— ——.]—In the case of a mtge. of land to secure a debt, made on Oct. 15, to defts., followed on Oct. 21 by an assignment by the mtgor. for the benefit of creditors:—*Held:* defts. were entitled to show that there was no intent to prefer.—CRAIG *v.* MCKAY (1906), 12 O. L. R. 121; 7 O. W. R. 507.—**CAN.**

m. —— —— ——.]—Where the writ was issued within sixty days of the impeached transaction:—*Held:* the *onus* lay on the party upholding it to rebut the presumption of fraud.—THOMPSON *v.* MORRISON (1907), 9 O. W. R. 179.—**CAN.**

n. —— —— ——.]—Deft., mtgee. of land belonging to W., received from him a chattel mtge. to secure the payment of arrears of interest, for which deft. believed he was entitled to distrain. A creditor of W. sought to have the chattel mtge. set aside on the ground of unjust preference:—*Held:* the *onus* of rebutting the *primâ facie* presumption of the intent to prefer, which arose under R. S. O., c. 147, s. 2 (3), was on deft.; such presumption had on the facts been rebutted.—KEENAN *v.* RICHARDSON (1902), 1 O. W. R. 333.—**CAN.**

o. —— —— —— *Pressure.*]—The presumption, under Assignments & Preferences Act, C. S. N. B., 1905 (c. 141), s. 2 (3), that a transfer of property attached within sixty days from the making thereof was made with intent to give the preferred creditor an unjust preference, is rebuttable, but evidence of pressure is not admissible for the purpose.—EDGETT *v.* STEEVES (1906), 2 E. L. R. 131; 3 N. B. Eq. Rep. 404.—**CAN.**

p. —— —— —— *Insolvency proved.*]—Assignment & Preference Act, R. S. O., 1914, c. 134, s. 5 (4), deals with the transaction in s. 5 (1) (2), which results in preferring a creditor. If it takes place within sixty days before assignment for the benefit of creditors, there are two presumptions, one that the transaction is in fact an unjust preference, & the other that it was so intended. If there be insolvency, or inability to pay debts in full, or consciousness that insolvency is impending, the creditors must, in order to discharge the statutory *onus*, show that there was no intent to prefer unjustly.—CLIFTON *v.* TOWERS (1917), 39 O. L. R. 292.—**CAN.**

7239 i. *What evidence admissible—Other acts of fraudulent preference.*]—On a question whether goods were delivered by bkpt. to a creditor fraudulently & in contravention of 1869 Act, evidence of an alleged fraudulent act committed by bkpt. in delivering goods to another creditor at about the same time is inadmissible.—EDMOND *v.* DUFFAS (1866), 2 Sc. L. R. 246.—**SCOT.**

7239 ii. —— *Statements by debtor after transaction.*]—Where a bill of sale is impeached as a fraudulent preference, statements by the grantor to his solr. shortly after executing the deed as to his intent are not admissible in evidence, but such statements made to a creditor are admissible.—SHAW *v.* SOLOMON (1870), 1 V. R. 153.—**AUS.**

7242 i. *Proper questions & direction to jury.*]—Execution debtors on the eve of insolvency, & after service upon them of the writ at the suit of the execution creditors, sold their stock-in-trade to pltf., who knew that they had been so sued, taking from him notes for the purpose of dividing them ratably among their creditors:—*Held:* (1) the jury were properly directed to support the sale to pltf., if they found it made *bonâ fide* with intent to transfer the property to pltf., & not colourable to protect it for debtor, even though the effect might be to defeat defts.' execution; (2) the jury

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against the son to recover that money, was, whether it was given in the ordinary course of maintaining the son, or as a fraudulent preference of the son over the creditors.—ABELL *v.* DANIELL (1829), Mood. & M. 370, N. P.

Annotations :—**Consd.** Bills *v.* Smith (1865), 6 B. & S. 314. **Refd.** *Re* Hunt, *Ex p.* Simpson (1844), 14 L. J. Bcy. 1, Ct. of R.

7243. —— Where there has been pressure.]—Debtor paid a bill which had ten days to run, deft. having threatened to arrest him & his father, who had accepted the bill, if it were not paid. It was left to the jury to say, whether in all the circumstances the payment was made in consequence of the threat, & they were directed to consider what were the motives which probably actuated debtor :—*Held :* a proper direction.—COOK *v.* ROGERS (1831), 7 Bing. 438 ; 5 Moo. & P. 353 ; 9 L. J. O. S. C. P. 155 ; 131 E. R. 169.

Annotations :—**Refd.** Morgan *v.* Brundrett (1833), 5 B. & Ad. 289 ; Belcher *v.* Prittie (1834), 10 Bing. 408 ; Strachan *v.* Barton (1856), 11 Exch. 647 ; Bills *v.* Smith (1865), 6 B. & S. 314.

7244. —— ——.]—In an action by assignees to recover money paid by bkpt. to deft., the judge, assuming that there had been importunity & pressure by deft., left it to the jury to say whether bkpt. had made the payments in consequence of such importunity & pressure, or with a view of giving deft. a fraudulent preference in contemplation of bkpcy. :—*Held :* this was a direction, of which deft. had no right to complain.—COOK *v.* PRITCHARD (1843), 5 Man. & G. 329 ; 6 Scott, N. R. 34 ; 12 L. J. C. P. 121 ; 134 E. R. 590.

Annotations :—**Refd.** Brown *v.* Kempton (1850), 19 L. J. C. P. 169, Ex. Ch. ; Hale *v.* Allnutt (1856), 18 C. B. 505.

7245. —— Pressure alleged.]—In 1837 A., being in embarrassed circumstances, executed a deed to secure to his creditors a composition of 7*s.* in the pound. B., a creditor, refused to sign the deed, until A. made B. a promise to give him security for the difference between the composition & the full amount of the debt. Pursuant to that agreement A. subsequently handed over to B. his promissory notes, payable to B. or order. B. indorsed the notes, & paid them in to his bankers at Leeds, to whom B. was in the habit of indorsing all bills & notes received by him, & drawing generally on account. When the notes were at maturity the London correspondents of the Leeds bankers presented them to A., by whom they were paid. A. continued to deal with B. down to his bkpcy., in 1840, without ever complaining of the transaction or attempting to set off the payments made in respect of the notes against the subsequent demands of B. against him. No evidence was given to show the state of the account between B. & the Leeds bankers at the time of the payments, or that A. knew the character in which the notes were held by the bankers who presented them. In an action for money paid by A. to the use of B., brought by the assignees of A. to recover back the amount of the notes, the judge left it to the jury to say whether or not the payment was voluntary, & told them that if the payment was made to the bankers as agents only, it must be considered as voluntary, & that if they found the payment to be voluntary, & to have been made with a full knowledge of the circumstances, they must find for B., otherwise for pltfs. The ct. directed a new trial, in order that the attention of the jury might be more precisely called to the question, whether A. knew the character in which the bankers presented the notes for payment, namely, whether as agents of B., or as holders for value.—GIBSON *v.* BRUCE (1843), 5 Man. & G. 399 ; 6 Scott, N. R. 309 ; 12 L. J. C. P. 132 ; 134 E. R. 619.

Annotation :—**Mentd.** Atkinson *v.* Denby (1861), 4 L. T. 252.

7246. —— ——.]—In July, 1844, deft. accepted a bill for £380 drawn by A. & B. on deft., which became due on Oct. 16. At the time it became due C. was the holder of the bill. Having told deft. that it would be impossible for him to meet the bill, by an effort A. procured £300 which he gave to deft. on Oct. 16, & deft. took up the bill, adding £80 of his own. On Oct. 17 deft. received a cheque for £40 10*s.* from A., on account of the £80. A. committed an act of bkpcy. shortly after Oct. 16. B. did not commit any act of bkpcy. until after the transaction. The fiat issued on Nov. 13. In an action by the assignees of A. & B. to recover the £340 10*s.* as a payment by bkpts. by way of fraudulent preference, the judge left it to the jury to say whether the £340 10*s.* was paid to deft. voluntarily, & in contemplation of bkpcy., remarking that there was a peculiarity in that C. was the holder of the bill, the money was procured to take up the bill, & C. received it :—*Held :* there was no misdirection.—SMITH *v.* WATSON (1848), 11 L. T. O. S. 105.

7247. —— ——.]—In an action by assignees to recover back from deft., a creditor of bkpts., the amount of a debt paid him by bkpts. which the assignees alleged to have been paid by way of fraudulent preference, the judge directed the jury, that if the payment was made under the influence of the pressure of deft., & also with a desire to give a preference to deft. in the event of a bkpcy., the verdict should be for deft. :—*Held :* the direction was right.—BROWN *v.* KEMPTON (1850), 19 L. J. C. P. 169, Ex. Ch.

Annotations :—**Apld.** Strachan *v.* Barton (1856), 11 Exch. 647. **Consd.** Edwards *v.* Glyn (1859), 2 E. & E. 29. **Folld.** *Re* Craven & Marshall, *Ex p.* Tempest (1870), 6 Ch. App. 70, L. JJ. **Consd.** *Re* Bell, *Ex p.* Official Receiver

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should have been further directed, that if the vendors were at the time of sale insolvent, or knew themselves to be on the eve of insolvency, & made the sale with intent to defeat or delay their creditors, or to give one or more a preference, the sale was void, unless made in the ordinary course of trade to an innocent purchaser, & a sale might be *bonâ fide* as opposed to colourable, & yet void by C. S. U. C. c. 26, s. 18, if the intent was to contravene its provisions.—GOTTWALLS *v.* MULHOLLAND (1864), 15 C. P. 62. **—CAN.**

7245 i. —— *Pressure alleged.*]—The intent with which an instrument alleged to be a fraudulent preference under C. S. U. C. c. 26, s. 18, is given, being a question for the jury, the circumstances of pressure attending its execution ought not to be withdrawn from them.—BANK OF TORONTO *v.* MCDOUGALL (1865), 15 C. P. 475. **—CAN.**

q. —— *Payment within sixty days of insolvency.*]—M. bought of Y. "on sale or return" goods for shipment to Otago, with the understanding that if not sold there, they might be brought back & returned to Y. within a reasonable time. M. insured the goods for their voyage, they were totally lost, & a verdict for their value was recovered from the insurance co. It was agreed by M. & Y. that Y. should receive from the insurance co. the amount of the policy in discharge of M.'s debt to Y. for the goods. The debt of M. to Y. was thus paid in full. There were other then existing creditors of M., & the estate of M. was sequestrated within sixty days. On trial of a feigned issue between Y. & the official assignee of M. the judge directed the jury that the payment in full of Y. by M. was void under 5 Vict. No. 17, s. 8, as a preference of Y. over other than existing creditors of M. :—*Held :* the direction was right.—YOUNGHUSBAND *v.* COURTNEY (1861), 1 W. & W. 55. **—AUS.**

r. *Effect of failure to establish—Whether transaction avoided.*]—Insolvent, shortly before his insolvency, made a large payment to a creditor :—*Held :* the payment did not constitute a fraudulent preference, as it did not appear that the payment was made with a view of preferring the payee over his other creditors.—HUNT *v.*

(1892), 10 Morr. 15, D. C. **Refd.** Hale *v.* Allnutt (1856), 18 C. B. 505; Graham *v.* Candy (1862), 3 F. & F. 206, N. P.; *Re* Cherry, *Ex p.* Matthews (1871), 25 L. T. 276; *Re* Collett, *Ex p.* Boyle (1871), 25 L. T. 550, L. JJ.; Smith *v.* Pilgrim (1876), 2 Ch. D. 127.

7248. —— ——.]—The mere fact that the farce of pressure has been gone through will not suffice. It is a question for the jury whether it is real.—GRAHAM *v.* CANDY (1862), 3 F. & F. 206, N. P.

7249. —— ——.]—In an action by assignees to recover a sum alleged to be paid by bkpt. by way of fraudulent preference, the jury were rightly directed, that although the payment was apparently voluntary, yet if the evidence satisfied them that debtor's motive was not to give a fraudulent preference, but to fulfil an obligation which he believed to be peremptory, the payment was legal & valid, as against the assignees. In such a case all these circumstances must be left to the jury, & they should be told, that unless they come to the conclusion that debtor had the intention of defeating the law, & preventing the due distribution of his assets, by preferring one creditor at the expense of the rest, the transaction will stand good in law.—BILLS *v.* SMITH (1865), 6 B. & S. 314; 5 New Rep. 364; 34 L. J. Q. B. 68; 11 Jur. N. S. 155; 13 W. R. 407; 122 E. R. 1211.

Annotations :—**Refd.** Jones *v.* Harber (1870), 19 W. R. 248; *Re* Softley, *Ex p.* Hodgkin (1875), L. R. 20 Eq. 746; *Re* Vautin, *Ex p.* Saffery, [1900] 2 Q. B. 325.

7250. —— ——.]—Bkpt., shortly before his bkpcy., paid a large sum to a creditor. The trustee having claimed such sum, on the ground that the payment amounted to a fraudulent preference :—*Held :* the question put to the jury whether the payment was made voluntarily & without real pressure was wholly immaterial, & only calculated to mislead the jury.—*Re* CHERRY, *Ex p.* BOLLAND (1871), 7 Ch. App. 24; 25 L. T. 646; 20 W. R. 136, L. JJ.

Annotation :—**Refd.** *Re* Wilcoxon, *Ex p.* Griffith (1883), 23 Ch. D. 69, C. A.

7251. —— **Debtor's goods allowed to be taken in execution.**]—On Jan. 15, the stock-in-trade of bkpt. was taken under *fi. fa.* at the suit of B., for a debt alleged to be due from bkpt. to B. individually, & on the 17th bills of exchange & promissory notes were taken under a *fi. fa.* at the joint suit of B. & C., &, not being due, were held by the sheriff, deft., under Judgments Act, 1838 (c. 110), s. 12. B. & C. were trustees under a marriage settlement, by which bkpt. had covenanted to pay them £1,000, & for that sum, which had not been paid, the second execution was sued out. That proceeding, though in their joint names, was in fact instituted by C. alone. Bkpt.'s assignees brought an action of trover & contended (1) that the execution of Jan. 15 was collusive, on which point evidence was given that bkpt. had, on that occasion, committed an act of bkpcy. under 6 Geo. 4, c. 16, s. 3, by procuring "his goods, money or chattels to be taken in execution, with intent to defeat or delay his creditors"; (2) inasmuch as B. knew of such act of bkpcy., C., who sued out the second execution jointly with B., & as his co-trustee, must be taken to have known of it also, & the second execution was not protected, as executed *bonâ fide* & without notice of a prior act of bkpcy., or, alternatively, the latter execution was itself, on the part of bkpt., a causing and procuring the property to be taken in execution for the purpose of defeating his creditors by a fraudulent preference. The judge left both heads of the case to the jury. With reference to the first, he stated that an act of bkpcy. was committed by bkpt.'s procurement of the first execution, if the jury were satisfied that, in order to defeat other creditors, that process was obtained for a debt which did not really exist, or for a real debt but with intent to give a fraudulent preference, & that if they were so satisfied, to bring the execution of Jan. 17 within 2 & 3 Vict. c. 29, it must appear that neither B. nor C. had notice of the prior act of bkpcy., & it was for deft. to give some reasonable evidence of that negative. As to pltfs.' second position, he left it to the jury to say, on the evidence, whether the execution of Jan. 17 was procured by bkpt. for the purpose of defeating his creditors by giving a fraudulent preference to the trustees under the settlement. The jury having found a verdict for pltfs., a motion for a new trial, on the ground (*inter alia*) of misdirection, was refused.—EDWARDS *v.* COOPER (1847), 11 Q. B. 23; 10 L. T. O. S. 160; 116 E. R. 386.

7252. —— **Security given for past debt & present advance.**]—The question whether a further advance to a trader will sustain an assignment to secure it & a previous debt, is a question whether the advance was made to enable the trader to continue business, or merely to enable the creditor to obtain a security.—*Re* VANE, *Ex p.* GREENER (1877), 46 L. J. Bcy. 76; 36 L. T. 781, C. A.

B. Transactions induced by Pressure or Threats.

7253. General rule—Pressure essential to validate transaction.]—If debtor be a trader, he cannot prefer one condition to another, unless he be pressed.—SCOTT *v.* THOMAS (1834), 6 C. & P. 611.

7254. —— ——.]—Bkpt. made an equitable mtge. by deposit on Apr. 18, the act of bkpcy. was on the 24th, & the fiat issued on the 27th. The deposit was to secure an antecedent debt & there was not any evidence of pressure. Bkpt. at the time of the deposit also gave a cognovit to secure the same debt, which had been set aside because irregular in point of form & obtained by fraud :—*Held :* the deposit was so near the act of bkpcy. in point of time, that, not being given under pressure, it was a fraudulent preference.—*Re* GOREN, *Ex p.* AINSWORTH (1838), 3 Mont. & A. 451, Ct. of R.

Annotation :—**Refd.** *Re* Lindon, *Ex p.* Clouter (1843), 7 Jur. 135, Ct. of R.

See, also, Nos. 7192 *et seq.*; 7245 *et seq.*, *ante*.

7255. —— **Threat or pressure need not be immediately legally enforceable.**]—In order to render a preference valid, it is not necessary that

HEARN (1892), 7 Nfld. L. R. 615. —NFLD.

s. —— ——.]—On Sept. 5, 1904, a merchant, being then insolvent, sold his stock-in-trade at 50 cents on the dollar, & received in payment the purchaser's cheque on defts.' private bank for $1,172.27, payable to his own order, which he took to that bank, where he had an account, & deposited it to his own credit. Defts. knew that the sale was about to be made, & had lent the purchaser the money to make the purchase, & knew that the money was to be deposited in their bank by insolvent, &, in anticipation, had charged up against insolvent's account, without the latter's knowledge, an overdue note for $1,000 & $40 interest thereon. The deposit of the purchaser's cheque with defts. was attacked within sixty days thereafter as a preferential transfer of a bill or security to a creditor, within R. S. O., 1897 (c. 147), s. 2 :—*Held :* it was not void as against creditors.—ROBINSON *v.* MCGILLIVRAY (1906), 12 O. L. R. 91; 7 O. W. R. 438; 8 O. W. R. 602; 27 C. L. T. 653.—CAN.

PART XX. SECT. 12, SUB-SECT. 4.—B.

7253 i. *General rule.*]—The doctrine of pressure which obtained before the insolvency laws now occupies the same position since their repeal.—BRAYLEY *v.* ELLIS (1882), 1 O. R. 119; 9 A. R. 565.—CAN.

7253 ii. ——.]—The doctrine of pressure may still be invoked in order to uphold a transaction impeached as a preference, when it is not attacked within sixty days, or when an assignment for the benefit of creditors is not made within that time.—BEATTIE *v.* WENGER (1897), 24 A. R. 72.—CAN.

Sect. 12.—*Avoidance of preference: Sub-sect.* 4, *B.*]

there should be a threat or pressure, with an immediate power of rendering it available by taking legal steps. To defeat a payment or transfer made to a creditor, the assignees must show it to be fraudulent as against the body of creditors, by proving it to be voluntary on the part of bkpt., & if it is made in consequence of the act of the creditor, it is not voluntary.—VAN CASTEEL *v.* BOOKER (1848), 2 Exch. 691; 18 L. J. Ex. 9; 12 L. T. O. S. 65; 154 E. R. 668.

Annotations:—**Consd.** The Marie Joseph (1864), 5 New Rep. 96. **Refd.** Edwards *v.* Glyn (1859), 2 E. & E. 29; Graham *v.* Candy (1862), 3 F. & F. 206. **Mentd.** Jenkyns *v.* Brown (1849), 14 Q. B. 496; Turner *v.* Liverpool Docks' Trustees (1851), 6 Exch. 543, Ex. Ch.; Browne *v.* Hare (1858), 3 H. & N. 484; Sheridan *v.* New Quay Co. (1858), 4 C. B. N. S. 618; Hare *v.* Browne (1859), 33 L. T. O. S. 334, Ex. Ch.; Gumm *v.* Tyrie (1864), 4 B. & S. 680; Joyce *v.* Swann (1864), 17 C. B. N. S. 84; Bills *v.* Smith (1865), 11 Jur. N. S. 155; Moakes *v.* Nicholson (1865), 34 L. J. C. P. 273; Smith *v.* Hudson (1865), 6 B. & S. 431; Berndtson *v.* Strang (1867), L. R. 4 Eq. 481; Schotsmans *v.* L. & Y. Ry. Co. (1867), 2 Ch. App. 332, L. C. & L. J.; Shepherd *v.* Harrison (1869), 17 W. R. 609; Gabarron *v.* Kreeft, Krecft *v.* Thompson (1875), L. R. 10 Exch. 274; Ogg *v.* Shuter (1875), 3 Asp. M. L. C. 79, n.; Mirabita *v.* Imperial Ottoman Bank (1878), 3 Ex. D. 164, C. A.; Colonial Insce. of New Zealand *v.* Adelaide Marine Insce. (1886), 12 App. Cas. 128, P. C.; The Parchim, [1918] A. C. 157, P. C.

7256. —— Payment need not correspond with amount pressed for.]—In order to make a payment to a creditor by bkpt. a fraudulent preference, bkpt. must be a volunteer, & if he makes a payment or gives a bill of exchange in consequence of pressure, it is immaterial in law that the payment or bill does not correspond in amount or parties with the money or security asked for, or that the creditor had already taken a previous bill not then due, those being merely circumstances for the jury in determining whether the payment or bill were given by way of fraudulent preference.

Bkpt., being indebted to deft. in £167 5*s.* for goods sold, gave him a bill at four months for £77. On the following day deft. brought back the bill stating that it was on a wrong stamp, & his bankers refused to discount it, & pressed bkpt. to give him cash on account. Bkpt. having in his possession an acceptance of K. at four months for £197 5*s.* gave it to deft., who returned him £30 in cash. Bkpt. said that by the course of dealing between himself & deft., the latter was only entitled at that time to bkpt.'s own acceptance at four months for the amount due. The jury found that K.'s acceptance was given by bkpt. in consequence of a request for payment:—*Held:* as against the assignees deft. was entitled to retain K.'s acceptance, as the payment of a debt not then due, upon a *bonâ fide* request of the creditor, was not in law a voluntary payment, & the fact of the debt not being due was merely a circumstance for the jury in considering the question of fraudulent preference.—STRACHAN *v.* BARTON (1856), 11 Exch. 647; 25 L. J. Ex. 182; 26 L. T. O. S. 246; 4 W. R. 292; 156 E. R. 990.

Annotations:—**Consd.** Johnson *v.* Fesemeyer (1858), 3 De G. & J. 13, L. C.; Edwards *v.* Glyn (1859), 2 E. & E. 29.

7257. Pressure — Must be real.] — The pressure must be real & not merely colourable or simulated, the mere result of a previous understanding between the parties.—GRAHAM *v.* CANDY (1862), 3 F. & F. 206, N. P.

7258. —— Must be cause of act.]—The mere fact of pressure on the part of a creditor is not enough to show that the transfer was not voluntary, unless it was made really by reason of such pressure, & not merely from a desire to favour & prefer the creditor.—KINNEAR *v.* WALMISLEY (1862), 2 F. & F. 756.

7259. —— ——.]—To show a transfer is not voluntary, there must be such pressure as would be likely to cause bkpt. to make the transfer. If the motive of the transfer is merely the desire of bkpt. to prefer the creditor it is fraudulent, if it is not by reason of the demand, or the pressure, of the creditor.—KINNEAR *v.* JOHNSON (1862), 2 F. & F. 753.

7257 i. *Pressure—Must be real.*]—To sustain the preference the pressure must have been real, & not a feigned contrivance between debtor & creditor to wear the appearance of pressure, for the mere purpose of giving effect to debtor's desire & intention to give a preference.—CLEMMOW *v.* CONVERSE (1869), 16 Gr. 547.—**CAN.**

7257 ii. —— ——.]—Assignments made under simulated pressure, with the intent on the part of debtor to give, & on the part of the preferred creditors to obtain, a preference over the other creditors:—*Held:* null & void under R. S. O., 1877 (c. 118), s. 2, as against the other creditors.—IVEY *v.* KNOX (1885), 8 O. R. 635; *N. F. Burns* v. *McKay*, 10 O. R. 167.—**CAN.**

7257 iii. —— ——.]—On Mar. 12, 1881, a firm, the partners of which were subsequently, within two months from that date, adjudicated insolvents, suspended payment. On the night of the previous day, Mar. 11, one of the creditors of the firm, the impending bkpcy. of the firm having become known, urged the latter to make over a part of their stock-in-trade as security for the debt, & insolvents consented. The only pressure which appeared to have been exercised was that on Mar. 11 security was demanded from insolvents:—*Held:* there having been no pressure which could not be resisted, & no legal proceedings having existed against insolvents, or which they could have feared, the transaction was a voluntary transfer, & void.—PHULCHAND *v.* MILLER (1885), I. L. R. 7 All. 340.—**IND.**

7257 iv. —— —— *& bonâ fide.*]—Debtor who was unable to pay his debts as they became due out of his own money, handed to creditors, who were aware of his financial position & had for some time unsuccessfully used pressure, a series of small cheques payable at extended dates, & representing the amount of the debt. Debtor having been adjudicated insolvent within six months:—*Held:* the payments were a fraudulent preference under Insolvency Act, 1874, s. 107.—STEWART & WALKER *v.* WHITE (1907), 5 C. L. R. 110.—**AUS.**

7257 v. —— —— ——.]—Pressure will not validate a security, unless it be *bonâ fide* pressure to secure a debt, & without a view of obtaining a preference over the other creditors.—POWELL *v.* CALDER (1885), 8 O. R. 505.—**CAN.**

7257 vi. —— —— *Debtor hopelessly insolvent.*]—Pressure to take a case out of the fraudulent preference sect. must be genuine, & a delivery by debtor, who is hopelessly insolvent, under threat of an action cannot be regarded as made under pressure, for such a threat cannot possibly have any influence on debtor so situated.—MACKAY *v.* JELLIE (1890), 17 V. L. R. 91.—**AUS.**

7258 i. —— *Must be cause of act.*]—Where a transaction is impeached as a fraudulent preference the question to be determined is whether debtor was actuated solely by a desire to prefer, or whether the request to do so was the moving cause.—COLQUHOUN *v.* SEAGRAM (1896), 11 Man. L. R. 339.—**CAN.**

7258 ii. —— ——.]—Pltf. refused to make debtor necessary advances unless secured, whereupon the impeached instrument was executed:—*Held:* there was pressure rebutting preference.—MATHESON *v.* POLLOCK (1893), 3 B. C. R. 74.—**CAN.**

7258 iii. —— ——.]—Insolvent had strong reasons to believe himself to be insolvent when he gave the impeached mtge., but the mtgee. did not know it, & the mtge. was given under pressure:—*Held:* it was not void under Insolvent Act as against the assignee.—ARCHIBALD *v.* HALDAN (1871), 31 U. C. R. 295.—**CAN.**

7258 iv. —— ——.]—T. lent E. $120 to enable her to purchase stock for her business, she promising to give him security for its repayment by executing in his favour a mtge. on everything she had. T. advanced E. money from time to time, till in Nov., 1880, she was indebted to him in a large sum, for which she executed a chattel mtge., covering all her stock-in-trade & household effects. E. refused to execute the security, notwithstanding her promise to do so, until after the receipt by her of a letter from T.'s solrs. demanding payment, or in default an action would be brought:—*Held:* the security was valid.—BRAYLEY *v.* ELLIS (1882), 1 O. R. 119; 9 A. R. 565.—**CAN.**

7258 v. —— ——.]—A payment by debtor within three months of his bkpcy.:—*Held:* not void as a fraudulent preference under 1884 Act, s. 27, where the main reason of the payment was owing to pressure by the creditor.—*Re* MORGAN (1885), 4 N. Z. L. R. 1.—**N.Z.**

7260. —— ——.]—A. obtained a loan from B., his brother-in-law, to enable him to set up as a publican. Being subsequently repeatedly pressed for repayment, A. sold his public-house business, & repaid B. the loan in full. There was evidence that debtor would have paid B. without pressure, inasmuch as he did not wish him to lose anything :—*Held :* in the circumstances, the fact of pressure by the creditor for his debt was unimportant, & the payment was a fraudulent preference.—*Re* GRIMES, *Ex p.* WHEATLEY (1881), 45 L. T. 80.

7261. —— ——.]—It is not sufficient to prevent a payment being a fraudulent preference, that honest pressure had something to do with bringing about such payment, if the ct. comes to the conclusion that the dominant view of bkpt. was to prefer the creditor, even though but for the importunity of the creditor bkpt. might not have made the payment.

If it is the fact that the desire to prefer the creditor was a substantial motive operating on the mind of bkpt. who has made the payment, in such a sense that it can be said to be the dominant motive, such payment will be a fraudulent preference, notwithstanding that but for the importunity of the creditor, the payment might never have been made.—*Re* BELL, *Ex p.* OFFICIAL RECEIVER (1892), 10 Morr. 15, D. C.

7262. —— **Must be exercised before payment.**]—L. being on the eve of bkpcy., drew out all his balance at his bankers & sent it to K., who was employed by him as accountant, & to whom he owed a considerable sum. His object in sending the money to K. was to prevent its being attached by another creditor, who had issued a writ against him. K. took back the money, & refused to accept it, unless debtor consented to his paying himself out of it. After some discussion, the debtor agreed, & K. appropriated £421, part of the sum entrusted to him, in satisfaction of his own debt. The evidence did not establish that there had been anything which amounted to pressure for payment on the part of K. before the occasion on which he took back the money to L. Three days afterwards L. stopped payment, & soon afterwards presented his petition for liquidation :—*Held :* the act of debtor in drawing out the balance from the bankers for the purpose of defeating the creditor who was suing him was in itself an act of bkpcy., & the payment of the £421 to K. was a fraudulent preference.—*Re* LIEBERT, *Ex p.* HALLIDAY (1873), 8 Ch. App. 283 ; 28 L. T. 324 ; 21 W. R. 348, L. C. & L. JJ.

7263. Threats.]—A trader may make a transfer of his goods, on the eve of bkpcy., to a creditor, who compels him so to do by any threat.—REED *v.* AYTON (1817), Holt, N. P. 503.

7264. Threat of legal process.]—Suppose a creditor, knowing a trader likely to break, conceal it from the knowledge of the other creditors until he gets, by threats of legal process, payment of his debt before any direct act of bkpcy. the law would say this was not fraudulent (LORD MANSFIELD, C.J.).—FOXCROFT *v.* DEVONSHIRE (1760), 2 Burr. 931 ; 1 Wm. Bl. 193 ; 97 E. R. 638.

Annotations :—**Mentd.** Copland *v.* Stein (1799), 8 Term Rep. 199 ; Houghton *v.* Matthews (1803), 3 Bos. & P. 485 ; Cash *v.* Young (1823), 3 Dow. & Ry. K. B. 652.

7265. Threat of arrest alleged by creditor—Despite bankrupt's statement & circumstances.]—Where bkpt. made a payment to deft. on the eve of bkpcy., as he said, & as circumstances indicated, to benefit deft. :—*Held :* the assignee might recover the amount from deft., notwithstanding deft. adduced evidence to show that he had pressed for payment, & had threatened to arrest bkpt.—COOK *v.* ROGERS (1831), 7 Bing. 438 ; 5 Moo. & P. 353 ; 9 L. J. O. S. C. P. 155 ; 131 E. R. 169.

Annotations :—**Consd.** Strachan *v.* Barton (1856), 11 Exch. 647. **Refd.** Bills *v.* Smith (1865), 6 B. & S. 314. **Mentd.** Morgan *v.* Brundrett (1833), 5 B. & Ad. 289 ; Belcher *v.* Prittie (1834), 10 Bing. 408 ; *Re* Mark (1852), 21 L. T. O. S. 36.

7266. Threat to strike docket.]—Debtor was alleged to have redelivered hired waggons to the lender in order to avoid an execution. The redelivery was upon notice by the lender that, if they were not redelivered, he would strike a docket against the hirer :—*Held :* not a fraudulent preference.—*Re* WHITBY, *Ex p.* WHITBY (1839), Mont. & Ch. 671 ; 4 Deac. 139 ; 8 L. J. Bcy. 55, Ct. of R.

7267. Threat of proceedings.] — A trader, who had previously failed to give a creditor the security which he had promised him, told the creditor that he was about to stop payment. The creditor then pressed for his debt, & threatened debtor with proceedings if he did not give him security, & debtor delivered bills of exchange, accepted by other firms, to a third person, requesting him to hand them to the creditor :—*Held :* the threat by the creditor to take proceedings against a man who was about to become bkpt. could not be considered as real pressure, & the giving of the bills of exchange was void as a fraudulent preference.—*Re* COOPER, *Ex p.* HALL (1882), 19 Ch. D. 580 ; 51 L. J. Ch. 556 ; 46 L. T. 549, C. A.

Annotation :—**Mentd.** *Re* Carill-Worsley, [1915] 2 K. B. 534.

7268. —— **"Make it hot" for debtor.**]—Debtor, insolvent to his knowledge, wrote to his principal creditor, whose account exceeded £3,000, & who held current bills for £1,000, two of them just falling due for sums amounting together to £512, asking for one of the bills to be renewed.

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a. *Bond given to obtain release from prison.*]—A bond given to raise money to release insolvent from prison will not be deemed an undue preference.—*Re* ANTHONY (1854), 25 L. T. O. S. 25.—**IR.**

7265 i. *Threat of arrest—Coupled with prospect of further advances.*]—A bill of sale, to secure a debt already due, was given to M., a creditor, shortly before the act of insolvency. M. had demanded the security & threatened arrest if it was not given, & also held out the hope that he would make insolvent further advances of supplies, if the security was given :—*Held :* there was no fraudulent preference.—*Re* BELL (1870), 1 P. E. I. 301.—**CAN.**

7267 i. *Threat of proceedings.*]—R. a creditor of A., under threat of suit, procured from him a chattel mtge. on his stock-in-trade :—*Held :* the mtge. was not a fraudulent preference within R. S. O. 1877 (c. 118).—SEGSWORTH *v.* MERIDEN SILVER PLATING CO. (1882), 3 O. R. 413.—**CAN.**

7267 ii. ——.]—A firm being insolvent & indebted to defts., one of the firm, under the threat of an action by defts., executed a bill of sale of all the firm's assets under which defts. immediately took possession :—*Held :* the bill of sale was not a fraudulent preference.—MCCLARY MANUFACTURING CO. *v.* HOWLAND (1902), 9 B. C. R. 479.—**CAN.**

7267 iii. ——.]—It is not necessary to threaten criminal proceedings to constitute pressure. The threat of civil suits is enough.—NRIPENDRA NATH SAHU *v.* ASHUTOSH GHOSE (1916), I. L. R. 43 Calc 640.—**IND.**

b. *Threat of criminal proceedings.*—An insolvent absconded to the United States, taking money with him. He was followed there by the agent of a person in Canada who had become surety for him, &, by the threats of criminal proceedings, induced to pay the amount of the security. A bill, by the official assignee, to recover the money from the surety, was dismissed with costs.—ROE *v.* SMITH (1868), 15 Gr. 344.—**CAN.**

c. ——.]—A preference, which debtor is induced to give by threats of criminal or other proceedings, is not void under Indigent Debtors Act, 1859, or Insolvent Act, 1864.—CLEMMOW *v.* CONVERSE (1869), 16 Gr. 547.—**CAN.**

d. ——.]—*Held :* a mtge. executed under a threat of a criminal prosecution, but given to secure a pre-existing debt, was not a fraudulent preference under C. S. U. C., c. 26, s. 18.

Sect. 12.—*Avoidance of preference: Sub-sect.* 4, *B.*]

The creditor replied that the bills must be met & the account considerably reduced. Debtor telegraphed suggesting a return of goods. The next day at an interview the creditor demanded a substantial payment or a return of goods, otherwise he would "make it hot" for debtor. Debtor agreed to return goods & during the next few days returned goods to the value of £1,808, being more than three times the amount of the two bills then due. Within three months debtor became bkpt.:—*Held:* the return of the goods was not caused by any real pressure on the part of the creditor but was the voluntary act of debtor, & was a fraudulent preference.

When I use the word "dominant" I do not mean that, if one could enter into a quantitative analysis, it would be good enough if 51 per cent. could be attributed to the wish to prefer & 49 per cent. to the wish to get an advantage or to escape difficulties; but I mean that the substantial motive, the master motive, was in the direction of fraudulent preference (PHILLIMORE, J.).—*Re* RAMSAY, *Ex p.* DEACON, [1913] 2 K. B. 80; 82 L. J. K. B. 526; 108 L. T. 495; 20 Mans. 15.

7269. Threat of execution—Creditor agreeing to pay off charges on property assigned.]—Debtor, threatened with an execution, assigned to his judgment creditor the lease, stock & good will of a branch business, the judgment creditor undertaking to pay off the existing mtge. on the premises together with the arrears of rent:—*Held:* not a fraudulent preference.—*Re* WILKINSON, *Ex p.* OFFICIAL RECEIVER (1884), 1 Morr. 65.

7270. Fear of legal process—Though groundless.]—If bkpt. gave a preference to a creditor under the apprehension of legal process, however groundless, such preference is binding.—THOMPSON *v.* FREEMAN (1786), 1 Term Rep. 155; 99 E. R. 1026.

Annotations:—**Apld.** Sharp *v.* Jackson, [1899] A. C. 419, H. L. **Refd.** *Re* Reid (1862), 7 L. T. 476. **Mentd.** Hartshorn *v.* Slodden (1801), 2 Bos. & P. 582; Crosby *v.* Crouch (1809), 11 East, 256; Strachan *v.* Barton (1856), 11 Exch. 647.

7271. Fear of prosecution.]—A transfer of property made on the eve of bkpcy., but under the apprehension that a degree of force, civil or criminal, is about to be applied, is valid.

A transfer by one of two partners on the eve of bkpcy., in circumstances which overcome the free will of the party, such as the apprehension of a prosecution for forgery is valid.—DE TASTET *v.* CARROLL (1815), 1 Stark. 88; 2 Rose, 462; *subsequent proceedings, sub nom. Re* LATHAM & PARRY, *Ex p.* DE TASTET (1831), Mont. 138, L. C.

Annotations:—**Refd.** Ward *v.* Lloyd (1843), 6 Man. & G. 785; *Re* Murgatroyd (1855), 26 L. T. O. S. 166; *Re* Reid (1862), 7 L. T. 476.

7272. ——.]—A transfer induced by fear of criminal prosecution is not a fraudulent preference.—*Re* LATHAM & PARRY, *Ex p.* DE TASTET (1831), Mont. 138, 153, L. C.

Annotations:—**Consd.** *Re* Reid (1862), 7 L. T. 476. **Refd.** *Re* Murgatroyd (1855), 26 L. T. O. S. 166. **Mentd.** Ward *v.* Lloyd (1843), 6 Man. & G. 785.

7273. ——.]—Where the ct. comes to the conclusion that bkpt.'s real motive in making a payment or transfer is to save himself from exposure or from a criminal prosecution, the payment or transfer is not a fraudulent preference.—*Re* GOLDSMID, *Ex p.* TAYLOR (1886), 18 Q. B. D. 295; 56 L. J. Q. B. 195; 35 W. R. 148; 3 T. L. R. 109, C. A.

Annotations:—**Consd.** *Re* Mills, *Ex p.* Official Receiver (1887), 58 L. T. 235, D. C.; New, Prance & Garrard's Trustee *v.* Hunting, [1897] 2 Q. B. 19, C. A. **Refd.** *Re* Mills, *Ex p.* Official Receiver (1888), 58 L. T. 871, C. A.; *Re* Lane, *Ex p.* Gaze (1889), 23 Q. B. D. 74; New, Prance & Garrard's Trustee *v.* Hunting, [1897] 1 Q. B. 607; Sharp

—BANK OF TORONTO *v.* MCDOUGALL (1865), 15 C. P. 475.—**CAN.**

f. ——.]—1872 Act, s. 53, avoiding preferences given within three months before bkpcy., has not altered the old law, which permitted such transactions, if carried out at arms' length under coercion or pressure, *e.g.* a threat of prosecution, & a security granted in such circumstances is not invalid, as being based upon an agreement to stifle a prosecution, if there be no contract on the part of the creditor to abandon permanently criminal proceedings.—*Re* BOYD (1884), 15 L. R. Ir. 521, 534.—**IR.**

7269 i. *Threat of execution.*]—S. borrowed money of W. & gave him a warrant of attorney & bond for the amount. Judgment was not entered up on the warrant of attorney, but a writ was issued & judgment entered in the action. Afterwards W., by threats to put the sheriff in possession & by other great pressure, got from S. a transfer of two bills of exchange. Within sixty days of the transfer S. absconded & his estate was sequestrated:—*Held:* as the transfer of the bill was not voluntary it was not defeated by 5 Vict. No. 17, s. 8.—COURTNEY *v.* WILSON (1864), 1 W. W. & A'B. 110.—**AUS.**

g. *Threat of seizure of property under security.*]—Debtor, within three months before his bkpcy., under pressure, gave a security for an antecedent debt over certain horses. Afterwards, before his bkpcy., the creditor having threatened to seize the horses, he paid the amount required to release the security. Debtor's object in making the payment in discharge of the security was to release the horses & save them for his wife. There was nothing in the relations between debtor & creditor to indicate that, though that might have been debtor's ostensible object, he really made the payment with a view to prefer:—*Held:* the payment was not a fraudulent preference.—*Re* MCCANDLISH, *Ex p.* OFFICIAL ASSIGNEE (1897), 15 N. Z. L. R. 407.—**N.Z.**

7270 i. *Fear of legal process.*]—M. & Co., being then insolvent, upon demand of one of their creditors, & in fear of legal proceedings, executed a bill of sale to them of their stock-in-trade & effects:—*Held:* the bill of sale was not made voluntarily or with intent to give a preference, but was made under pressure.—CASCADEN *v.* MCINTOSH (1892), 2 B. C. R. 268.—**CAN.**

7271 i. *Fear of prosecution.*]—Where insolvent is criminally responsible for misappropriating the money of an estate of which he is exor., the fear of penal consequences is sufficient pressure to take from a mtge. the character of a voluntary preference.—MOLSONS BANK *v.* HALTER (1890), 18 S. C. R. 88.—**CAN.**

7271 ii. ——.]—Traders got fictitious bills discounted in a bank as ordinary trade bills. Before they became due they found themselves embarrassed, & in order to prevent a prosecution or exposure in case of bkpcy., the traders went to the bank & took up the bills. Bkpcy. ensued:—*Held:* such payments were a fraudulent preference.—*Re* REID (1862), 7 L. T. 476; 7 Ir. Jur. 404.—**IR.**

7271 iii. ——.]—Where an irrevocable power of attorney to pass a mtge. bond was given to defts. for an overdue debt, by insolvent who had committed extensive forgeries to save exposure of his forgeries:—*Held:* there was no intention to prefer, & the mtge. bond was not liable to be set aside as an undue preference.—SLATER'S TRUSTEE *v.* SMITH & CO. (1885), 5 E. D. C. 9.—**S. AF.**

7271 iv. ——.]—A payment made with the object of escaping a criminal prosecution cannot, as a matter of law, be deemed to be made with intent to prefer.—MICHAU'S TRUSTEES *v.* DE WET (1909), 3 Buch. App. C. 518.—**S. AF.**

7271 v. —— *No pressure by creditor.*]—A bank, being indorsee of bills on which a trader had forged acceptances, the trader, in contemplation of bkpcy., took up the bills without pressure on him being made by the bank:—*Held:* the payment to the bank was a fraudulent preference.—*Re* ——, *Ex p.* HIBERNIAN BANK (1863), 14 I. Ch. R. 113.—**IR.**

7271 vi. —— ——.]—A partner in a firm drew bills in fictitious names, & indorsed them to a bank. Seeing that the stoppage of his firm was inevitable, & fearing a prosecution for forgery, if the circumstances transpired, he withdrew the bills, still immature, from the bank:—*Held:* the payment was a fraudulent preference.—*Re* READ & READ (1863), 15 Ir. Jur. 41.—**IR.**

7271 vii. —— ——.]—An agent for an insurance co., being in embarrassed circumstances, transmitted without any application of the co. the balance in his hands on Jan. 2. On Jan. 3 he suspended payment. In an action by his assignees against the co. for the balance the agent stated that he considered the money trust-money, & feared a prosecution for embezzlement if he retained it. There was a verdict for pltfs., but the ct. granted a new trial.—TAYLOR'S ASSIGNEES *v.* THOMPSON (1869), I. R. 4 C. L. 129; 4 I. L. T. Jo. 272.—**IR.**

v. Jackson, [1899] A. C. 419, H. L.; *Re* Blackpool Motor Car Co., Hamilton *v.* Blackpool Motor Car Co., [1901] 1 Ch. 77; *Re* Lake, *Ex p.* Dyer, [1901] 1 K. B. 710, C. A. **Mentd.** *Re* Hutchinson, *Ex p.* Ball (1887), 35 W. R. 264, C. A.; Pratt *v.* Inman (1889), 6 T. L. R. 91; *Re* Blackburn, Buckley's Case, [1899] 2 Ch. 725; *Re* Warren, *Ex p.* Trustee, [1900] 2 Q. B. 138.

7274. —— Taking up bills before due date.]—Debtors paid into their bank three bills drawn & accepted by a brother of one of them, & they informed the bankers they represented goods invoiced to the acceptor. In fact they were accommodation bills. Six months later, debtors, who were heavily in debt to the bankers, discussed their position with the bank manager, & it was arranged that a suspense account should be opened, into which money could be paid without diminishing the debt on current account. Debtors shortly before their bkpcy. gave their bankers two cheques, in exchange for the three bills, which were still undue:—*Held:* the payment by the two cheques constituted a fraudulent preference.—*Re* FLEMING, FRASER & Co., *Ex p.* TRUSTEE (1888), 60 L. T. 154.

Annotations:—**Mentd.** *Re* Crook, *Ex p.* Crook (1890), 24 Q. B. D. 320, C. A.; Crook *v.* Morley, [1891] A. C. 316, H. L.; *Re* Entwistle, *Ex p.* Turner (1891), 65 L. T. 349, D. C.

7275. —— Security given to third party who paid forged bills.]—In Jan., 1875, M., who then owed B. £100, for which he had given no security, wrote to B telling him that he had forged his name to a bill of exchange for £100, which he had discounted with his bankers, that the bill was just due & that he was unable to meet it, & entreating B. to pay the bill, & thus save him & his family from the ruin which would result from exposure. M. promised, if B. would do so, to give him a bill of sale of all his property to secure what he owed him. B. acceded to the request, a bill of sale of all M.'s property was given to him to secure £200, & B. paid the £100 to the bankers. Soon afterwards M. was adjudicated a bkpt.:—*Held:* however difficult, on grounds of public policy, the position of B. might have been, if he had been seeking the assistance of the ct., M., who was a party to the offence, if any, could not have recovered the proceeds of the goods from B., & as no offence against bkpcy. law had been committed, the trustee had only the same rights as M.—*Re* MAPLEBACK, *Ex p.* CALDECOTT (1876), 4 Ch. D. 150; 41 J. P. 262; *sub nom. Re* MAPLEBACK, *Ex p.* BUTT, 46 L. J. Bcy. 14; 35 L. T. 503; 25 W. R. 103.

Annotations:—**Consd.** *Re* Wilkinson, *Ex p.* Stubbins (1881), 17 Ch. D. 58, C. A. **Distd.** *Re* Campbell, *Ex p.* Wolverhampton Banking Co. (1884), 14 Q. B. D. 32, D. C. **Refd.** Harris *v.* Truman (1881), 7 Q. B. D. 340.

7276. —— No prosecution contemplated.]—Debtor shortly before his bkpcy. transferred to his father shares of the value of £2,000 in a co., of which his father was the promoter & principal shareholder, the father at the same time paying off a charge of £105 which had been effected on the shares by debtor & also certain sums of money amounting to about £1,000 received by debtor on behalf of the said co. & not accounted for. The shares constituted practically the whole of the assets of debtor & the transaction was subsequently set aside by the county ct. judge as being void against the trustee:—*Held:* there being no evidence of any criminal proceedings having been contemplated against debtor in respect of his alleged defalcations, & the father being well aware of debtor's insolvent condition at the time when the transfer was made to him, the county ct. judge was right in setting the transaction aside.—*Re* BOYD, *Ex p.* BOYD (1889), 6 Morr. 209, D. C.

7277. Withdrawal of prosecution.]—A banking co. commenced a prosecution against a customer for having obtained credit under false pretences. The bank had notice of an act of bkpcy. committed by the customer. H. signed an undertaking that, if the magistrate would allow the summons to be withdrawn, he would pay the bank the sum obtained from them by false pretences. An application to allow the summons to be withdrawn was granted by the magistrate. H. then paid the money to the bank. The bank manager believed that H. was paying the money out of his own pocket. The customer was adjudicated a bkpt., upon the act of bkpcy. of which the bank had notice. The trustee discovered that the money, which H. had paid to the bank, had been previously handed to him by bkpt.'s wife, she having, with bkpt.'s knowledge, taken it for the purpose of paying the bank out of a bag of money belonging to bkpt.:—*Held:* the consideration for the payment to the bank being the stifling of a prosecution, there was no legal consideration, & though H., being in *pari delicto*, could not have recovered the money from the bank, the trustee, to whom, by virtue of the relation back of his title to the act of bkpcy., the money really belonged, could recover it.—*Re* CAMPBELL, *Ex p.* WOLVERHAMPTON BANKING CO. (1884), 14 Q. B. D. 32; 33 W. R. 642; 1 Morr. 261, D. C.

Annotations:—**Refd.** Bull, Bevan *v.* Photographic Apparatus Co. (1887), 4 T. L. R. 139; Ward *v.* Fry (1901), 85 L. T. 394, C. A.

7278. Coercion of law.]—Payments enforced by coercion of law are valid against the assignees, in case any commission should afterwards be taken out.—FOSTER *v.* ALLANSON (1788), 2 Term Rep. 479; 100 E. R. 258.

Annotations:—**Consd.** Ponsford, Baker & Co. *v.* Union of London & Smith's Bank, [1906] 2 Ch. 444, C. A. **Refd.** Cox *v.* Morgan (1801), 2 Bos. & P. 398. **Mentd.** Schack *v.* Anthony (1813), 1 M. & S. 573; Cash *v.* Young (1823), 3 Dow. & Ry. K. B. 652; Fromont *v.* Coupland (1824), 2 Bing. 170; Coffee *v.* Brian (1825), 3 Bing. 54; Green *v.* Beesley (1835), 2 Bing. N. C. 108; Garland *v.* Carlisle (1837), 11 Bli. N. S. 421, H. L.; Wray *v.* Milestone (1839), 2 Horn & H. 32; Middleditch *v.* Ellis (1848), 2 Exch. 623; Bothamley *v.* Heyward (1862), 8 Jur. N. S. 1156.

7279. Process of law.]—A., on being arrested, gave a bail-bond to the sheriff, but did not perfect bail, by which the sheriff became fixed. Proceedings having been taken on the bail-bond, a judge at chambers made an order, on an application by the bail, that proceedings should be stayed on payment of debt & costs, which were paid by A.'s attornies, on Oct. 27. A. had supplied his attornies with a sum of money towards the payment of the debt & costs on Oct. 10, & on the

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7277 i. *Withdrawal of prosecution.*]—A bill of sale, given under pressure upon debtor himself of a threat of criminal prosecution, or even an agreement to stifle such prosecution, before the maturity of a promissory note on same account, is not a fraudulent preference.—HASKER *v.* MOORHEAD, HASKER *v.* BLACKWOOD, HASKER *v.* M'MULLEN (1876), 2 V. L. R. 160. —**AUS.**

7279 i. *Process of law.*]—C. & Co., finding themselves in embarrassed circumstances, got an extension of time from their creditors, among whom defts. stood for $449, & arranged to pay in three, six & nine months. When the first note became due, the C. & Co. were unable to meet it, & defts. through their solrs., took measures to force them into liquidation, but were unsuccessful. They then issued an ordinary action, & got paid within thirty days of the assignment afterwards made. Defts. knew that C. & Co. could not meet their engagements in full:—*Held:* C. & Co.'s assignee entitled to recover the money from defts.—MULHOLLAND & MCARTHUR (1878), 2 Steph. Q. Dig. 576, 577 (45).—**CAN.**

7279 ii. ——.]—Insolvent in settlement of proceedings brought against him in the Transvaal, upon a judgment obtained by deft. in the Cape Colony, delivered in the Transvaal certain oxen & £50 shortly after his estate had been sequestrated in the Cape Colony:—*Held:* as insolvent had been

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14th he became bkpt.:—*Held:* this was a payment under process of law, & the assignees of A. had no right to recover the money back from the party to whom it was paid.—BELCHER *v.* MILLS (1835), 2 Cr. M. & R. 150; 1 Gale, 142; 5 Tyr. 715; 4 L. J. Ex. 160; 150 E. R. 64.

Annotation:—**Apld.** Reynolds *v.* Wedd (1838), 4 Bing. N. C. 694.

7280. Issue of writ of execution—Payment before bankruptcy.]—The sheriff having received a writ of execution against a trader for a debt exceeding £50, debtor, on July 24, before any levy had been made, paid to the sheriff's officer a large part of the debt in a bill, a cheque drawn by another person, & bank notes. On July 25 the sheriff's officer asked the creditors whether they would accept in part payment what debtor had given him, & showed them the bill. They expressed their assent. On July 26 (Saturday) debtor filed a liquidation petition, & a receiver was appointed. On July 28 the sheriff's officer, having received the remainder of the debt from another person liable for it, paid the whole to the creditors:—*Held:* the transaction was a payment under pressure, & the creditors were not bound to hand over to the trustee the bill of exchange, the cheque, or the bank notes.—*Re* HASSALL, *Ex p.* BROOKE (1874), 9 Ch. App. 301; 43 L. J. Bcy. 49; 30 L. T. 103; 22 W. R. 395, L. C. & L. JJ.

Annotations:—**Apprvd. & Folld.** Stock *v.* Holland (1874), L. R. 9 Exch. 147. **Consd.** *Re* Pearson, *Ex p.* West Cannock Colliery Co. (1886), 3 Morr. 187, D. C.

See, also, cases in Sect. 10, sub-sect. 4, A., *ante.*

7281. Demand of payment or security—No actual threat of legal process.]—On trover for a bill of exchange drawn by W., the bkpt., on S., & accepted by him, where it appeared that deft., a creditor, had called on W., three days before his bkpcy., & demanded payment of his debt, & received from him the bill:—*Held:* deft., had a right to retain the bill, though he had not actually threatened any legal process.—COSSER *v.* GOUGH (1790), 1 Term Rep. 156, n.; 99 E. R. 1027.

7282. —— Taking part of stock-in-trade.]—A creditor, knowing his debtor to be in distressed circumstances & not able to pay his debt, applied to him in the first instance about two months before his bkpcy. for a security, & took part of his stock-in-trade for that purpose:—*Held:* this was not an undue preference, though the creditor did not threaten to sue him in case of a refusal.—SMITH *v.* PAYNE (1795), 6 Term Rep. 152; 101 E. R. 484.

compelled by legal process to alienate the property, there had been no undue preference.—VAN HEERDEN'S TRUSTEE *v.* GLATT (1909), 26 S. C. 592.—**S. AF.**

k. *Instituting action—Debtor consenting to strike out defence.*]—Deft., a creditor of O., who was in insolvent circumstances, commenced an action on May 25, 1882. By arrangement with O., who appeared, pleaded to pltf.'s statement of claim, & consented to an order striking out his defence, a judgment was obtained the next day. Pltf. commenced proceedings immediately after deft., & in due course obtained judgment against O.; the validity of deft.'s judgment came in question:—*Held:* deft.'s judgment was valid.—TURNER *v.* LUCAS (1882), 1 O. R. 623.—**CAN.**

7281 i. *Demand of payment or security.*]—M.'s creditors, to whom a chattel mtge. had been granted, had requested their debtor trader to secure them by chattel mtge., he stating to them at the time that he was solvent, that his other creditors were small, & that he could arrange to pay them off & concentrate the business:—*Held:* insufficient to bring into question the doctrine of pressure.—ANDERSON *v.* SHOREY (1885), 1 B. C. R., Pt. XI., 325.—**CAN.**

7281 ii. ——.] The mtgor. was indebted to the bank on promissory notes which had been renewed from time to time & partly reduced. The manager refused to renew again, & insisted on security, & the mtgor. gave a chattel mtge. under the pressure. The manager swore that he did not know that the mtgor. had other creditors at the time, & the mtgor. swore that he gave the mtge. solely on account of the pressure & to gain time:—*Held:* the mtge. was valid.—ONTARIO BANK *v.* MINER, *Temp.* Wood, 167.—**CAN.**

7281 iii. ——.]—A mtge. was obtained by pressure from insolvent three months before he executed an assignment in insolvency. The mtge. was for an antecedent debt, & was not enforceable for two years; it was not executed with intent to give the mtgees. a preference, & at the time of obtaining it they were not aware of the mtgor.'s insolvency:—*Held:* the mortgage was valid.—MCWHIRTER *v.* ROYAL CANADIAN BANK (1870), 17 Gr. 480.—**CAN.**

7281 iv. ——.]—M. had in his warehouse two thousand five hundred bushels of rye, belonging to T. & W., who owed him $1,400 for storing grain, for grain supplied, & for balance of account. T. & W. were insolvent, & their creditors pressing them, of which M. was aware. They demanded the grain more than once, but M. refused, & T. offered, if M. would give it up & a receipt of the debt due to him by T. & W., to assign to M. his interest in a vessel. M. assented, & T. executed a bill of sale of his interest to M., & received the grain:—*Held:* as M. had demanded payment, & the transfer was made on the express condition that the rye should be given up, the transaction was not a voluntary one, & not one by which M. had obtained an unjust inference.—MCFARLANE *v.* MCDONALD (1874), 21 Gr. 319.—**CAN.**

7281 v. ——.]—Traders, who had been in business for about eight months, & were at the end of that time in insolvent circumstances, had sent an order for goods to their largest creditor, which goods were packed up, but not sent for some days, when one of the firm waited on the creditor, taking with him a list of debts due the firm, intending to offer to assign to the creditor such of the accounts as the creditor should select, & which he did offer on being asked if he could pay any money on account, & a transfer thereof was accepted by the creditor:—*Held:* sufficient pressure on the part of the creditor to prevent the assignment being considered a preferential one.—KEAYS *v.* BROWN (1875), 22 Gr. 10.—**CAN.**

7281 vi. ——.]—A. recovered a judgment against an insurance co., & assigned the judgment on the same day to B.:—*Held:* as B. had asked A. for security shortly before the security was given, & the security given was that which was promised, there was pressure inducing the giving of the security, & it should be upheld.—MURPHY *v.* COLWELL (1902), 22 C. L. T. Occ. N. 111; 3 O. L. R. 314; 1 O. W. R. 146.—**CAN.**

7281 vii. ——.]—A payment made in contemplation of bkpcy. is a payment made without "pressure," where there has been only a request for payment.—*Re* LAVENDER, *Ex p.* HYNDMAN & Co. (1894), 29 I. L. T. 128.—**IR.**

7281 viii. —— *No actual threat of legal process.*]—A mere demand by the creditor, without even a threat of legal proceedings, is sufficient pressure to rebut the presumption of a preference.—STEPHENS *v.* MCARTHUR (1890), 6 Man. L. R. 496; 19 S. C. R. 644.—**CAN.**

7281 ix. *S. P.* FISHER *v.* BROCK (1892), 8 Man. L. R. 137.—**CAN.**

7281 x. —— ——.]—A., a holder of a hundi drawn up & accepted by the firm of B., procured that firm, when it was on the verge of insolvency, to sell him certain property in payment of the hundi:—*Held:* the sale in his favour could not, in the absence of any finding of fraud, be set aside, merely on the ground that the effect of it had been to deprive the other creditors of their powers to have recourse to the property.—DALOO RAM *v.* SHIVA PERSHAD (1867), 2 Agra, 71.—**IND.**

7281 xi. —— *Or return of goods.*]—B., knowing himself to be in insolvent circumstances, purchased from defts. some corn & flour. The goods were delivered without demand of cash. After a few days, defts. having demanded from B. immediate payment for the flour & corn, or a return of the property, the latter paid the price of the corn, & returned the flour to defts. On the forty-sixth day following, B. sequestrated his estate:—*Held:* the official assignee was entitled to recover the amount so paid, & the value of the goods so delivered.—SEMPILL *v.* ANDERSON (1861), 4 N. S. W. S. C. R. 20.—**AUS.**

7281 xii. —— *Whether previous demand for security.*]—Debtor mortgaged all his real estate to deft., & shortly afterwards made an assignment to pltf. for the benefit of his creditors generally. Before the giving of the mtge. he knew himself to be insolvent. On the day the mtge. was given deft. asked for payment, & debtor informed him he could make none, & then gave the mtge. The evidence was contradictory as to whether there was a request for security:—*Held:* the mtge. constituted a preference.—SCHWARTZ *v.* WINKLER (1901), 21 C. L. T. Occ. N. 574; 13 Man. L. R. 493.—**CAN.**

Annotations :—**Distd.** Singleton *v.* Butler (1800), 2 Bos. & P. 283. **Consd.** Hartshorn *v.* Slodden (1801), 4 Esp. 60. **Refd.** Cook *v.* Rogers (1831), 7 Bing. 438.

7283. —— Bill allowed to become due at date of transaction.]—The acceptor of a bill of exchange, two days before the expiration of the time for which the bill was originally drawn, called upon the indorser & informed him privately that he was insolvent. The indorser insisted on being paid the amount of the bill, offering at the same time to become security to the creditors for so much as the estate should produce, whereupon the acceptor paid it, & four days after became bkpt. It also appeared that the bill had been altered so as to make it fall due before such transaction, but without deft.'s knowledge :—*Held :* this was sufficient proof of fraudulent preference to defeat the payment of the bill.—Where a trader having accepted a bill for the use of a third person, is induced by that person to pay the bill, after having informed him that he was insolvent, on the promise of such person to guarantee the payment of a composition to the trader's creditors, and he afterwards becomes bankrupt, that payment is a fraudulent preference.—SINGLETON *v.* BUTLER (1800), 2 Bos. & P. 283 ; 3 Esp. 215 ; 126 E. R. 1283.

Annotations :—**Refd.** Simpson *v.* Sikes (1817), 6 M. & S. 295 ; Cook *v.* Rogers (1831), 7 Bing. 438.

7284. —— Debt not due.]—If debtor at the instance of his creditor give goods out of his shop in part payment of a bond not then due, & shortly afterwards become bkpt., the mere circumstance of the bond not being due will not alone vitiate the part payment on the ground of fraudulent preference.—HARTSHORN *v.* SLODDEN (1801), 2 Bos. & P. 582 ; 4 Esp. 60 ; 126 E. R. 1452.

Annotations :—**Consd.** Crosby *v.* Crouch (1809), 11 East, 256 ; Fidgeon *v.* Sharp (1814), 1 Marsh. 196 ; Flook *v.* Jones (1826), 5 L. J. O. S. C. P. 21 ; Churchill *v.* Crease (1828), 2 Moo. & P. 415 ; Cook *v.* Rogers (1831), 7 Bing. 438. **Refd.** Bills *v.* Smith (1865), 6 B. & S. 314. **Mentd.** Strachan *v.* Barton (1856), 11 Exch. 647.

7285. —— Made after dispatch but before delivery of cheque.]—A trader in contemplation of bkpcy., & without solicitation, put three cheques into the hands of his clerk, to be delivered to a creditor at the counting-house of the latter, but before they were delivered the creditor called upon the trader, & demanded payment of his debt :—*Held :* the intention to give a voluntary preference not being consummated, there was a valid payment.—BAYLEY *v.* BALLARD (1808), 1 Camp. 416.

Annotation :—**Dbtd.** Cook *v.* Rogers (1831), 7 Bing. 438. *Bayley* v. *Ballard* I can hardly consider law ; & Lord ELLENBOROUGH in that case went a length he had never gone before (PARK, J.).

7286. —— Bankrupt released from prison to collect debt.]—A trader in the Fleet Prison, under an arrest for debt, eight days before the suing out of a commission of bkpcy. against him, obtained a day rule, & went to an insurance office to receive a sum of money that was due to him. Deft., to whom bkpt. was indebted, knowing that he was about to receive the money, without any communication from him, met him at the office, & procured payment of his debt out of the money received by bkpt. The payment was made on June 8, debtor having been committed to prison on Apr. 19 preceding, & on June 18, a commission issued against him, on an act of bkpcy. committed by his lying in prison. In *assumpsit* by the assignees, for money had & received by deft. to their use, the jury having found that there was no fraudulent preference, & that deft. did not know of his debtor's insolvency & imprisonment at the time of the payment :—*Held :* the payment was not a fraudulent preference.—CHURCHILL *v.* CREASE (1828), 5 Bing. 177 ; 2 Moo. & P. 415 ; 7 L. J. O. S. C. P. 63 ; 130 E. R. 1028.

Annotations :—**Consd.** Terrington *v.* Hargreaves (1829), 5 Bing. 489. **Mentd.** Luckin *v.* Simpson (1840), 6 Bing. N. C. 353.

7287. —— Presentation of cheques—With knowledge that bank insolvent.]—One of the partners in a bank, which was in a state of insolvency, intending to give a preference to his father-in-law, communicated to him the state of their affairs. The father-in-law, besides his private account, had also an account for an insurance co., of which he was a trustee. Bkpt. did not intend to favour the insurance co., & was anxious that no communication should be made to them, but his father-in-law transmitted the information to them, & their debt was drawn out by cheques, one paid over the counter, & the other passed through the clearing-house before the bank stopped. The other partners were not acquainted with the fact of the communication having been made :—*Held :* the money was not recoverable by the assignees as a fraudulent preference.—BELCHER *v.* JONES (1837), 2 M. & W. 258 ; Murp. & H. 34 ; 6 L. J. Ex. 89 ; 1 Jur. 72 ; 150 E. R. 752.

7288. —— By solicitor—Refusal to proceed with composition arrangement until paid.]—The deposit of a lease made by bkpts. on the morning of the day fixed for the first sitting, under a petition for private arrangement, under pressure, such pressure being a demand by the solr. for security for his costs, & a refusal on his part to proceed unless such security were given :—*Held :* a transaction protected under 1849 Act, s. 133, notwithstanding bkpt.'s petition for arrangement was turned into a bkpcy. the same day, the security given in such circumstances not amounting to a fraudulent preference.—*Re* ROBINSON & ROBSON, *Ex p.* ROBINSON'S ASSIGNEES *v.* ROBSON (1858), 32 L. T. O. S. 230.

7289. —— Bankrupt endeavouring to avoid failure.]—Deft. called on bkpt. to give security for a debt, & bkpt. endeavoured to do what he could to avoid a failure, as deft. had assisted & might assist him again, & to meet deft.'s proposals, bkpt. gave a mtge. as a temporary security :—*Held :* the deed was not voluntary, but was given under pressure.—BAKER *v.* RICHARDSON (1858), 6 W. R. 663.

7290. —— By surety—On object of loan becoming impossible.]—O. & S., bankers at B., being in want of funds to meet an expected run upon their bank, obtained a written guarantee for £3,000, upon the strength of which defts., bankers in London, advanced to O. & S. £3,000. The guarantee was signed by the sureties on the

7284 i. —— *Before usual time for payment.*]—T. was an under-agent of defts., & about the 4th of each month he settled with defts. In the end of Dec., 1869, defts.' representative, L., told T. that he must keep defts. safe. On the four days before his bkpcy. on Jan. 5 T. sent sums of money to defts. Large sums were due to T. from customers of defts., a great part of which pltfs. collected. The jury found for pltfs., on the ground that the payments before bkpcy. were fraudulent preferences. The ct. decided a verdict to be entered for defts. —TAYLOR'S ASSIGNEES *v.* KILLILEAGH FLAX SPINNING CO. (1869), I. R. 4 C. L. 120 ; 4 I. L. T. Jo. 272.—**IR.**

7288 i. —— *By solicitor—Refusal to proceed with defence without security.*]—A. sued B., who engaged C. to defend the action for him & thereby became indebted to C., & for security for C.'s costs, B. executed a deed of his property :—*Held :* as C. had insisted upon security being given before he would continue the defence, the conveyance was not a voluntary one. —CHRISTIE *v.* SHROEDER (1908), 8 W. L. R. 757.—**CAN.**

7290 i. —— *By surety.*]—The fact that a surety under the contract has obtained some collateral advantage or diminution of liability, by a delivery

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understanding with O. & S. that the money should be returned if they found themselves, notwithstanding the advance, unable to meet the run. Defts. knew nothing of such understanding. The money was sent in notes & gold, in a box, &, finding it impossible to meet the run, O. & S. discussed the propriety of returning the money. While discussing it they received a letter from F., one of the sureties, saying that, as the case was hopeless, O. & S. could not honourably retain the money, & that it ought to be returned, & F. afterwards, in an interview, again urged them to return the money. The letter & the subsequent application from F. operated upon the minds of O. & S. in coming to the conclusion to return the money, & the box containing the money was returned to defts. unopened:—*Held:* O. & S., in returning the money, were influenced not solely by their own wish, but also by the application from the surety, & the return of the money was not purely voluntary, & did not amount to a fraudulent preference.—EDWARDS *v.* GLYN (1859), 2 E. & E. 29; 28 L. J. Q. B. 350; 33 L. T. O. S. 236; 5 Jur. N. S. 1397; 121 E. R. 12.

Annotations:—**Consd.** *Re* Craven & Marshall, *Ex p.* Tempest (1870), 6 Ch. App. 70, L. JJ. **Refd.** *Re* Rogers, *Ex p.* Holland & Hannen (1891), 8 Morr. 243, C. A.

7291. —— Bankruptcy inevitable.] — The assignment of a security to a particular creditor, even when bkpcy. is inevitable, if the assignment be not made voluntarily, but at the demand of a creditor, is not necessarily a fraudulent preference. —THE HEART OF OAK (1869), 39 L. J. Adm. 15; 21 L. T. 727; 3 Mar. L. C. 317.

Annotation:—**Mentd.** The Mullingar (1872), 26 L. T. 326.

7292. —— Presentation of bill of costs.]—A fortnight before debtor filed his petition his solr. lent him £200 on the security of a bill of sale. At the same time as he handed debtor a cheque for that amount, he presented him with his bill of costs, which amounted to £87, & debtor paid it out of the money advanced:—*Held:* not a fraudulent preference, as the presentation of the bill of costs amounted to a demand for payment. —*Re* COLLETT, *Ex p.* BOYLE (1871), 25 L. T. 550, L. JJ.

7293. —— Charge given to secure overdraft.]—Debtor having overdrawn his account at his bankers, & being insolvent, at their request signed a paper charging certain money that was coming to him with the payment of the balance due:—*Held:* the charge having been given at the request of the bank, there had been sufficient pressure to negative the inference of fraudulent preference.—*Re* BROWN, *Ex p.* LONDON & COUNTY BANKING CO., *Ex p.* TRICKETT (1873), L. R. 16 Eq. 391; 42 L. J. Bcy. 112; 29 L. T. 73; 21 W. R. 842.

Annotation:—**Mentd.** *Re* Lister, *Ex p.* Simmons (1876), 2 Ch. D. 749.

7294. —— After promise to give security.]—A solr., shortly before absconding as an insolvent debtor, had given securities to deft., who was one of his clerks, & who was a *bonâ fide* creditor. Bkpt. left on Oct. 28, having two days previously signed a declaration admitting his inability to pay his debts. The securities bore date the 30th of Sept., but they were not executed till after that day. The deeds were engrossed in the office of bkpt. on Oct. 10, & were executed on Oct. 14. They were not stamped till after bkpt. absconded. Deft. had been pressing for security during Aug. & Sept., & it had been promised, & the drafts of the securities were prepared in Sept.:—*Held:* the pressure & promise of security were sufficient to rebut the presumption of a fraudulent preference arising from the circumstances, & would sustain the deeds, even if the knowledge of the insolvency were brought home to the deft.—SMITH *v.* PILGRIM (1876), 2 Ch. D. 127; 32 L. T. 408; 40 J. P. 437.

7295. —— For overdraft.]—Bankers agreed to allow their customer to overdraw his account to £1,800 upon his obtaining three sureties to that amount. His overdraft exceeded £2,400, & the bankers repeatedly pressed him to reduce his account within the limits of their security. Subsequently the manager at an interview pressed him to square his account, whereupon saying he "was fast" he handed to the manager £2,450 in cheques & bills against which he had drawn largely. The same evening the manager wrote to him that they would not honour any more of his cheques:—*Held:* in the absence of evidence to show that the payment was made with a view to release the sureties, or otherwise than in the ordinary course of a current account, the general lien of the bankers attached for their benefit & the payment was not a fraudulent preference.—*Re* WALTON, *Ex p.* CARLISLE BANKING CO. (1877), 36 L. T. 522; *affd. sub nom., Re* WALTON, *Ex p.* REDDISH, 37 L. T. 237, C. A.

7296. —— Where debt would not have supported debtor's summons.]—A. owed B. £1,612 16*s.* 3*d.*, all of which sum was drawn for by bills, of which the first falling due would be due on Jan. 8, 1882. On Dec. 28, 1881, C., B.'s son, called at A.'s warehouse, & demanded money "as security for" the bills running, saying that if money was not paid to his father he would be ruined. A. thereupon gave C. a customer's cheque, all the stock, his gold watch & chain & a blank cheque on his bankers, which was afterwards filled up. B. further obtained from one of A.'s creditors a cheque for £69 3*s.*, & from another a cheque for £172 8*s.* 9*d.* Two days afterwards he met A., & induced him to hand over £87 in notes & gold. On Jan. 4, 1882, A. filed a liquidation petition. The trustee moved for a declaration that the cheques, cash, bills, & goods paid & handed over as above formed part of the estate of debtor. The application having been refused:—*Held:* as a trader debtor's summons could not have been supported against debtor, there was no legal pressure, & as the

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of goods in pursuance of the contract, does not of itself prevent such delivery from being an undue preference of the creditor.—If it were clearly shown that the dominant motive for the delivery was that the surety was able to intimidate or put some pressure on debtor to make the delivery, the presumption that there was an intention to prefer the creditor might be negatived.—DU TOIT'S ESTATE *v.* BARRY BROTHERS (1909), 19 C. T. R. 101. —**S. AF.**

1. —— *By wife.*]—Pltf. was married in 1876 without any marriage contract or settlement being possessed of about $1,500, which she lent to her husband, directly or in paying his debts, a small portion having been lent prior to their marriage. In Jan., 1879, on a further advance of $200 she obtained from her husband a chattel mtge. of certain goods, which was duly registered but not renewed. In Nov. she insisted upon & obtained from her husband a bill of sale of other goods, for the expressed consideration of $300:—*Held:* the bill of sale, being obtained by pressure was not a fraudulent preference under R. S. O., 1887 (c. 118).—TOTTEN *v.* BOWEN (1882), 8 A. R. 602.—**CAN.**

7294 i. —— *After promise to give security.*]—Deft. in consideration of a promise by a trader to pay a sum of money on account of indebtedness within a given time or to give security, & believing the trader to be solvent, gave him on credit a further supply of goods. Subsequently the trader, becoming insolvent, announced the fact to his creditors. Deft. thereupon reminded the trader of his promise to him, & induced him to give a confession of judgment for the amount of his indebtedness to deft., & to execute an assignment of his book debts to him:—*Held:* the confession of judgment, & the assignment of book debts, having been obtained by pressure, were not within 58 Vict. c. 6, ss. 1 & 2.—AMHERST BOOT & SHOE CO. *v.* SHEYN (1901), 21 C. L. T. Occ. N. 415; 2 N. B. Eq. Rep. 236.—**CAN.**

evidence of B. & his son that they were ignorant of debtor's insolvent condition was inconsistent with the proved facts, the trustee was entitled to the declaration asked for.—*Re* MATTHEWS, *Ex p.* PALMER, [1882] W. N. 130.

7297. —— Goods at sea—Retransfer of bills of lading.]—Merchants supplied goods on credit, & after the goods had been shipped they transferred the bill of lading to the purchaser. While the goods were on the sea the purchaser became unable to pay his debts as they became due, &, on being pressed by the vendors, retransferred the bill of lading :—*Held :* the retransfer of the bill of lading was made on account of the pressure, & not in order to prefer.—*Re* JOHNSON, *Ex p.* WRIGHT (1908), 99 L. T. 305 ; 52 Sol. Jo. 622.

7298. Creditor acting adversely to views & wishes of debtor.]—Where the creditor acts adversely to the views & wishes of his debtor, & by urgency & importunity obtains a transfer of property to cover his liability upon a bill then running, which bill he has discounted, although such transfer be made on the eve of bkpcy., it will not be a fraudulent preference.—ARBOUIN *v.* HANBURY (1817), Holt, N. P. 575.

Annotation :—**Refd.** *Re* Reid (1862), 7 L. T. 476.

7299. Importunity—Inferred from findings of jury on another point.]—W. drew a bill on deft. to whom he had been sending goods for sale, & deft. accepted the bill, neither party knowing the state of the account between them, but it turned out that W. was at the time indebted to deft. W. lurking from his creditors at large, after an act of bkpcy., indorsed the bill, upon importunity, to pltf., one of his creditors, with whom he was on friendly terms, & then became a bkpt. Pltf. sued deft. on the bill, & the jury found for deft., at the same time stating expressly that the bill had been indorsed after an act of bkpcy., by the drawer, of which pltf. had no notice :—*Held :* if the jury still found their verdict for deft., it could only have proceeded on the ground that the delivery of the bill to pltf. by bkpt., either was not a *bonâ fide* payment to him, or was a fraudulent preference to pltf., & though that precise point was not specifically left to the jury, it was involved in the evidence in the cause, & could be the only ground on which the verdict rested.—BAGNALL *v.* ANDREWS (1830), 7 Bing. 217 ; 4 Moo. & P. 839 ; 9 L. J. O. S. C. P. 21 ; 131 E. R. 84.

7300. Pressure in hostile spirit—Transfer of dock warrants.]—A trader handed over wine warrants to deft., a creditor, on the occasion of a sudden stoppage of payment, caused by the unexpected withdrawal of assistance. The transfer was pressed for by the creditor in a hostile spirit, & concurrently with other steps taken for his own protection, & the trader assented to it with reluctance, & struggled against bkpcy. several weeks afterwards in the hope of surmounting his difficulties :—*Held :* it was for the jury whether there was not a transfer of the property in the warrants for the benefit of the creditor, under pressure & against the will of the trader, & if so, deft. was entitled to a verdict.—PENNELL *v.* HEADING (1862), 2 F. & F. 744.

7301. Pressure continued after receipt of bill—Goods payable in cash.]—Debtor purchased goods of A., to be paid for in cash three days after delivery. Being unable to pay, he drew a bill on A. for the price, which debtor himself promised to discount the following week, A. retaining the bill in his own hands. A. continuing to press for payment, debtor signed a paper requesting a creditor of his to pay the amount of the bill to A., & the creditor paid the sum to the assignee of debtor, who had become bkpt. The ct. being satisfied that the bill was given only as a security, that there was no intention to depart from the terms of the original contract, & that pressure had been put upon debtor :—*Held :* the signature of the paper was not an act of fraudulent preference, & A. was entitled to the debt.—*Re* BAKER, *Ex p.* SEALS (1864), 10 L. T. 315, C. A.

7302. Judgment creditor seeking to stop sale.]—Debtor, a farmer, whose tenancy was about to expire, placed the whole of his farming stock in the hands of an auctioneer for sale. To prevent a judgment creditor from stopping the sale, he gave a letter to the auctioneer authorising him out of the first proceeds of sale, after satisfying the rent, to pay the judgment creditor his judgment debt, together with the amount due to him on debtor's promissory note :—*Held :* the motive for the transaction was not to favour the creditor, & it was not a fraudulent preference.—*Re* GLANVILLE, *Ex p.* JENKINS (OFFICIAL RECEIVER), HARRIS *v.* HAWKER (1885), 33 W. R. 523 ; 2 MORR. 71.

7303. Creditor stopping goods in transit.]—The purchaser of brimstone, which formed a portion of the cargo of a general ship then on its voyage from Messina to Swansea, finding himself unable to protect his acceptances given in exchange for bills of lading indorsed in blank, & desiring to cancel the contract, telegraphed to the vendors to appoint an agent in England to receive the brimstone & returned the bills of lading. The ship arrived in port on Aug. 24, & the vendors' agent, by notice to the master, stopped delivery of the brimstone to the purchaser. On Aug. 25 the sheriff came on board & took it in execution at the instance of J. & Co. judgment creditors, & on the same day a receiving order was made on the purchaser's own petition, & adjudication followed on Sept. 23. The sheriff interpleaded, & upon a motion in the county ct. for a declaration as to the relative legal positions of the parties as claimants, it was decided that the redelivery of the bills of lading revested the property in the vendors, & they had lost their right of stoppage *in transitu*, & that the redelivery was an act of bkpcy., & gave the vendors a preference over the other creditors, which was fraudulent & void as against the trustee in bkpcy. Upon appeal to the Divisional Ct., WILLIAMS & COLLINS, JJ., differed in opinion, COLLINS, J., holding the vendors' right of stoppage *in transitu* was not destroyed, & as between the vendors & the trustee the former were entitled to the cargo, & even if there were a fraudulent preference, it did not defeat the vendors' right to stop *in transitu*. On appeal to the Ct. of Appeal :—*Held :* on the

7298 i. *Creditor acting adversely to views & wishes of debtor.*]—W. & Co., demanded security for their overdue account, & agreed to supply further goods & not register the instrument, if it was given. Debtors objected that it would be unfair to other creditors to accede, but finally gave the security by bill of sale on part of their stock of goods. Debtors were at the time in insolvent circumstances, but it was not proved that W. & Co. were aware of it :—*Held :* the bill of sale was made under pressure.—STEWART *v.* WILSON (1894), 3 B. C. R. 369.—**CAN.**

7299 i. *Importunity.*]—Where as the evidence showed that a bill of sale was reluctantly given by debtor, who only yielded to a continuous insistence on the part of his creditors, his intent being to escape his creditor's importunity, & that the demand of the creditor was made *bonâ fide*, with no intent but to obtain the security, which she was advised she ought to have :—*Held :* the bill of sale was not void under R. S. O., 1877 (c. 118). s. 2.—SLATER *v.* OLIVER (1884), 7 O. R. 158.—**CAN.**

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facts, there had not been a concluded agreement between the vendors & bkpt. to return the bill of lading, & there had not been a fraudulent preference.—*Re* O'SULLIVAN, *Ex p.* FERD, BALLER & Co. (1892), 67 L. T. 464 ; 8 T. L. R. 581, C. A.

Annotation :—**Consd.** *Re Johnson, Ex p. Wright* (1908), 99 L. T. 305, where BIGHAM, J., intimated that, if it had been necessary, he should have followed the judgment of COLLINS, J., in preference to that of WILLIAMS, J.

7304. When unavailing to protect transaction—Act done not relieving trader from present difficulty.]—Where a trader being pressed by a creditor for payment or security, one or other of which he said he would have, gave a bill of sale of apparently the whole of his stock, & immediately left his business & home & became a bkpt. :—*Held :* inasmuch as the act done did not redeem the trader even from any present difficulty, which was the ordinary motive for such an act when really done under the pressure of a threat, there was evidence that it was not done under such pressure, but voluntarily, & with a view to prefer the particular creditor, & was void as against the assignees of bkpt.—THORNTON *v.* HARGREAVES (1806), 7 East, 544 ; 103 E. R. 210.

Annotations :—**Distd.** Churchill *v.* Crease (1828), 5 Bing. 177. **Consd.** Cook *v.* Rogers (1831), 7 Bing. 438. **Refd.** Lindon *v.* Sharp (1843), 6 Man. & G. 895.

7305. —— Creditor aware of insolvency.]—A., a trader, being indebted to B., another trader, assigned property to him to secure it. A. was either actually insolvent at the time, or in such circumstances that enforcement of the provisions of the deed would have stopped the business, & both A. & B. knew that it was only by preserving the goodwill & by careful management that A. could hope to pay his debts, for which time & the forbearance of B. were necessary. A., & probably B. also, knew that the former was insolvent. B.'s debt, however, was *bonâ fide*, & the security was executed under *bonâ fide* pressure, & contemplated the continuance of the business by A., & his ultimate extrication from his difficulties by the aid of B. :—*Held :* the assignment came within 1849 Act, s. 67, & could not be supported against the assignees of A., who had become bkpt.—STANGER *v.* WILKINS (1855), 19 Beav. 626 ; 52 E. R. 493.

Annotations :—**Consd.** Johnson *v.* Fesemeyer (1858), 3 De G. & J. 13, L. C. ; Smith *v.* Timms (1863), 32 L. J. Ex. 215, Ex. Ch. **Refd.** *Re* Nurse, *Ex p.* Foxley (1868), 17 L. T. 623.

7306. —— Transaction fraudulent in inception.]—A creditor suggested to his debtor that the latter should buy goods on credit from other persons, & should, with the proceeds of their sale, pay off the debt due to the former. Debtor adopted the suggestion, & out of the proceeds of the sale of goods which he obtained on credit he made several payments on account of the debt. The payments were made under pressure from the creditor :—*Held :* as the transaction was fraudulent in its inception, it was immaterial that the payments were made under pressure, & they must be set aside as being fraudulent preferences.—*Re* WRIGLEY, *Ex p.* READER (1875), L. R. 20 Eq. 763 ; 44 L. J. Bcy. 139 ; 33 L. T. 36.

7307. —— Collusion.]—Pressure alone cannot be an answer to a case which alleges collusion.—EDISON GENERAL ELECTRIC CO. *v.* WESTMINSTER & VANCOUVER TRAMWAY CO., [1897] A. C. 193 ; 66 L. J. P. C. 36 ; 75 L. T. 438 ; 13 T. L. R. 62 ; 4 Mans. 244, P. C.

7304 i. *When unavailing to protect transaction.*]—The fact that the creditors actually executing an agreement in trust for such creditors as should execute same, exerted pressure to obtain its execution by the grantor does not prevent such trust agreement from being a voluntary or fraudulent preference & void.—KIMBALL LUMBER CO., LTD. *v.* CANADIAN CREDIT MEN'S TRUST ASSOCN., [1917] 2 W. W. R. 561 ; 10 Sask. L. R. 251.—**CAN.**

7305 i. —— *Creditor aware of insolvency.*]—To constitute pressure which will authorise an assignment by way of security, there must be a legitimate & *bonâ fide* attempt by the creditor to get payment of his debt or security thereof. It is not *bonâ fide* pressure for a creditor, knowing of his debtor's insolvency, to take an assignment of all his property.—DOLL *v.* HART (1890), 2 B. C. R. 32.—**CAN.**

7305 ii. ——.]—A mercantile firm obtained from their debtor promissory notes for the amount of his indebtedness. While the notes were still outstanding in the hands of third parties they applied to debtor to give a *cognovit actionem*, knowing at the time that he was hopelessly insolvent, & under threat of suit debtor gave the *cognovit*, upon which judgment was entered & execution issued :—*Held :* fraudulent preference, & the judgment & execution were fraudulent & void under R. S. O., 1877 (c. 118).—MERIDEN SILVER CO. *v.* LEE (1883), 2 O. R. 451.—**CAN.**

7305 iii. ——.]—A. obtained a decree against B. During the pendency of the suit, & only four days before the decree was passed B. mortgaged nearly the whole of his property to one of his creditors, C. The assignment was made in consideration of past debts due to C., who was aware of B.'s embarrassments :—*Held :* the assignment by B. of nearly the whole of his property to C. amounted to an unfair preference.—DADAPA *v.* VISHNUDAS (1887), I. L. R. 12 Bom. 424.—**IND.**

m. —— [*Debtor aware that result will be to prefer creditor.*]—Under Assignments Act, R. S. M., c. 7, s. 33, a mtge. given by debtor to a creditor to secure his claim may be set aside as a preference, although it has been obtained by pressure & was given by debtor without any active desire to prefer the mtgee. to his other creditors, if debtor knew or ought to have known that such would be the result of giving the mtge.—SCHWARTZ *v.* WINKLER (1901), 13 Man. L. R. 493 ; 21 C. L. T. Occ. N. 574.—**CAN.**

7307 i. —— *Collusion.*]—DAVIDSON *v.* ROSS (1876), 24 Gr. 22.—**CAN.**

7307 ii. —— ——.]—DAVIDSON *v.* MCINNES (1875), 22 Gr. 217 ; 24 Gr. 414.—**CAN.**

n. —— *Intent to delay proved.*]—*Held :* under C. S. B. C. (c. 51), s. 1, a consent judgment obtained by resp. bank against an insolvent co., with intent to defeat or delay the creditors of the latter, was null & void against them, & so long as the intent was proved, it was immaterial whether consent was given under pressure.—EDISON GENERAL ELECTRIC CO. *v.* WESTMINSTER & VANCOUVER TRAMWAY CO., [1897] A. C. 193 ; 66 L. J. P. C. 36 ; 75 L. T. 438 ; 13 T. L. R. 62 ; 4 Mans. 244, P. C. —**CAN.**

o. —— *Made within six months of insolvency.*]—Where a payment is made to a creditor by insolvent solely as the result of pressure by the creditor, & with no desire on the part of debtor to prefer the creditor, the payment is nevertheless a fraudulent preference, & void against the trustee, if made within six months of debtor's insolvency, unless the creditor is protected as a payee in good faith & for valuable consideration.—RUSSELL WILKINS & SONS, LTD. *v.* OUTRIDGE PRINTING CO., LTD., [1906] S. R. Q. 172.—**AUS.**

p. —— *Made within sixty days of insolvency.*]—EDGETT *v.* STEEVES (1906), 2 E. L. R. 131 ; 3 N. B. Eq. 404.—**CAN.**

q. ——.]—R. gave a bill of sale, which gave the grantee a preference over the other creditors of R. :—*Held :* the bill of sale must be presumed to have been made with intent to give an unjust preference, & to be such preference, whether made voluntarily or under pressure.—SHEDIAC BOOT & SHOE CO. *v.* BUCHANAN (1903), 35 N. S. R. 511.—**CAN.**

r. —— ——.]—A bill of exchange was sent by a merchant in London to a commission agent in Glasgow, to be discounted, with instructions to remit the proceeds to the merchant. The commission agent had the bill discounted, but applied the proceeds to his own purposes, & the merchant pressing for a remittance, the commission agent indorsed & remitted to him by post an acceptance of a Liverpool house, & also a bill of lading of certain goods shipped to Calcutta, with a relative draft against the shipment, & they were received in course by the merchant in London, & receipt acknowledged. Within sixty days thereafter, the agent in Glasgow became bkpt. :—*Held :* the conveyances of the bills & goods were struck at, as illegal preferences, by 1696 Act, c. 5.—WHITE *v.* BRIGGS, THURBURN, ACRAMAN & CO. (1843), 5 Dunl. (Ct. of Sess.) 1148 ; 15 Sc. Jur. 467.—**SCOT.**

s. —— *Yukon Ordinance*, c. 38, *C. O.*, 1902.]—The effect of Yukon Ordinance, c. 38, C. O., 1902, s. 2, is to remove the doctrine of pressure in respect to preferential assignments & all assignments made by persons in insolvent circumstances come within the terms of the ordinance.—BENALLACK *v.* BANK OF BRITISH NORTH AMERICA (1905), 36 S. C. R. 120.—**CAN.**

7308. For whom available—Pressure by one creditor—Security given to him & others.]—A deed whereby debtor, being pressed, conveys estates in trust to sell, & to pay the pressing creditor, with a further trust to pay his debts to certain relatives, in order to give them an undue preference in contemplation of bkpcy., is valid, so far as it relates to the protection of the urgent creditor. *Qu.:* whether it is void for the residue. —MORGAN *v.* HORSEMAN (1810), 3 Taunt. 241; 128 E. R. 96.

Annotations:—**Consd.** Pulling *v.* Tucker (1821), 4 B. & Ald. 382. **Refd.** Gibbins *v.* Phillipps (1827), 7 B. & C. 529; Abbott *v.* Burbage (1836), 2 Scott, 656; Young *v.* Fletcher (1865), 34 L. J. Ex. 154.

7309. —— —— **Payment to him & another.**]—A judgment creditor, who had issued execution upon the property of his insolvent debtor, agreed to make him a substantial advance for the alleged purpose of enabling him to carry on his business, upon the understanding, come to at a meeting at which all the parties to the transaction were present, that the advance should be applied in paying the bankers of debtor, who had pressed for payment of a debt of £2,000, & threatened to make debtor a bkpt. if they were not paid, & also in paying off two other debts due to solrs. employed in the transaction. A bill of sale over substantially the whole of debtor's property was given by him to the execution creditor on Sept. 9, 1882, to secure the execution debt & the fresh advance, which was applied in payment of the debts to the bankers and the solrs. On Sept. 11 possession under the bill of sale was taken by the grantee. On Sept. 13 debtor filed a liquidation petition, & the trustees impeached the bill of sale & the above-mentioned payments:—*Held:* the payments to the solrs. were fraudulent & void, but the payment to the bankers, who had acted *bonâ fide*, was protected by 1869 Act, s. 92.—*Re* WILKINSON, *Ex p.* CLATER, *Ex p.* BECKETT-DENISON (1883), 48 L. T. 648.

7310. Effect of showing pressure—Whether creditor's knowledge of debtor's difficulty material.]—A. & B. being brothers, B. applied to A. for an advance of money for building purposes, which A. supplied at various times in 1840 & 1841. Subsequently B. mortgaged the houses & land to C. for £1,000. A. afterwards pressing B. for payment, B. gave him a second mtge. of the premises in Nov., 1848. In Jan., 1849, B. became bkpt. In 1854 the first mtgee. entered into possession, & A. in the same year gave notice of his incumbrance. In 1853 or 1854 the assignees threatened to file a bill to have the rights of the parties ascertained. In 1857 A. filed a bill to redeem the premises:—*Held:* he was entitled to relief.

It is immaterial, in impeaching a deed for fraudulent preference as against the creditor, to show that the creditor knew of the difficulties of his debtor, provided that the creditor can show pressure exerted on debtor by him. *Semble:* the rule may be different as against debtor.—DAVISON *v.* ROBINSON (1857), 3 Jur. N. S. 791; *subsequent proceedings* (1858), 6 W. R. 673, L. C.

7311. —— **Where desire to favour.**]—Though there is a desire to favour a particular creditor, yet, if there is pressure, the transfer or payment is not voluntary, & it is valid.—GRAHAM *v.* CANDY (1862), 3 F. & F. 206, N. P.

7312. —— **Negatives fraudulent preference.**]—R., a trader, under pressure executed a bill of sale, by which he assigned all his property to J.,

7308 i. *For whom available—Pressure by one creditor—Payment to him & another.*]—A solr., acting for a mtgor. & for two mtgees., voluntarily paid certain arrears of interest & also rates, taxes, & insurance premiums. The mtgor. also owed the solr. considerable sums for costs, & after negotiations & threats by the mtgees., transferred the mortgaged property to the solr. in full of his indebtedness. Three weeks later he filed his petition for liquidation:—*Held:* the transfer was not fraudulent as a fraudulent preference.—*Re* WRIGHT (1906), 3 Tas. L. R. 1.—**AUS.**

7308 ii. —— —— ——.]—A., being sued by B. on an overdue promissory note, & being indebted to C., who was not pressing for payment, by arrangement between A., B., & C., in consideration of a further advance of trifling amount from C. & C. forbearing to sue A. for a reasonable time, & also obtaining for A. forbearance from B., executed an assignment to C. of the greater part of his stock-in-trade, in trust to sell & pay B. & C. ratably, & pay over any surplus to A., & immediate possession was given to C.:—*Held:* (1) the pressure by B. made the assignment good as to his debt then due, but it was for the jury to say whether in the circumstances, the assignment was a fraudulent preference as to C.; (2) the jury having found that it was such a fraudulent preference, the assignment could be treated as good in part, & bad in part.—COHEN *v.* MCGEE (1878), 4 V. L. R. 543.—**AUS.**

7310 i. *Effect of showing pressure—Whether creditor's knowledge of debtor's difficulty material.*]—If *bonâ fide* pressure is exercised by the transferee upon debtor, the transfer should be upheld, even if the inference that the transferee knew of debtor's financial difficulties is justified on the evidence. —KOOP *v.* SMITH (1914), 20 B. C. R. 372; 20 D. L. R. 440; 29 W. L. R. 872; 7 W. W. R. 416.—**CAN.**

7310 ii. ——.]—L. made a chattel mtge. to deft. under pressure of the manager of L.'s bank to procure an advance from deft. to L. to repay an overdraft. At the time of the mtge. L. was insolvent & the bank manager knew of L.'s financial position:—*Held:* as against the assignee of L., the mtge. was void as a preference of the bank.—ALLAN *v.* MCLEAN (1906), 8 O. W. R. 223, 761.—**CAN.**

7310 iii. ——.]—Mtgees., shortly after obtaining their mtge., became aware of debtor's desperate circumstances, & obtained from him by pressure a mtge. on his chattels used in his business:—*Held:* such mtge. was void against the assignee in insolvency. —MCWHIRTER *v.* ROYAL CANADIAN BANK (1870), 17 Gr. 480.—**CAN.**

7310 iv. ——.]—A creditor, who lived twenty miles from insolvent, had a mtge. on insolvent's house for $900, of which $400 was due. On Feb. 8 he wrote to insolvent to arrange matters the next time he was in, & on the 9th he purchased goods from insolvent, on condition that $600 should go upon the mtge., & he paid the balance of the purchase-money to other creditors. An attachment in insolvency issued on Mar. 3. The creditor said he did not wish to press debtor in any way, but wanted his money. There was contradictory evidence as to deft. knowing or having probable cause for believing that debtor was unable to meet his engagements, & as to whether the property mortgaged was worth more than the balance left due upon it. The jury having found in favour of deft.: *Held:* (1) the transaction was not avoided; (2) insolvent could not be said to have acted voluntarily.—CAMPBELL *v.* BARRIE (1871), 31 U. C. R. 279.—**CAN.**

a. —— *Debtor's belief of ability to carry on business.*]—A mtge. of chattels to a creditor by a person in insolvent circumstances, made under pressure, & to obtain an extension of time, under the expectation of being thereby enabled to pay all his creditors in full, is not void under 22 Vict. c. 26. —GORDON *v.* YOUNG (1866), 12 Gr. 318.—**CAN.**

b. —— ——.]—Where mtgor. did not believe he was insolvent, though the mtgee. feared he was so, & made a mtge. of real estate under pressure on the part of the mtgee., & in the belief that he would thereby be enabled to continue his business & pay his liabilities in full:—*Held:* the mtge. was valid as against his assignee in insolvency.—CURTIS *v.* DALE (1867), 2 Ch. Ch. 184.—**CAN.**

7312 i. —— *Negatives fraudulent preference.*]—A conveyance of property upon pressure, as for a debt due, is not a fraudulent preference.—*Re* SCHLIEFF (1880), 6 V. L. R. 51.—**AUS.**

7312 ii. —— ——.]—Where the mtgor. is coerced into making the mtge., the making of such mtge. cannot be regarded as a fraudulent preference. —TIDEY *v.* CRAIB (1884), 4 O. R. 696. —**CAN.**

7312 iii. *S. P.* SHELDRICK *v.* AITKEN & BOSTOCK (1869), 6 W. W. & A'B. L. 59.—**AUS.**

7312 iv. *S. P.* MCPHERSON *v.* REYNOLDS (1877), 6 C. P. 491.—**CAN.**

7312 v. *S. P.* ROE *v.* MASSEY MANUFACTURING CO. (1892), 8 Man. L. R. 126.—**CAN.**

7312 vi. *S. P.* BERTRAND *v.* PARKES (1892), 8 Man. L. R. 175.—**CAN.**

7312 vii. *S. P.* MCWHIRTER *v.* THORNE (1869), 19 C. P. 302.—**CAN.**

7312 viii. *S. P.* GIBBONS *v.* MCDONALD (1891), 20 S. C. R. 587.—**CAN.**

7312 ix. *S. P.* GIGNAC *v.* ILER (1898), 29 O. R. 147; 25 A. R. 393.—**CAN.**

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a creditor, & then became bkpt. on his own petition :—*Held :* the existence of pressure negatived a fraudulent preference.—JONES *v.* HARBER (1870), L. R. 6 Q. B. 77 ; 40 L. J. Q. B. 59 ; 23 L. T. 606 ; 19 W. R. 248.

7313. —— Not altered by 1869 Act, s. 92.]—*Held :* the above sect. did not alter the law with respect to fraudulent preferences, & it was necessary, in order to constitute a fraudulent preference, that the conveyance or transfer should be made voluntarily & in contemplation of bkpcy.

A creditor having told his debtor "that he should like his money repaid," adding that "he was determined to have either the money or security," debtor conveyed property in part satisfaction of the debt, & presented a petition for liquidation shortly afterwards :—*Held :* the conveyance was valid, & could not be set aside as being a fraudulent preference.—*Re* CRAVEN & MARSHALL, *Ex p.* TEMPEST (1870), 6 Ch. App. 70 ; 40 L. J. Bcy. 22 ; 23 L. T. 650 ; 19 W. R. 137, L. JJ.

Annotations :—**Distd.** *Re* Douglas, *Ex p.* Snowball (1872), 7 Ch. App. 534, L. JJ. **Consd.** *Re* Meldrum, *Ex p.* Butcher (1874), 9 Ch. App. 595, L. JJ. ; Smith *v.* Pilgrim (1876), 2 Ch. D. 127. **Refd.** *Re* Patent File Co., Birmingham Banking Co.'s Claim (1870), 40 L. J. Ch. 190, L. JJ. ; *Re* Cherry, *Ex p.* Bolland (1871), 7 Ch. App. 24, L. JJ. ; *Re* Walker, *Ex p.* Topham (1873), 8 Ch. App. 614, L. JJ. ; *Re* Wincham Shipbuilding, etc., Co., Poole, Jackson & Whyte's Cases (1878), 26 W. R. 588 ; *Re* Liverpool & London Guarantee & Accident Insce., Gallagher's Case (1882), 46 L. T. 54. **Mentd.** Butcher *v.* Stead (1875), 33 L. T. 541, H. L.

C. Transactions to make good Breaches of Trust.

7314. Property embezzled & invested in lease.]—If the servant of A. embezzle his property & therewith purchase a lease, etc., & afterwards commit an act of bkpcy., & then assign the lease to A., A. has not such an equitable lien as to be answer to an action of trover by the assignees against him.—BLOXHAM *v.* GRAHAM (1795), Peake, Add. Cas. 3, N. P.

7315. Securities earmarked during solvency—Owner notified & securities dispatched to him on eve of bankruptcy.]—Bankers having fraudulently sold out stock belonging to a customer, which stood in their names, & applied the proceeds to their own use, while they remained solvent wrapped up bonds belonging to them in an envelope inscribed with the customer's name, & inclosed a memorandum, stating that they had deposited the bonds with him as a collateral security for his stock which they promised to replace. The parcel they deposited among the securities belonging to other persons who dealt with them, but

7312 x. *S. P.* ADAMS & BURNS *v.* BANK OF MONTREAL (1900), 32 S. C. R. 719 ; 8 B. C. R. 314.—**CAN.**

7312 xi. ——-——.]—A trader made an absolute bill of sale of two ships, in payment of advances made him by the assignee, who had raised the money on bills discounted in a bank. The bill of sale was made at the bank manager's instance :—*Held :* the transaction was not a fraudulent preference, although the ships still remained in the assignor's possession.—*Re* CURRAN (1865), 17 Ir. Jur. 59.—**IR.**

7312 xii. —— ——.]—Applts., stock auctioneers, on July 12 & 18 sold one hundred bullocks to H., a stock dealer, & on July 23 they sold H. a line of sheep, the price paid for the sheep being £514. On Aug. 9 following H. was indebted to applts. in the sum of £1,171. On that date, in response to requests by applts. to reduce his account, H. sent the following letter to applts. : "On looking over my accounts I find I owe you a considerable amount, & as I have two hundred cattle grazing at O., which were bought through you, I am giving you the sole right to them. The amount the cattle cost is between £1,000 & £1,100. I only ask that I be allowed to jockey the cattle off through your firm," etc. On Aug. 15 H. absconded without paying his debts. H. was adjudicated a bkpt. on Sept. 5, the bkpcy. relating back to Aug. 15 :—*Held :* the giving of the letter to applts. was not a fraudulent preference.—WILLIAMS & KETTLE, LTD. *v.* HARDING'S OFFICIAL ASSIGNEE (1908), 27 N. Z. L. R. 871.—**N.Z.**

7312 xiii. —— —— 38 *Vict. c.* 5 (*Man.*), *s.* 59.]—Pressure by a creditor upon debtor removes a transaction from the operation of the above sect. as to fraudulent preference.—TUCKER *v.* YOUNG, *Temp.* Wood, 186.—**CAN.**

7312 xiv. —— —— *R. S. O.*, 1877 (*c.* 118).]—T., being then insolvent, transferred to A., one of his creditors, all his estate & effects. The impelling cause of the transfer was the application of A. to be paid or protected :—*Semble :* the transfer was not "voluntary" within the above Act, & could not be set aside as a fraudulent preference.—STUART *v.* TREMAIN (1883), 3 O. R. 190.—**CAN.**

7312 xv. —— —— *R. S. O.*, 1887 (*c.* 124), *s.* 2.]—A conveyance obtained by pressure is not within the terms of the above sect.—MOLSONS BANK *v.* HALTER (1890), 18 S. C. R. 88.—**CAN.**

7312 xvi. —— —— 49 *Vict. c.* 45 (*Man.*), *s.* 2.]—*Held :* the word "preference" in the above sect. did not apply to a transfer induced by the pressure of the creditor.—STEPHENS *v.* MCARTHUR (1890), 19 S. C. R. 446. —**CAN.**

7312 xvii. —— —— *Fraudulent Preferences Act, C. S. B. C.*, 1888 (*c.* 15), *s.* 2.]—A *bonâ fide* demand by a creditor for payment or security is pressure sufficient to rebut any inference of "intent to prefer," & takes the transaction out of the prohibition of the above sect.—BROWN & ERB *v.* JOWETT (1895), 4 B. C. R. 44.—**CAN.**

7312 xviii. —— —— 1892 *Act*, *s.* 79.] —The above sect. has restored the old provisions on the subject of fraudulent preference, & a payment made or security given, under pressure from the creditor, is not a fraudulent preference. —*Re* MARSH (1893), 12 N. Z. L. R. 456.—**N.Z.**

7312 xix. —— —— *Transaction in usual course of business.*]—Within six months of his insolvency, G., the agent in a country district of deft. insurance society, paid to the society the amounts of premiums which he had received during the preceding six days. The payment was made on pressure by an inspector of the society, & by means of cheques given to G. by third parties : —*Held :* the payment was not an undue preference, & was protected. —GREEN'S ESTATE *v.* SOUTH AFRICAN MUTUAL INSURANCE SOCIETY (1904), 21 S. C. 47.—**S. AF.**

c. —— *Onus of proof of intent to prefer on person seeking to avoid transaction.*]—Insolvency Act, 1897, s. 116, does not exempt a person, who alleges that a transaction, admittedly brought about by pressure by the creditor, is a fraudulent preference, from proving that the transaction was entered into with a view of giving such creditor a preference over the other creditors.—*Re* COHEN, [1908] V. L. R. 171.—**AUS.**

d. —— ——.]—In an action by the assignee for benefit of creditors seeking to set aside transactions, the result of pressure, whereby defts. received payment in full in preference to defts. other creditors :—*Held :* the *onus* of showing intent to delay or prejudice the other creditors was upon pltf.—CLARKSON *v.* EDELSTEIN (VICTOR) & SON, LTD. (1919), 15 O. W. N. 390. —**CAN.**

f. *Evidence of pressure—Letters to & from insolvent.*]—In an action to set aside a mtge. given by insolvent within three months before the sequestration of his estate as being a fraudulent preference, letters written before & at the date of the mtge. by insolvent are admissible to show that he was then being pressed by his creditors, & was striving to gain time or evade present payment & to prevent proceedings being taken against him, & letters from creditors to him are admissible to show such pressure on him.

Press copies of the original letters written by such creditors without proof of comparison with the original are not admissible for such purpose. —GRIEVE *v.* BODEY (1894), 20 V. L. R. 269.—**AUS.**

g. —— *Statements by insolvent.*] —On an interpleader issue the ct. were unable to decide whether there was sufficient pressure upon debtor to save the impeached assignment, as the only evidence on such point was that of debtor, who said that he had made the assignment at the request of pltf.'s solr.—COLQUHOUN *v.* SEAGRAM (1896), 11 Man. L. R. 339.—**CAN.**

PART XX. SECT. 12, SUB-SECT. 4.—C.

k. *General rule.*]—When debtor on the eve of bkpcy. voluntarily makes good trust money which he has misapplied, the payment cannot be set aside as a fraudulent preference of the trust estate.—TAYLOR'S OFFICIAL ASSIGNEE *v.* MOORHOUSE (1885), 4 N. Z. L. R. 420.—**N.Z.**

l. ——.]—On the eve of bkpcy. bkpt., who had misappropriated trust money, paid certain promissory notes, received in the ordinary way of business, into a bank, with instructions to appropriate the proceeds to the trust account, but without notice to the *cestui que trust* :—*Held :* the notes formed part of bkpt.'s estate, & were not affected with any trust.—*Re* KILGOUR, OFFICIAL ASSIGNEE *v.* NATIONAL BANK OF NEW ZEALAND (1887), 6 N. Z. L. R. 301.—**N.Z.**

gave no information of any of the circumstances to the customer till the eve of their bkpcy., when they sent him the parcel with the bonds saying they must stop payment next morning :—*Held :* the customer could not retain the bonds against the assignees of the bankers.—WILSON *v.* BALFOUR (1811), 2 Camp. 579, N. P.

Annotations :—**Consd.** New, Prance & Garrard's Trustee *v.* Hunting, [1897] 2 Q. B. 19, C. A. ; *Re* Cozens, Green *v.* Brisley, [1913] 2 Ch. 478. **Refd.** Mogg *v.* Baker (1838), 7 L. J. Ex. 94.

7316. Securities pledged by firm—Redeemed & indorsed to trustee partner on eve of bankruptcy.]—A trustee, with the consent of his *cestui que trust*, pledged Madras Govt. notes, held by him in trust, for the benefit of a firm of which he was partner. The notes were afterwards redeemed & delivered to the firm. Subsequently the firm, without the consent of the *cestui que trust*, pledged them for a similar purpose. The firm being insolvent & bkpcy. imminent, the trustee redeemed the notes with partnership assets, indorsed them to himself personally, & replaced them in his private chest. The firm became bkpt. :—*Held :* there was no fraudulent preference.—SINCLAIR *v.* WILSON (1855), 20 Beav. 324 ; 24 L. J. Ch. 537 ; 25 L. T. O. S. 58 ; 1 Jur. N. S. 967 ; 52 E. R. 627.

Annotation :—**Refd.** *Re* Goldsmid, *Ex p.* Taylor (1886), 18 Q. B. D. 295, C. A.

7317. Property sold to co-executor—Price applied in making good estate—Co-executor with knowledge of facts.]—If debtor on the eve of bkpcy. voluntarily makes good trust money which he has misapplied, the payment cannot be set aside as a fraudulent preference of the trust estate.

Within three months before the filing of a liquidation petition debtor, one of the exors. of a will, sold goods to his co-exor. with the intention of applying the purchase-money in repaying to testator's estate money, which he had improperly abstracted from it. That intention was known to the co-exor., & the purchase-money was, with his knowledge, immediately after its payment by him, paid by the vendor into a bank to the credit of the exors. :—*Held :* the transaction was not a fraudulent preference within 1869 Act, s. 92.—*Re* WILKINSON, *Ex p.* STUBBINS (1881), 17 Ch. D. 58 ; 50 L. J. Ch. 547 ; 44 L. T. 877 ; 29 W. R. 653, C. A.

Annotations :—**Folld.** *Re* Goldsmid, *Ex p.* Taylor (1886), 18 Q. B. D. 295, C. A. ; *Re* Hutchinson (1887), 3 T. L. R. 324, C. A. ; New, Prance & Garrard Trustee *v.* Hunting, [1897] 1 Q. B. 607. **Consd.** *Re* Blackpool Motor Car Co., Hamilton *v.* Blackpool Motor Car Co., [1901] 1 Ch. 77. **Refd.** Pratt *v.* Inman (1889), 6 T. L. R. 91 ; *Re* Lake, *Ex p.* Dyer, [1901] 1 K. B. 710. **Mentd.** *Re* Kemp, *Ex p.* Luck (1883), 49 L. T. 809.

7318. Trust deed granted—To raise funds to make good scheduled breaches of trust—No pressure from cestuis que trust.]—A trustee, on the eve of his bkpcy. & without any pressure or request by his *cestuis que trust*, executed a deed, by which he conveyed an estate to a person, upon trust to raise thereout by sale or mtge. £4,200, & therewith to make good breaches of trust which he had committed in respect of certain scheduled trust estates. By the deed he charged the property conveyed with the payment of the £4,200, & conferred on the grantee, his exors. or administrators, a power to appoint new trustees. The deed was not communicated to any of the beneficiaries : —*Held :* the deed was not a fraudulent preference within 1883 Act, s. 48, because the object of bkpt. in executing it was not to prefer some creditors to others, but to shield himself from the consequences of the breaches of trust committed by him.—SHARP *v.* JACKSON, [1899] A. C. 419 ; 68 L. J. Q. B. 866 ; 80 L. T. 841 ; 15 T. L. R. 418 ; 6 Mans. 264, H. L. ; *affg.* S. C. *sub nom.* NEW, PRANCE & GARRARD'S TRUSTEE *v.* HUNTING, [1897] 2 Q. B. 19, C. A.

Annotations :—**Consd.** *Re* Blackburn, Buckley's Case, [1899] 2 Ch. 725. **Apld.** *Re* Vautin, *Ex p.* Saffery, [1900] 2 Q. B. 325. **Consd.** Radcliffe *v.* Abbey Road & St. John's Wood Permanent Bldg. Soc. (1918), 87 L. J. Ch. 557. **Refd.** Hermoux *v.* Harbord (1898), 14 T. L. R. 243 ; *Re* Blackpool Motor Car Co., Hamilton *v.* Blackpool Motor Car Co., [1901] 1 Ch. 77 ; *Re* Lake, *Ex p.* Dyer, [1901] 1 K. B. 710 ; *Re* Cozens, Green *v.* Brusley, [1913] 2 Ch. 478. **Mentd.** Taylor *v.* London & County Banking Co., London & County Banking Co. *v.* Nixon, [1901] 2 Ch. 231, C. A. ; *Re* Pidcock, Penny *v.* Pidcock (1907), 51 Sol. Jo. 514 ; Wigan *v.* English & Scottish Law Life Assce. Assocn., [1909] 1 Ch. 291.

7319. Deposit of securities—Not communicated to cestuis que trust or co-trustees.]—A trustee, who had misappropriated the trust fund, on the eve of his bkpcy. deposited in the trust box, which was then in his custody, as solr. to the trust, but voluntarily & without any communication with his co-trustees or *cestuis que trust*, securities belonging to him, accompanied by a memorandum admitting his breach of trust, expressing gratitude for kindness received from his *cestuis que trust* during his pecuniary difficulties, & stating that the deposit was made in order to make good the breach of trust :—*Held :* on the memorandum, bkpt.'s dominant motive for the deposit was, not to prefer his *cestuis que trust* to his other creditors, but to repair the wrong he had done by his breach of trust, & the transaction could not be set aside as fraudulent preference. —*Re* LAKE, *Ex p.* DYER, [1901] 1 K. B. 710 ; 70 L. J. K. B. 390 ; 84 L. T. 430 ; 49 W. R. 291 ; 17 T. L. R. 296 ; 45 Sol. Jo. 310 ; 8 Mans. 145, C. A.

D. Transactions in Fulfilment of prior Agreements.

7320. Price of goods purchased retained—Under agreement with surety.]—A. became bound as a surety for B., who, in order to indemnify him, agreed that he should retain out of any money

m. ——.]—The transfer by the defaulting treasurer of a municipality to the bankers of the municipality of the accepted cheque of a third person for the amount due by him to the municipality, cannot be impeached under Assignments & Preferences Act, the duty to make good his wrong being sufficient to protect the transaction.—HALWELL *v.* WILMOT TOWNSHIP (1897), 24 A. R. 628.—**CAN.**

7317 i. *Property mortgaged to co-executor—To secure money misappropriated by insolvent.*]—W. having become insolvent, & wishing to secure to an estate of which he was an exor., money, which he had used for his own purposes, gave his co-exors. a mtge. on his property for the purpose :—*Held :* the mtge. was not void under R. S. O., 1887 (c. 124), s 2.—MOLSONS BANK *v.* HALTER (1890), 18 S. C. R. 88.—**CAN.**

n. *Declaration of trust—Not assented to by cestuis que trust.*]—L., a practising barrister & solr., having misapplied clients' money & being also indebted in other large sums, upon finding himself hopelessly insolvent made up his mind to prefer those particular creditors in the distribution of his estate, & conveyed land, his only asset, to R. in trust for the benefit of named creditors. No assent of creditors was shown :—*Held :* in the circumstances the preference given to the limited class of creditors could not be attacked.—IMPERIAL TRUSTS CO. OF CANADA *v.* LANGLEY (1917), 11 O. W. N. 262.—**CAN.**

o. —— *Communicated to cestuis que trust on eve of bankruptcy.*]—A father borrowed £300 from a brother, & was told by letter to "keep it for the bairns." Some nine years afterwards the father got into difficulties, but before committing an act of bkpcy. told his eldest son of the trust. His children consulted a firm of solrs., who made a demand upon the father for the amount of the fund & interest, & the father paid some of the money before bkpcy., & arranged for payment of further sums, which were paid to the solrs. after the bkpcy. :—*Held :* the direction "to keep it for the bairns" & the subsequent conduct of the parties constituted a valid trust prior to the bkpcy., & as the motive of debtor in paying the money to the children's solrs. was to restore the fund of which he was a trustee, the payments to the solrs. did not amount to a fraudulent preference.—*Re* FRASER (1910), 29 N. Z. L. R. 1004.—**N.Z.**

PART XX. SECT. 12, SUB-SECT. 4.—D.

p. *General rule.*]—A preference given on the verge of insolvency, in virtue of a previous agreement, is not

Sect. 12.—*Avoidance of preference: Sub-sect.* 4, *D.*]

that should be due from him to B. in respect of any dealings between them in trade so much as he should pay on the bond. B. afterwards sold goods to A. of a less value than the money secured by the bond, & then became a bkpt., & A. was obliged to satisfy the bond :—*Held :* the assignees of B. could not recover in an action for goods sold & delivered, there being nothing due to bkpt.'s estate on the original contract.—DOBSON *v.* LOCKHART (1793), 5 Term Rep. 133 ; 101 E. R. 77.

Annotations :—**Refd.** Pennell *v.* Walker (1856), 26 L. J. C. P. 9. **Mentd.** Parker *v.* Ramsbottom (1824), 5 Dow. & Ry. K. B. 138.

7321. Payment out of proceeds of particular transaction—Financed by creditor on condition of payment.]—A trader, having a large order & not having funds to execute it, borrowed money from B. upon an agreement that B. should receive the money for the order & repay himself. At the time of the loan B. knew the trader to be insolvent, & before the money became due the trader was arrested several times, & was bailed by B., & so avoided committing an act of bkpcy. until after the money became due, when B. received it :—*Held :* not a fraudulent preference.—HUNT *v.* MORTIMER (1829), 10 B. & C. 44 ; L. & Welsb. 60 ; 5 Man. & Ry. K. B. 12 ; 8 L. J. O. S. K. B. 62 ; 109 E. R. 367.

Annotations :—**Distd.** Vacher *v.* Cocks (1830), 1 B. & Ad. 145. **Apld.** Hutchinson *v.* Heyworth (1838), 9 Ad. & El. 375. **Consd.** Bills *v.* Smith (1865), 6 B. & S. 314. **Refd.** *Re* Craven & Marshall, *Ex p.* Craven (1870), L. R. 10 Eq. 648. **Mentd.** Rodick *v.* Gandell (1852), 1 De G. M. & G. 763, L. C.

7322. Payments under agreement for overdraft.]—*Semble :* payments made to a banker under an agreement, by which the customer was allowed to overdraw his account, were not voluntary payments so as to make them a fraudulent preference.—VACHER *v.* COCKS (1830), 1 B. & Ad. 145 ; 8 L. J. O. S. K. B. 341 ; 109 E. R. 741.

Annotations :—**Consd.** Bills *v.* Smith (1865), 6 B. & S. 314. **Refd.** *Re* Vautin, *Ex p.* Saffery (1900), 69 L. J. Q. B. 703. **Mentd.** Carr *v.* Burdiss (1835), 5 Tyr. 309 ; Thomas *v.* Connell (1838), 4 M. & W. 267.

7323. Furniture supplied by landlord—Agreement to give bill of sale to secure price.]—A. became tenant of a house to B., who put furniture in, upon an arrangement that A. should execute to B. a bill of sale of the furniture, as a security for its price. The bill of sale was executed within three months of A.'s arrest by his creditors : —*Held :* a conveyance or transfer made in *bonâ fide* pursuance of a previous agreement was not voluntary, & it was not necessary, in order to support it, that there should have been pressure by the creditor, or apprehension by debtor that by not making it he would be in a worse condition.—MOGG *v.* BAKER (1838), 4 M. & W. 348 ; 1 Horn & H. 461 ; 8 L. J. Ex. 55 ; 150 E. R. 1462.

Annotations :—**Consd.** Brown *v.* Kempton (1850), 19 L. J. C. P. 169, Ex. Ch. **Folld.** Strachan *v.* Barton (1856), 11 Exch. 647. **Consd.** Edwards *v.* Glyn (1859), 2 E. & E. 29. **Refd.** Vickery *v.* Reed (1841), 5 Jur. 876 ; Van Casteel *v.* Booker (1848), 2 Exch. 691 ; Stanger *v.* Wilkins (1855), 19 Beav. 626 ; Edwards *v.* Glyn (1859), 33 L. T. O. S. 236. **Mentd.** Holroyd *v.* Marshall (1860), 2 De G. F. & J. 596, L. C. ; Langton *v.* Waring (1865), 18 C. B. N. S. 315.

7324. Alleged promise to transferee's solicitor—Deposit of title deeds to make good debt to trust in which transferee interested.]—Bkpt. deposited title deeds of property with his brother, when bkpcy. was inevitable by reason of the stoppage of a firm, with which he had very extensive transactions. Bkpt. alleged that, as trustee, he was indebted to an estate to which his brother was beneficially entitled, & that he deposited the deeds, in pursuance of a promise previously given to his brother's solr. :—*Held :* as such promise was not binding on bkpt., & as he had sent the deeds on the very day after the firm had stopped payment, it was an act of fraudulent preference.—*Re* BARTON (1861), 31 L. J. Bcy. 7 ; 6 L. T. 142, L. JJ.

7325. Verbal promise to give security.]—Money was lent upon a verbal promise to give security, & a deed was executed two days before bkpcy. purporting to be an absolute assignment to the creditor of the equity of redemption in some property :—*Held :* the promise was sufficient to

void.—DALTON & RYAN'S TRUSTEES *v.* ATTWOOD & HAYNES (1818), 1 Nfld. L. R. 67.—**NFLD.**

q. ——.]—On Dec. 19, 1885, a transfer of book debts was made by B. & Co., to deft., under a contract therefor, made on Aug. 16, 1884, whereby deft. lent the firm $15,000. The firm subsequently made an assignment under 48 Vict. c. 26, for the benefit of their creditors. The firm were not insolvent at the time of the transfer.—CLARKSON *v.* STERLING (1887), 14 O. R. 460; 15 A. R. 234.—**CAN.**

r. ——.]—J., in pursuance of a previous agreement with B., & on being pressed by B., who had a pecuniary claim against him, which nearly equalled half the amount of all the pecuniary claims against him, assigned to B. the whole of his property by way of sale, in consideration in part of B.'s pecuniary claim against him :—*Held :* by such assignment J. did not give B. an " undue preference " to his other creditors.—JOAKIM *v.* SECRETARY OF STATE FOR INDIA (1881), I. L. R. 3 All. 530.—**IND.**

s. *Consent to judgment on bond —Under provision in previous marriage settlement.*]—The terms of a marriage settlement provided that bkpt. should consent to entering judgment on a bond. The question at the trial was, whether bkpt. procured his goods to be taken in execution " with intent to defeat or delay his creditors " ? Bkpt., on the eve of his bkpcy., gave his consent to entering judgment on the bond :—*Held :* bkpt. being under a moral obligation to provide for his wife, was not bound to withhold his consent, in case he had been pressed by his wife & her trustee for permission to enter judgment on the bond, & the ct. refused to disturb the verdict found for deft. in an action by the assignee.—ROONEY *v.* WHITE (1840), 3 I. L. R. 153.—**IR.**

t. *Payments under compromise of existing debt.*]—Payments by debtor within six months of his insolvency of fortnightly sums of money, in pursuance of a prior valid agreement with his creditor for the compromise of an existing debt :—*Held :* to have been received in good faith by the creditor & not fraudulent preferences.—GOW *v.* WHITE (1908), 5 C. L. R. 865. —**AUS.**

7325 i. *Verbal promise to give security.*]—A., the son of B., was the holder of two farms under Land Act, 1897. In Sept. A. owed B. a large sum of money, A. being hopelessly involved in financial difficulties. B. advanced money to A. & paid certain of A.'s creditors. On Oct. 3, & before paying the creditors, it was verbally agreed between A. & B. that as soon as A. could legally do so, he would transfer both farms to B. as security for the advances so made. In Oct., A. agreed, in writing, that in consideration of the money advanced, he would transfer one farm to B. whenever required to do so, & that in consideration of £100 paid to M., one of A.'s creditors, by B. & in consideration of £200, which B. agreed to pay M., A. would transfer the other farm to B. whenever called upon to do so. A. transferred one farm to B. on Feb. 1, 1909, & the transfer was registered on Feb. 16. On Feb. 19 A. executed a transfer of the other farm to B., which was registered on Mar. 15. On May 27, an insolvency petition was presented against A. & on June 14, he was adjudicated on the petition :—*Held :* even on the assumption that the agreements were legal, the transaction was fraudulent & void as against the trustee in insolvency under Insolvency Act, 1874, ss. 108, 109.—*Re* MCSHARRY, MCSHARRY *v.* HARDING, [1911] S. R. Q. 75. —**AUS.**

7325 ii. —— *Unenforceable as not complying with Statute of Frauds.*]—Debtor, unable to pay his debts as they became due, gave to a creditor, one month before sequestration, & at a time when he must have contemplated insolvency as a probable contingency, security over land in pursuance of an antecedent verbal promise made when he became his creditor : —*Held :* the giving of such security was not a fraudulent preference, although the promise to give the security could not, against the will of debtor, have been enforced, as it was not in writing so as to comply with Stat. Frauds.—GRIEVE *v.* BODEY (1894), 20 V. L. R. 269.—**AUS.**

7325 iii. —— *Security given by promisor's executor.*]—R. being pressed for payment under a guarantee to a bank of the amount of W.'s overdraft, verbally made a proposal for the

support the deed, & the deed must stand as security for the debt.—MORRIS *v.* VENABLES (1866), 15 W. R. 2.

7326. —— Delay occasioned by illness of solicitor.]—In Oct. a creditor visited his debtor's place of business, & seeing that the business was misconducted, asked him to pay off the money. Debtor proposed to give security on a certain property, but the property being insufficient, it was arranged that the creditor should take it in satisfaction of part of his debt, & in Dec. debtor & creditor went to a solr. & instructed him to draw a conveyance. Owing to the illness of the solr. the matter was delayed & the conveyance was not executed till Feb. Debtor became bkpt. in Mar. :—*Held :* as the conveyance was executed in pursuance of the verbal agreement made in Dec. in consequence of the application of the creditor, it was not a fraudulent preference.—*Re* CRAVEN & MARSHALL, *Ex p.* TEMPEST (1870), 6 Ch. App. 70 ; 40 L. J. Bcy. 22 ; 23 L. T. 650 ; 19 W. R. 137, L. JJ.

Annotations :—**Folld.** *Re* Walker, *Ex p.* Topham (1873), 28 L. T. 716, L. JJ. **Consd.** *Re* Meldrum, *Ex p.* Butcher (1874), 9 Ch. App. 595, L. JJ. ; Smith *v.* Pilgrim (1876), 2 Ch. D. 127. **Reid.** *Re* Cherry, *Ex p.* Bolland (1871), 7 Ch. App. 24, L. JJ. ; Butcher *v.* Stead (1875), 33 L. T. 541, H. L. ; *Re* Wincham Shipbuilding, etc., Co., Poole, Jackson & Whyte's Case (1878), 26 W. R. 588. **Mentd.** *Re* Patent File Co., Birmingham Banking Co.'s Claim (1870), 40 L. J. Ch. 190, L. JJ. ; *Re* Douglas, *Ex p.* Snowball (1872), 7 Ch. App. 534, L. JJ. ; *Re* Liverpool & London Guarantee & Accident Insce., Gallagher's Case (1882), 46 L. T. 54.

7327. Agreement to transfer scrip—Scrip not transferable until certain date.]—B., in June, 1866, borrowed £350 from deft. on a promissory note, & at the same time deposited with deft. as security an agreement to transfer fifteen scrip certificates in a limited co. By the articles of association shares in the co. were not transferable until Jan., 1867. On Jan. 14, 1867, B. handed over the scrip to deft., & on the next day B. stopped payment :—*Held :* as the handing over of the scrip in Jan., 1867, was merely a carrying out of the agreement made in June, 1866, it was not a fraudulent preference.—HALLIDAY *v.* HOLGATE (1867), 17 L. T. 18, N. P. ; *affd.* on another point (1868), L. R. 3 Exch. 299, Ex. Ch.

Annotations :—**Mentd.** Mulliner *v.* Florence (1878), 3 Q. B. D. 484, C. A. ; Yungmann *v.* Briesemann (1892), 67 L. T. 642, C. A. ; Cox *v.* Liddell (1895), 2 Mans. 212 ; Durham *v.* Robertson, [1898] 1 Q. B. 765, C. A. ; Hughes *v.* Pump House Hotel Co., [1902] 2 K. B. 190, C. A. ; Whiteley *v.* Hilt, [1918] 2 K. B. 808.

7328. Bill of sale granted in accordance with prior agreement.]—A bill of sale was executed in July, 1870, in accordance with an agreement made in Oct., 1868. The grantor filed a petition for liquidation on the same day, but after the execution of the bill of sale, & the bill of sale was registered within twenty-one days :—*Held :* the title of the holder of the bill of sale prevailed over that of the trustee.—*Re* BROADBENT, *Ex p.* HOMAN (1871), L. R. 12 Eq. 598 ; 36 J. P. 148.

Annotations :—**Expld.** *Re* Fairbrother, *Ex p.* Harding (1873), L. R. 15 Eq. 223. **Apprvd.** *Re* Jeavons, *Ex p.* Mackay, *Ex p.* Brown (1873), 42 L. J. Bcy. 68, L. JJ. **Reid.** Hollinshead *v.* Egan, [1913] A. C. 564, H. L. **Mentd.** Jarvis *v.* Jarvis (1893), 63 L. J. Ch. 10.

7329. —— For successive renewals to avoid registration.]—S., a trader, in May, 1870, being in want of money, borrowed of C. £55 on the security of two bills of sale, by which he assigned the whole of his property, worth about £600, to C. It was agreed verbally between S. & C. that the bills of sale should be given up within the period limited for registration, & new bills of sale from time to time substituted for them. That was done twice. The last bills of sale were given on July 20, 1870. No fresh advance was made on the occasion of the renewal. On Aug. 9, 1870, S. filed a petition for liquidation by arrangement, & on the next day the bills of sale of July 20 were registered. The trustee under the liquidation took possession of the goods comprised in the bills of sale, & the mtgee. brought an action of trover against him to recover possession of the goods :—*Held :* the bills of sale were void as against the trustee under the liquidation.—*Re* SPARKE, *Ex p.* COHEN (1871), 7 Ch. App. 20 ; 41 L. J. Bcy. 17 ; 25 L. T. 473 ; 20 W. R. 69, L. JJ.

reduction of the overdraft, & offered to give security over certain land for repayment of the debt. R. died without giving the security, & probate of his will was granted to W. Subsequently the bank asked W. to carry out R.'s promise & execute the mtge. : —*Held :* the mtge. was void, as it had not been taken by the bank *bonâ fide* as regarded the other creditors of R.—*Re* CRACKNELL, *Ex p.* OFFICIAL ASSIGNEE, AUSTRALIAN JOINT STOCK BANK, LTD., RESPONDENTS (1895), 16 N. S. W. B. 120.—**AUS.**

7328 i. *Bill of sale granted in accordance with prior agreement.*]—Goods were sold in Feb. by P. to W. on the terms part cash on completion of delivery & the balance by four equal promissory notes, & it was further agreed that if at any time W. made default in payment, he should give P. a bill of sale over certain goods. Default was made, & subsequently in May, June, or July following bills of sale were given over the goods. In Nov. a petition in bkpcy. was presented against W. on which a sequestration order was made on Nov. 25 :—*Held :* the agreement to defer the taking or giving the bill of sale was evidence of an intention to defeat or delay W.'s creditors.—*Re* WALSH, *Ex p.* OFFICIAL ASSIGNEE, REID (1894), 15 N. S. W. B. 101.—**AUS.**

7328 ii. ——.]—A chattel mtge. given in pursuance of a previous agreement therefor to cover an antecedent debt & advance made at the time of the agreement, both the mtgor. & mtgee. believing the former to be solvent when the mtge. was actually made, was impeached within the sixty days provided for by 54 Vict. c. 20, s. 2, amending R. S. O., 1887, c. 124 :—*Held :* the mtge. was valid.—LAWSON *v.* MCGEOCH (1893), 20 A. R. 464. —**CAN.**

7328 iii. ——.]—Conveyances & a bill of sale, although absolute in form, made by the grantor when he was insolvent, to secure a past due indebtedness in pursuance of a pre-existing agreement, held not invalid under Nova Scotia Assignments Act.—POWER *v.* MUNRO (1912), 11 E. L. R. 508; 5 D. L. R. 577.—**CAN.**

7328 iv. —— *Purposely postponed to protect credit of debtor.*]—When the giving of a security is purposely postponed until the trader is in a state of insolvency, in order to prevent the destruction of his credit which would result from its registry, such postponement is evidence of an intention to commit an actual fraud against the general creditors.—BROW *v.* CRABBE & WRIGHT (1911), 9 E. L. R. 336. —**CAN.**

7328 v. —— ——.]—Certain creditors believing their debtor to be insolvent, but not desiring by taking a chattel mtge. to bring down upon him his other creditors, procured from him an agreement in writing to give, on default of payment or on demand, a chattel mtge. to secure the debt. About four months after pursuant to the agreement, debtor gave a chattel mtge., within sixty days from the date of which he made an assignment for the benefit of his creditors :—*Held :* 54 Vict. c. 20 applied, & the fraudulent intent must be presumed.—BREESE *v.* KNOX (1896), 24 A. R. 203.—**CAN.**

7328 vi. —— *By firm to secure both firm & private debt.*]—A bill of sale, executed by the members of a partnership, purported to be made in consideration of £300 already advanced through a cash credit bond for £400, & of a present cash advance of £300. The first sum of £300 consisted of two sums of £150 each, one of which was a private debt due from one of the mtgors. to one of the mtgees. The second sum of £300 was not advanced in cash, but by acceptances. It was contended that the deed was fraudulent, because it mtged. the property of the firm to secure a private debt of one of the partners :—*Held:* if there was a genuine bargain that the private debt of a partner should be so secured, & a consideration passed, the transaction could not be impeached as a fraudulent preference.—MORRIS *v.* MCNEIL, O. B. & F. 55.—**N.Z.**

7328 vii. —— *More than sixty days before bankruptcy.*]—A mtge. of stock executed more than sixty days before the bkpcy. of the mtgor. & in consideration of a past advance held bad as against the official assignee, notwithstanding that it was given pursuant to an agreement in writing entered into at the time of the advance.—*Re* SOMERVILLE (1889), 7 N. Z. L. R. 400.—**N.Z.**

7329 i. —— *For successive renewals to avoid registration.*]—J. & C. gave a bill of sale to deft. to secure a *bonâ fide* advance, & it was agreed that, to

Sect. 12.—Avoidance of preference: Sub-sect. 4, D.]

Annotations:—**Consd.** *Re* Bent, *Ex p.* Mackenzie (1873), 42 L. J. Bcy. 25, L. J.; Ramsden *v.* Lupton (1873), L. R. 9 Q. B. 17, Ex. Ch. **Distd.** *Re* Cook, *Ex p.* Izard (1874), 9 Ch. App. 271, L. JJ. **Folld.** *Re* Stevens, *Ex p.* Stevens (1875), L. R. 20 Eq. 786. **Distd.** *Re* Jackson, *Ex p.* Hall (1877), 4 Ch. D. 682. **Refd.** *Re* Couston, *Ex p.* Ward (1872), 27 L. T. 502, L. JJ. **Mentd.** Halliday *v.* Harris (1874), L. R. 9 C. P. 668; *Re* Wood, *Ex p.* Musgrave (1878), 10 Ch. D. 94; *Re* Barnett, *Ex p.* Reynolds (1885), 15 Q. B. D. 169, D. C.

7330. —— ——.]—A trader gave to one of his creditors a bill of sale of all his property to secure an existing debt & a fresh advance. It was verbally agreed that the bill of sale should not be registered, but that the grantor should give a new bill of sale in substitution for the first when required to do so by the grantee. More than two months before the grantor filed his petition, the grantee put a man in possession of the property, but the grantor's name remained on the premises as the ostensible occupier of them:—*Held:* there having been a sufficient fresh advance when the first bill of sale was given, the substituted bill of sale was good as against the trustee.—*Re* JACKSON, *Ex p.* HALL (1877), 4 Ch. D. 682; 46 L. J. Bcy. 39; 35 L. T. 947; 25 W. R. 382.

See, further, BILLS OF SALE.

7331. Promise should be unconditional.]—Where a sum of money is advanced upon the faith of a promise by debtor to give a bill of sale of his property, the sum so advanced is to be considered as advanced on the security of the bill of sale, but in such a case the promise must be an absolute one.—*Re* ASH, *Ex p.* FISHER (1872), 7 Ch. App. 636; 41 L. J. Bcy. 62; 26 L. T. 931; 20 W. R. 849, L. JJ.

Annotations:—**Distd.** *Re* Bent, *Ex p.* Mackenzie (1873), 42 L. J. Bcy. 25, L. J. **Consd.** *Re* King, *Ex p.* King (1876), 2 Ch. D. 256, C. A.; *Re* Gibson, *Ex p.* Bolland (1878), 8 Ch. D. 230; *Re* Barker, *Ex p.* Kilner (1879), 13 Ch. D. 245, C. A. **Folld.** *Re* Tunstall, *Ex p.* Burton (1879), 13 Ch. D. 102, C. A. **Consd.** *Re* Hemingway, *Ex p.* Hauxwell (1883), 23 Ch. D. 626, C. A. **Distd.** Morris *v.* Morris, [1895] A. C. 625, P. C. **Consd.** *Re* Jackson & Bassford, [1906] 2 Ch. 467. **Folld.** *Re* Columbian Fireproofing Co., [1910] 1 Ch. 758. **Refd.** *Re* Cook, *Ex p.* Izard (1874), 9 Ch. App. 271, L. JJ.; *R. v.* Creese (1874), L. R. 2 C. C. R. 105, C. C. R. **Mentd.** Harrison *v.* Cohen (1875), 32 L. T. 717; Philps *v.* Hornstedt (1875), 1 Ex. D. 62, Ex. Ch.; Heath *v.* Cochrane (1877), 46 L. J. Q. B. 727.

7332. Agreement to give security when creditor "lost confidence."]—Shortly before a trader filed his petition he executed a bill of sale of substantially the whole of his property, to secure the repayment of an advance, which had been made to him two months previously. At the time when the advance was made, the borrower agreed to give a bill of sale to secure it, but the agreement was that the bill of sale was not to be signed, until the lender "lost confidence" in the borrower:—*Held:* this amounted to an agreement to postpone the giving of the bill of sale until the grantor should be on the verge of bkpcy., & it could not support the deed.—*Re* TUNSTALL, *Ex p.* BURTON (1879), 13 Ch. D. 102; 41 L. T. 571; 28 W. R. 268, C. A.

Annotation:—**Mentd.** *Re* Hemingway, *Ex p.* Hauxwell (1883), 23 Ch. D. 626, C. A.

7333. Agreement to give security if & when required.]—Debtor gave promissory notes for the amount of his debt, which notes contained the words "security to be given by bill of sale when required." One year afterwards the creditor required security, & six weeks after the request debtor gave him a bill of sale over a portion only of his property, which was registered. Debtor having afterwards petitioned for liquidation the creditor took possession under his bill of sale:—*Held:* (1) the bill of sale was not bad as a

avoid registration under Bills of Sale Act fresh bills of sale from time to time for the same consideration should be given by way of renewal within thirty days of each other. When the last three bills of sale were executed J. & C. were actually insolvent. The last bill of sale was registered, & possession was taken under it by defts. The estate of J. & C. was afterwards sequestrated:—*Held:* the last bill of sale was a security for the past debt & had the effect of preferring defts. to other creditors within Insolvency Act, s. 8, & was void.—LYONS *v.* COHEN (1877), KNOX, 92.—**AUS.**

a. *Mortgage granted in accordance with prior agreement—Antedated to date of agreement.*]—A. within sixty days before the sequestration of his estate, gave his father a mtge. on a leasehold. No valuable consideration passed when the mtge. was executed. It was alleged that A. more than sixty days before his insolvency had agreed with his father to give him the mtge., & that the mtge. deed was antedated so as to appear to have been executed as of the date of the agreement, at which time there was no proof of A. being in insolvent circumstances, or contemplating insolvency:—*Held:* the deed must be set aside as void under Insolvent Act.—MACKENZIE *v.* HOLLINSHEAD (1873), 11 N. S. W. S. C. R. 83.—**AUS.**

b. *Renewal of chattel mortgage.*]—55 Vict. c. 26, s. 2, does not enable an assignee for the general benefit of creditors to question the validity of the renewal of a chattel mtge.—TALLMAN *v.* SMART (1894), 25 O. R. 661.—**CAN.**

7332 i. *General agreement to give security—To party procuring accommodation acceptances.*]—Distillers procured acceptance for their accommodation upon a general agreement that the party so accommodating them should be secured by a transfer of whisky in bond. A delivery order & invoice were made out in May, which was alleged to have been done in pursuance of the general agreement of Mar. & Apr. previous:—*Held:* this did not prevent the operation of the law with regard to a fraudulent preference.—*Re* LEFROY, STEIN & CO. (1866), 14 L. T. 607.—**IR.**

7332 ii. —— *To party indorsing notes for debtors' accommodation.*]—In Apr., 1898, a firm obtained from a bank accommodation of about $8,200 for the purpose of buying goods upon promissory notes indorsed for their accommodation by deft., they promising him to retire the notes out of the proceeds of the sales of the goods. The proceeds were not so applied, to deft.'s knowledge, & the notes were from time to time renewed in full, deft. indorsing them upon each renewal. He was satisfied by a general promise that they would secure him, but no security was ever definitely mentioned, nor did he ever press for it. On May 27, 1899, the firm sold out their assets. Before the sale was carried out deft. became aware that the firm was insolvent. The purchase-money was paid to the firm, $1,000 in cash, $5,000 by a cheque to their order, & the remainder by promissory notes. The firm handed over the cash to deft., & indorsed the cheque & some of the notes to him, & he retired all the notes upon which he was liable, & paid, besides, some rent, taxes, & other debts due by the firm. On June 2, 1899, the firm assigned for the benefit of their creditors:—*Held:* (1) the promise to give deft. security was not sufficient to rebut the statutory presumption of a preference; (2) the payment of $1,000 in cash to deft. could not be attacked; (3) the $5,000 cheque transferred to deft. was the transfer of a security, & he was liable to repay the proceeds of it, less the portion expended in paying debts, etc., of the firm.—ARMSTRONG *v.* JOHNSTON (1900), 20 C. L. T. Occ. N. 334; 32 O. R. 15.—**CAN.**

7332 iii. —— —— *Agreement not contemporaneous with indorsement.*]—A chattel mtge. to indemnify an indorser if given in good faith in pursuance of an antecedent absolute promise, is not avoided by the Act relating to assignments & preferences by insolvents, merely because it was not given contemporaneously with the indorsement or other liability.—EMBURY *v.* WEST (1888), 15 A. R. 357.—**CAN.**

c. *Agreement that creditor should "go good"—Not carried out.*]—A. made a bill of sale to his brother, W., the alleged consideration being a prior agreement that W. should "go good" for amounts owing to two of the creditors of A., & a cash advance of $20. At the time the agreement was made, & at the time the bill of sale was given, A. was insolvent to the knowledge of W., who had not carried out the agreement:—*Held:* the bill of sale was void.—MCCURDY *v.* GRANT (1900), 32 N. S. R. 520.—**CAN.**

7333 i. *Agreement to give security if & when required.*]—A trader, when in insolvent circumstances, to the knowledge of himself & defts., executed to them a bill of sale of his stock-in-trade, pursuant to an agreement made with them nearly four years previously, to give it whenever required, they advancing to him upon the faith of the agreement a sum of money for use in his business and giving him a line of credit. Shortly after executing the bill of sale, he made an assignment for the benefit of his creditors under C. S. N. B., 1903, c. 141:—*Held:* the agreement was a fraud upon the other creditors, & the bill of sale should be set aside.—TOOKE BROTHERS, LTD. *v.* BROCK & PATTERSON, LTD.

fraudulent preference under 1869 Act, s. 92; (2) the interval of six weeks between the request for security & the execution of the bill of sale was not in itself sufficient so to disconnect the two as to make the bill of sale voluntary.—*Re* BENT, *Ex p.* MACKENZIE (1873), 42 L. J. Bcy. 25, L. J.

Annotations:—**Refd.** *Re* Softley, *Ex p.* Winter (1875), 24 W. R. 68. **Mentd.** *Re* Parker, *Ex p.* Charing Cross Advance & Deposit Bank (1880), 16 Ch. D. 35, C. A.; Blaiberg *v.* Parke (1882), 10 Q. B. D. 90.

7334. ——.]—When an assignment comprising the whole of the grantor's property is given on the eve of his bkpcy. to secure a pre-existing debt, & it is attempted to support it by an agreement alleged to have been made at the time when the money was advanced, it is for the ct. to judge from all the surrounding circumstances whether the agreement was a *bonâ fide* one, or whether the giving of the bill of sale was purposely postponed in order to protect the grantor's credit. The fact that the agreement was to give the bill of sale "if or when required" by the creditor does not of itself necessarily invalidate it.—*Re* BARKER, *Ex p.* KILNER (1879), 13 Ch. D. 245; 41 L. T. 520; 44 J. P. 264; 28 W. R. 269, C. A.

Annotations:—**Apprvd.** *Re* Hemingway, *Ex p.* Hauxwell (1883), 23 Ch. D. 626, C. A. **Expld.** *Re* Jackson & Bassford, [1906] 2 Ch. 467.

7335. Payment out of proceeds of security—Debtor allowed to remain in possession.]—Debtor executed an assignment of the goodwill & fixtures of his business to his brother, in satisfaction of money advanced. Two years afterwards debtor, who had retained possession of the goodwill & fixtures, sold them, & his brother obtained payment of the purchase-money. Debtor was then insolvent, & soon afterwards presented a petition for liquidation by arrangement:—*Held:* the payment of the purchase-money to debtor's brother was not a fraud upon the other creditors, & could not be set aside.—*Re* WILSON, *Ex p.* WILSON (1874), 29 L. T. 860; 22 W. R. 241, L. JJ.

7336. Payment not expressly stated to be in fulfilment of promise.]—In Aug., 1872, P., a trader abroad, requested C., her debtor, both personally & by letter, to make her some payment on account of the money due to her personally, & also as extrix. under her mother's will, whereupon C. promised payment to the extent of £2,350. The debt exceeded £5,000. In Nov., 1872, C. paid to P., through a foreign bank, £4,000, but without expressly stating that it was paid in pursuance of the previous promise. On the 28th of the same month C. was adjudicated a bkpt.:—*Held:* the payment was not a fraudulent preference.—*Re* CRAWFORD, *Ex p.* PUTMAN (1874), 30 L. T. 335; 22 W. R. 569.

7337. Offer of security at first declined & subsequently asked for.]—Debtor in Aug. offered his bankers a mtge. of a ship which he was building as a security for his overdraft. The bankers did not then take the security, but debtor agreed to let them have it at any time, if they should desire it. In Oct. the bankers called upon him to fulfil his promise, & he deposited the builder's certificate of the ship with their manager, who took possession of the ship, & applied to the authorities to have her registered in his name as owner, but as the ship had not been launched that could not be done. A few days later debtor filed his petition:—*Held:* the transaction amounted to a valid mtge. of the ship, & was not a fraudulent preference.—*Re* SOFTLEY, *Ex p.* HODGKIN (1875), L. R. 20 Eq. 746; 44 L. J. Bcy. 107; 33 L. T. 62; 24 W. R. 68.

Annotations:—**Refd.** Bulteel & Colmore *v.* Parker & Bulteel's Trustee (1916), 32 T. L. R. 661. **Mentd.** *Re* Wincham Shipbuilding, etc., Co., Poole, Jackson & Whyte's Case (1878), 26 W. R. 588.

7338. Promise given to deceased creditor—Renewed to executor.]—Debtor having borrowed £450 from H., promised to give her a bill of sale for the amount when called upon to do so. In

(1907), 3 E. L. R. 270; 3 N. B. Eq. Rep. 496.—**CAN.**

7333 ii. —— *Not validated by pressure to procure giving of security.*]—In 1869 W. agreed to make cash advances from time to time to B., & B. promised to give W. security on his property when W. should require it. W. made cash advances to a large amount. In Aug., 1872, B., being hopelessly involved, W. by his agent, T., after very considerable urging, obtained security for W., upon almost the entire property of B. W. did not know the exact state of B.'s affairs, or the full amount of B.'s indebtedness, but knew that B.'s affairs were desperate. B. gave W. a certificate of sale of a ship on Aug. 17, 1872, & B. confirmed the sale to W. on Sept. 20. B. made an assignment for the benefit of his creditors in Nov., & his assignee filed a bill to recover back the property so transferred to W.:—*Held:* the transfer from B. to W. was an unjust preference, & neither the previous promise of B. to give security, nor the pressure brought to bear on him by T. made the transfer good.—MCLEOD *v.* WRIGHT (1877), 1 P. & B. 68.—**CAN.**

d. *Agreement to give security "in case anything should happen."*]—F., a ship owner, employed as his agents in N.Y. S. & Co., of which S. was a member. F. became indebted to S. & C., & promised to give them security "in case anything happened," & mentioned as such security a mtge. on a ship. Later F. executed a mtge. of 20,64 shares of the ship in favour of S., & had same recorded, & within thirty days thereafter a writ of attachment in insolvency was issued against him:—*Held:* the promise to give security "in case anything should happen," could only mean "in case the party should go into insolvency," & the transfer was void under Insolvent Act, 1875, s. 133.—JONES *v.* KINNEY (1885), 11 S. C. R. 708.—**CAN.**

7336 i. *Payment not expressly stated to be in fulfilment of promise—Chattel mortgage given five months after date of advance.*]—A chattel mtge. was dated Apr. 22, 1909, & was filed on May 1. Debtor was insolvent at the date of the mtge., the moneys secured by which were advanced in Nov., 1908:—*Held:* the mtge. had the effect of giving the mtgee. a preference over the other creditors & was void.—GOWER *v.* KOLCHEN (1910), 14 W. L. R. 1.—**CAN.**

f. *Agreement to deliver goods—Delivery within three months of bankruptcy.*]—T., in pursuance of an antecedent contract, delivered coals to a co. T. was at the time indebted to the co. & the price was to be placed to his credit. The contract was made more than three months prior to T.'s bkpcy., but the delivery was within the three months. For some years previous to the date of delivery T. had been hopelessly insolvent, but at the latter date he had no more reason to anticipate bkpcy. than he had had for some time previously:—*Held:* the delivery was not a fraudulent preference.—TURNER'S OFFICIAL ASSIGNEE *v.* FARMERS' CO-OPERATIVE CO., TIMARU (1893), 12 N. Z. L. R. 357.—**N.Z.**

g. —— *Delivery when sequestration contemplated.*]—If, in pursuance of a contract made at a time when there was no contemplation of sequestration, debtor subsequently delivers goods to his creditor at a time when he does contemplate sequestration, the date to be looked to in determining whether the transaction can be set aside is the date of delivery, & not the date of the original contract.—DU TOIT'S ESTATE *v.* BARRY BROTHERS (1909), 19 C. T. R. 101.—**S. AF.**

k. —— *To secure prior advance—Delivery shortly before sequestration.*]—S., a dealer in wool & also a woolwasher, prior to his insolvency pledged to defts. against cash advanced certain specific bales of wool, which a third party undertook to hold at the disposal of defts. The wool was left with S. for the purpose of being washed, & shortly before the sequestration of S.'s estate was delivered by him to defts.:—*Held:* there had not been an undue preference of defts.—STRATFORD'S TRUSTEES *v.* THE LONDON & SOUTH AFRICAN BANK (1874), 3 E. D. C. 439.—**S. AF.**

l. *Agreement to pay price or deliver specific stock—Different stock delivered.*]—Applt. sold or exchanged a racehorse with G. for £250 cash or 250 wethers of the value of £1 each. Applt. delivered the horse & afterwards went to G.'s farm to receive the sheep. As the wethers tendered were not worth £1 each, five hundred ewes & lambs at 10*s.* 6*d.* each were delivered in lieu thereof. G. shortly afterwards surrendered his estate:—*Held:* at the time of the delivery of the sheep applt. had the right to demand back his horse unless paid for, & the delivery of the sheep to him only secured to G. the property in the horse.—FRONEMAN *v.* GOOSEN'S TRUSTEES (1884), 1 Buch. A. C. 458.—**S. AF.**

m. *Agreement to give delivery order to replace provisional order given at time of advance.*]—The owner of timber, which was lying in the custody

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the following year H. died, without having called for the bill of sale, & leaving the debt still owing. Debtor renewed his promise to H.'s exor., & undertook to let the exor. know if he was threatened with legal proceedings. Shortly afterwards he was threatened, & gave notice to the exor., who applied for a bill of sale, which debtor then executed, including substantially all his property. It was registered on the following day, being June 2, 1887. On July 17, debtor was served with a debtor's summons. He gave notice to the bill of sale holder, who on the 19th or 20th, went into possession, & sold the goods on the 23rd :—*Held :* the giving of the bill of sale was a fraudulent preference, & the proceeds of sale must be paid to the trustee.—*Re* GIBSON, *Ex p.* BOLLAND (1878), 8 Ch. D. 230 ; 26 W. R. 481 ; *sub nom. Re* DOBSON, *Ex p.* BOLLAND, 38 L. T. 326.

Annotation :—**Consd.** *Re* Jackson & Bassford, [1906] 2 Ch. 467.

7339. Agreement to give legal mortgage—Made on deposit of deeds as equitable security.]—A legal mtge., made in pursuance of an antecedent agreement entered into on a deposit of deeds by way of equitable mtge., does not constitute a fraudulent preference.—HERMOUX *v.* HARBORD (1898), 14 T. L. R. 243.

7340. Agreement that advances were sufficient for & to be applied towards debts—Sum found insufficient & returned.]—V. borrowed from T. £1,000, representing that that sum would suffice to discharge his liabilities, & it was understood, though not expressly agreed, that the money was to be used for that purpose & no other. V., finding the amount insufficient to discharge all his liabilities, returned it to T., & immediately afterwards committed an act of bkpcy. & was made a bkpt. :—*Held :* bkpt. having *bonâ fide* believed he was bound by contract to return the money, the payment was not a fraudulent preference, because the dominant view was not to prefer.—*Re* VAUTIN, *Ex p.* SAFFERY, [1900] 2 Q. B. 325 ; 69 L. J. Q. B. 703 ; 82 L. T. 722 ; 48 W. R. 652 ; 44 Sol. Jo. 503 ; 7 Mans. 291.

Annotation :—**Refd.** Bulteel & Colmore *v.* Parker & Bulteel's Trustee (1916), 32 T. L. R. 661.

7341. Promise given under pressure.] — On Aug. 1, 1914, C., one of the trustees of a marriage settlement, being impressed with the financial crisis which seemed impending owing to the imminence of war & believing that trustees ought not to leave trust money in the hands of a private bank which did not publish accounts, interviewed the partners in the banking business & insisted that the balance of the trust account then in the bank should be paid or secured, & a promise to give security was made. In his evidence P., one of the partners in the bank, stated that he had no idea on Aug. 1 that the bank would be compelled to close its doors. On Aug. 3, the Bank Holiday, it appeared that very heavy demands would be made on the bank which they could not meet, & it was determined to close the doors on Aug 4, but on the announcement that the three succeeding days would be bank holidays, it was decided to carry on, & the instructions to close were cancelled. Afterwards P. remembered the promise to give a charge to the trustees & wrote a letter giving a charge. On Aug. 22 the bank closed its doors & the partners were subsequently made bkpt. : —*Held :* there was no fraudulent preference, the previous promise to give the security being a good ground for writing the letter of charge, & there was valuable consideration for the charge in the fact that C., on account of the agreement, refrained from getting his co-trustee's signature to a cheque for the amount in the bank, though P. did not know that C. had no cheque & believed with reasonable grounds that he would be bound to pay.—BULTEEL & COLMORE *v.* PARKER & BULTEEL'S TRUSTEE (1916), 32 T. L. R. 661.

of storekeepers, borrowed £900, & in security therefor granted them a delivery order for five hundred logs, under an arrangement that the order should not be presented & that it should be replaced by a right order in a few days. Ten days afterwards, when the value of the logs had been ascertained, the lenders, in exchange for the order for five hundred logs, which had never been intimated to the storekeepers, received a delivery order for four hundred & twenty logs, which was intimated to the storekeepers & the logs identified. The borrower was made bkpt. within sixty days of the transactions :—*Held :* the delivery order for four hundred & twenty logs was struck at by 1696 Act, c. 5.—PRICE & PIERCE, LTD. *v.* BANK OF SCOTLAND, [1910] S. C. 1095.—**SCOT.**

n. *Transaction being last of connected series.*]—*Held :* an impeached assignment was not a fraudulent preference as it was only the last of a series of transactions all connected together, which should be treated as a whole &, so treated, were not open to attack.—FERGUSON *v.* BRYANS (1904), 15 Man. L. R. 170.—**CAN.**

o. *Agreement by partner to give mortgage to creditor of firm—Debt statute barred before mortgage given—Acknowledgment by debtor.*]—On Jan. 1, 1886, a partnership between A. & B. was dissolved, & the deed of dissolution provided for the execution by B. on demand of a mtge. on the plantation house, then subject to a subsisting mtge. in favour of the A. bank, to secure a debt due by the firm to the trustees of A.'s marriage settlement. The debt to A.'s trustees became barred by limitation, but A. by a letter consented to pay it, & the trustees demanded the execution of the mtge. as agreed on. On Jan. 2, 1889, B., executed a mtge. of the plantation house in pursuance of the agreement, & in June the trustees paid off the bank. B. became involved in pecuniary difficulties, & in Feb., 1890, applied to be declared an insolvent : —*Held :* the execution of the mtge. of Jan., 1889, did not amount to an act of fraudulent preference, not being a voluntary transfer.—BROWN *v.* FERGUSON (1893), I. L. R. 16 Mad. 499. —**ND.**

p. *Agreement to transfer ship—Transfer not postponed to injure creditors.*]—P. mortgaged a ship to S. at a time when P. was insolvent, but in pursuance of a promise made when P., was solvent :—*Held :* though the circumstances were somewhat suspicious, the ct. was bound to give effect to the agreement, as the carrying out of the agreement had not been purposely kept back in order to injure the other creditors.—MORRIS *v.* SOLLING (1890), 11 N. S. W. L. R. 247. —**AUS.**

r. *Covenant to insure & assign policy—Money due under another policy assigned within thirty days of insolvency.*] —G. & Co., being unable to meet a note given to pltf. in the course of their business, at pltf.'s request gave him a chattel mtge. on certain machinery & tools in their manufactory, the mtge. containing a covenant by the mtgors. to insure against fire, & on demand to assign the policy to pltf. No insurance was effected after the mtge. was executed, & the property was destroyed by fire. The mtgors. held an insurance in a mutual co., on the building only in which the goods were, but not on the goods. Some days after the fire G. & Co., with the knowledge that they were in insolvent circumstances, & within thirty days of being declared insolvent, gave pltf. an order on the co. for a certain amount of money :—*Held :* the order was void under 1875 Act, s. 133.—SMYTH *v.* MORTON (1880), 30 C. P. 566.—**CAN.**

s. *Agreement to consent to judgment—Acceptances given afterwards for debt—Judgment signed during currency of bills.*]—H. was indebted to A. for a loan, & at the time of the loan promised A. to allow him to sign judgment against him. Before judgment was signed, H. gave A. acceptances for the amount of his debt, & during the currency of the bills, judgment was signed by A. against H. H. afterwards sequestrated his estate :—*Held :* H.'s official assignee might set aside the judgment as a fraud on the general body of creditors.—ANDREWS *v.* HARLEY (1870), 1 V. L. R. 127.—**AUS.**

t. *Onus of proof—Giving of security postponed.*]—When a mtge. over the whole of mtgor.'s property is given at a time when he is in insolvent circumstances to secure a pre-existing debt, & it is attempted to support it by a previous agreement, alleged to have been made at the time when the money was advanced, the bare fact of the postponement of the execution throws upon the person supporting the transaction the *onus* of proving that the antecedent agreement was in fact made, & was made *bonâ fide*, but the ct. may find for itself in the surrounding circumstances a satisfactory explanation of the postponement.—THOMSON *v.* MULGO IRRIGATION CO. (1894), 15 N. S. W. Eq. 25, 55.—**AUS.**

E. Transactions induced by Desire for further Advance or Credit.

Assignments in satisfaction of antecedent debts —Whether act of bankruptcy.]—*See* Part II., Sect. 2. sub-sect. 2, B., *ante*.

7342. Advance to pay off lien—Simultaneous additional advance.]—If A. have a lien on goods of bkpt. in his hands, & B. without knowledge of any act of bkpcy. pay the sum for which he has a lien & advance a further sum to bkpt. upon those goods which are delivered to him, trover will not lie by the assignees. He has the same lien as A., but if the value of the goods be more than the whole sum advanced, the assignees may maintain an action for money had & received for the residue. —DIXON *v.* PURSE (1800), Peake, Add. Cas. 187.

7343. Advance to pay off distress—By creditor.]—A. being distrained on for rent applied to deft., to whom he was already indebted, to advance him money. Deft. refused to do so, unless upon security, whereupon A. assigned to him all his personal estate & effects, in trust to pay deft. & other creditors:—*Held:* not a voluntary conveyance.—ARNELL *v.* BEAN (1831), 8 Bing. 87; 1 Moo. & S. 151; 1 L. J. C. P. 38; 131 E. R. 334.

Annotations:—**Consd.** Margareson *v.* Saxton (1835), 1 Y. & C. Ex. 525; Binns *v.* Towsey (1838), 7 Ad. & El. 869. **Refd.** Davies *v.* Acocks (1835), 2 Cr. M. & R. 461.

7344. Bill of sale to secure advances of goods.]—C. executed a bill of sale to secure advances of goods to the amount of £60, & three days after its execution made an assignment of all his property for the benefit of his creditors:—*Held:* the giving of the bill of sale was not a fraudulent preference on the part of C., & the bill of sale was valid, although C. knew, at the time he gave it, that he was in difficulties.—CURTIES *v.* JACOBS (1867), 16 L. T. 574.

Annotation:—**Mentd.** Richards *v.* Jenkins (1886), 55 L. J. Q. B. 435, D. C.

7345. —— & of money & previous debt.]—A trader, in consideration of advances in cash & goods, assigned all his stock to defts., to secure such advances & also a debt previously due to them. The goods so assigned comprised all his property, except some household furniture & book debts. In an action by the assignees of the trader to recover the value of the goods seized under the bill of sale, the judge left it to the jury with very strong observations to say whether they would infer an intent to defeat & delay creditors. The jury having found for pltfs., the ct. thinking they might have been misled by the observations of the judge granted a new trial, the costs to abide the event.—PENNELL *v.* DAWSON (1856), 18 C. B. 355; 139 E. R. 1407.

Annotation:—**Refd.** Pennell *v.* Reynolds (1861), 11 C. B. N. S. 709.

7346. Bill of sale partly in respect of original agreement—Partly for subsequent advance of

PART XX. SECT. 12, SUB-SECT. 4.—E.

a. *Advance made bonâ fide.*]—A transfer had been made to a bank by K. within thirty days of his insolvency, upon the faith of which the bank had made further advances to K. exceeding the value of the securities so transferred, which would not otherwise have been made:—*Held:* the bank had not thereby obtained an unjust preference.—NELLES *v.* MONTREAL BANK (1882), 7 A. R. 743. —**CAN.**

b. ——.]—On Nov. 19, 1906, June 15, Nov. 16, & Dec. 30, 1907. B. made assignments to a bank to secure advances, which the bank made on the strength of the securities. B. was insolvent on Nov. 1, 1907, & assigned for the benefit of creditors on Jan. 17, 1908, but all the transactions prior to Dec. 30, 1907, were entered into by the bank in good faith, the bank were ignorant of B.'s insolvency, & there was no intention to defeat or delay other creditors, or to prefer the bank's claims in taking the assignments up to Nov. 16:—*Held:* the first three assignments were valid, but the last one was not. —NORTON *v.* CANADIAN BANK OF COMMERCE (1908), 1 Sask. L. R. 448; 9 W. L. R. 331.—**CAN.**

c. ——.]—CAPE BRETON WHOLESALE GROCERY CO. *v.* MCDONALD (1914), 14 E. L. R. 141; 15 D. L. R. 807; 47 N. S. R. 505.—**CAN.**

d. —— *Portion applied in liquidation of then liabilities.*]—Where a trader is indebted to a party, from whom he requires further advances, & that party refuses to make the advances, unless he gets a mtge. of the entirety of the trader's property as security, such mtge. or assignment will not be deemed a fraudulent preference or a making away with property, if the advances are *bonâ fide* made, & a portion of them applied in liquidation of the trader's then liabilities.—*Re* LEARY (1856), 27 L. T. O. S. 256. —**IR.**

f. *Advance not made bonâ fide.*]—A creditor received an assignment of assets from debtor as security for a pre-existing debt & an advance which was made to enable the creditor afterwards to plead the validity of the assignment under Fraudulent Preference Act, s. 4:—*Held:* the assignment was invalid both as to the advance & the pre-existing debt.—HAZELL *v.* CULLEN (1914), 20 B. C. R. 603.—**CAN.**

g. ——.]—A fresh advance made by a creditor for the purpose of obtaining security for a past debt, & with a knowledge of debtor's insolvent circumstances, does not relieve the transaction of the character of a fraudulent preference.—*Re* BLOOMFIELD (1886), 5 N. Z. L. R. C. A. 51. —**N.Z.**

k. *Advance for purpose of paying amount of composition—Absolute transfer of property already held as security.*]—An agreement by which a bank makes an advance to an insolvent customer, of the amount of a composition with his creditors, in consideration of an absolute transfer to it of securities, already held as collateral, & of his note for the surplus of his secured indebtedness, after payment of the composition, does not amount to an undue preference & is valid & binding.—PHILIE *v.* COTÉ (1911), Q. R. 21 K. B. 128.—**CAN.**

l. *Bill of sale to secure advance & past debt.*]—N. a trader being indebted to M. & Co. assigned by bill of sale all his available assets to M. & Co. to secure their antecedent debt & an advance of £350, of which £120 was immediately returned to one of the firm of M. & Co. in payment of a private debt from N. On Jan. 14, 1870, N. voluntarily sequestrated his estate:—*Held:* the transaction did not amount to a fraudulent preference. —SHAW *v.* SOLOMON (1870), 1 V. R. 153.—**AUS.**

m. ——.]—Insolvent on Sept. 17, 1877, gave a mtge. to deft., the alleged consideration being a prior debt of $600, & an advance in cash of $1,800. No money was paid before Oct. 1. On Oct. 18 the writ of attachment issued:—*Held:* the *onus* of supporting the transaction was upon deft., & the evidence being wholly insufficient, mtge. must be set aside.—RICE *v.* BRYANT (1880), 4 A. R. 542.—**CAN.**

n. ——.]—*Held:* good as to the advance, but bad as to the past debt. —DOUGLAS *v.* HOURIE (1909), 10 W. L. R. 67; 2 Sask. L. R. 35.—**CAN.**

o. *S. P.* EMPIRE SASH & DOOR CO. *v.* MARANDA (1911), 19 W. L. R. 78; 21 Man. L. R. 605.—**CAN.**

p. —— *Bonâ fide intention to carry on business.*]—Insolvent gave one of his creditors a chattel mtge. upon the whole of his stock for an existing debt & a fresh advance. The advance was not made with the *bonâ fide* belief & intention that the business would be carried on through the relief afforded:—*Held:* the mtge. was fraudulent, & could not be supported even for the further advance. —KALUS *v.* HERGERT (1876), 1 A. R. 75.—**CAN.**

r. —— —— *Onus of proof.*]—Where the ct. is satisfied that an arrangement for advance on mtge. is entered into *bonâ fide*, in order to aid debtor with the view of enabling him to discharge his obligations, such arrangement will be sustained, notwithstanding its effect to give such creditor a preference over other creditors for the full amount of his claim, including a prior indebtedness, & debtor became insolvent within thirty days from the time of entering into such arrangement. In such a case the *onus* of proving the *bona fides* of the transaction is cast upon the creditor claiming the benefit of the security.—SMITH *v.* MCLEAN (1878), 25 Gr. 567.—**CAN.**

7345 i. *Bill of sale to secure advances of goods—& past debt.*]—*Held:* valid.—BELL *v.* ROBINSON (1909), 13 O. W. R. 676.—**CAN.**

7345 ii. —— ——.]—M. gave a mtge. to pltfs. on her furniture etc., to secure advances of goods to be made by pltfs., & at the same time she executed a mtge. on the same goods to secure a past indebtedness to pltfs. The transaction was an honest one throughout: —*Held:* the transaction had not the effect of giving a preference under 48 Vict. c. 26, s. 2.—GOULDING *v.* DEEMING (1888), 15 O. R. 201.—**CAN.**

s. *Bill of sale to creditor settling claims of other creditors.*]—S., a trader in embarrassed circumstances, made an assignment of all his stock-in-trade & effects, to his wife, who carried on the business & obtained from pltfs. goods on her own credit. On pltfs. agreeing to settle the claims of two

Sect. 12.—*Avoidance of preference: Sub-sect.* 4, *E.*]

substantial amount.]—On Dec. 9, 1865, in consideration of deft. having agreed to lend J. £107 to pay an acceptance then about to fall due, J. agreed to give him a mtge. of all his goods & chattels as security for the sum, & also for any further money deft. might lend him. On Jan. 6, 1866, deft. made a further advance of £64 to J., who on Jan. 27 executed a bill of sale in pursuance of the agreement, reciting the total amount then due, & assigning all his personal property, worth about £115, to deft. as security for it. On Dec. 31, 1866, J. was adjudicated a bkpt.:—*Held:* the bill of sale, being given partly in respect of the original agreement & partly in respect of the subsequent advance, which was actually made to such an amount as to constitute a substantial equivalent for the assignment, was a valid bill of sale as against the assignee in bkpcy.—MERCER *v.* PETERSON (1868), L. R. 3 Exch. 104; 37 L. J. Ex. 54; 18 L. T. 30; 16 W. R. 486, Ex. Ch.

Annotations:—**Consd.** Bew *v.* Bill (1868), 16 W. R. 760; Jones *v.* Harber (1870), 23 L. T. 606. **Apld.** Lomax *v.* Buxton (1871), L. R. 6 C. P. 107. **Consd.** *Re* Ash, *Ex p.* Fisher (1872), 26 L. T. 931, L. JJ.; *Re* King, *Ex p.* King (1876), 2 Ch. D. 256, C. A. **Apld.** Heath *v.* Cochrane (1877), 46 L. J. Q. B. 727. **Consd.** *Re* Barker, *Ex p.* Kilner (1879), 13 Ch. D. 245, C. A. **Refd.** *Re* Nurse, *Ex p.* Foxley (1868), 3 Ch. App. 515, L. JJ.; Allen *v.* Bonnett (1870), 5 Ch. App. 577, L. C. & L. J.; Philps *v.* Hornstedt (1875), 1 Ex. D. 62, Ex. Ch.; *Re* Hemingway, *Ex p.* Hauxwell (1883), 23 Ch. D. 626, C. A.

See, generally, BILLS OF SALE.

7347. Advances to enable debtor to carry on business.]—B., as a security for future advances to enable him to carry on his business, conveyed to his bankers, who already held other securities, as far as they would go, for any existing debt, all his stock-in-trade & the money to arise therefrom. B. subsequently became bkpt., & the security was then impeached as being a voluntary conveyance, made in contemplation of bkpcy., for the purpose of defeating creditors:—*Held:* the conveyance was good.—MARTIN *v.* WILLYAMS (1869), 20 L. T. 350.

7348. ——.]—A firm of traders, one of the partners in which was an infant, in consideration of one of their creditors paying out an execution for about £100, executed an assignment to him of their whole joint & separate property to secure the repayment of the £100, & an existing debt of about £200, on demand. The business was carried on for about three weeks by the firm when the bill of sale holder took possession, & the firm then went into liquidation:—*Held:* the payment of the execution creditor was not a present advance such as to sustain the assignment.—*Re* VANE, *Ex p.* GREENER (1877), 46 L. J. Bcy. 76; 36 L. T. 781, C. A.

7349. ——.]—Debtor had been allowed by manufacturers credit to the extent of £500. The credit had been exceeded by £300. The creditors pressed him to reduce his account to £500, & debtor gave his creditors property & cash amounting to £721, & the creditors supplied further goods to the value of £102. Debtor made the transfer in order to carry on his business, & not with the intention of preferring the creditors:—*Held:* not a fraudulent preference.—*Re* M'INNES, *Ex p.* BUMSTEAD & Co. (1891), 8 T. L. R. 14, C. A.

other creditors, which they did, she executed to them a chattel mtge. on all the effects in her shop:—*Held:* the mtge. was a fraudulent preference.—BOYD *v.* GLASS (1883), 8 A. R. 632.—**CAN.**

7347 i. *Advances to enable debtor to carry on business.*]—R., a colliery proprietor, owed his bank on an overdraft £937, & he applied for a further advance of £954 to pay his wages for June, which were payable on July 7, and also, for an advance to pay £311 due by him for a railway freight on coal. The bank agreed to make further advances, upon R. giving them security, & upon the faith of his executing a mtge. & conveyances, securing £1,850, the amount of the overdraft plus the wages due, & further advances, advanced him the amount due for wages, & promised to carry him on:—*Held:* the advance of the £934 for wages, & a promise by them to carry R. on, did not amount to "a reasonable & sufficient consideration given at the time" for the security for £1,850 & further advances given by R. to the bank, & such security was a fraudulent preference, & void under Insolvency Act, 1874, s. 108, as against R.'s trustee.—BANK OF AUSTRALASIA *v.* HALL (1907), 4 C. L. R. 1514.—**AUS.**

7347 ii. ——.]—A person in embarrassed circumstances applied to one of his creditors to supply him with goods to enable him to carry on his business, which the creditor agreed to supply on obtaining security therefor, as also for his pre-existing debt: *Held:* the chattel mtge. given for such purpose was not such a preference as rendered the chattel mtge. void.—RISK *v.* SLEEMAN (1874), 21 Gr. 250.—**CAN.**

7347 iii. ——.]—A firm, having become embarrassed, applied to pltfs., to whom they owed $50,000, to advance them $15,000 more, &, in order to obtain the advance, they offered to secure both debts by a mtge. of the real estate of one of the partners, worth $30,000. Pltfs. agreed, made the advance, & obtained the mtge. In less than three months afterwards debtors became insolvent. The mtge. was given solely as a means of obtaining the advance which debtors thought would enable them to go on with their business & pay all their creditors:—*Held:* as regards the antecedent debt the mtge. was valid as against the assignee in insolvency.—ROYAL CANADIAN BANK *v.* KERR (1870), 17 Gr. 47.—**CAN.**

7347 iv. ——.]—Q. & A. were indebted to S., & being desirous of obtaining further advances to aid them in carrying on their business, applied to S. therefor, which S. agreed verbally to make upon receiving security for such advances as well as such prior indebtedness & Q. & A. executed a mtge. to S. on all their stock-in-trade, securing $2,400, S. agreeing to make the further advances, as they should require in the course of their business, Q. & A., having executed a deed of assignment for creditors, a simple contract creditor of Q. & A. sought, on behalf of the creditors of Q. & A. to have the mtge. declared void:—*Held:* pltf. could not succeed.—PARKES *v.* ST. GEORGE (1884), 10 A. R. 496.—**CAN.**

t. *Mortgage to obtain indorsement of note.*]—C. & P. carrying on business in partnership, being indebted to pltf.'s firm for money advanced to carry on their business, in consideration that the firm would indorse a note held by C. & P., agreed to execute a mtge. securing their indebtedness, & for the indemnity of the firm against that & other indorsements. Eighteen months after the execution of such mtge. C. & P. became insolvent:—*Held:* the security could not be impeached under 1875 Act, ss. 130–133.—COOK *v.* ROGERS (1879), 26 Gr. 599.—**CAN.**

a. *Deposit of deeds to obtain further discount of bills.*]—*Held:* not void.—MILLER *v.* CHARTERED MERCANTILE BANK OF INDIA, LONDON, & CHINA (1871), 6 B. L. R. 701.—**IND.**

b. *Mortgage to secure surety for composition.*]—Upon the arrangement for a deed of composition & discharge, the creditors required security for payment of the composition, & M., a creditor, agreed to indorse the composition notes upon receiving a mtge. upon the property settled upon insolvent's wife, securing him in respect of his indorsations, & on payment of $250 in addition to his composition:—*Held:* not a fraudulent preference.—*Re* RUSSELL (1882), 7 A. R. 777.—**CAN.**

c. ——.]—G., in 1878, being unable to meet his liabilities, applied to his creditors for an extension of time for the payment of their claims. The creditors consented to grant his request, & agreed to accept G.'s notes at four, eight, twelve, & sixteen months, on condition that the last of them should be indorsed to their satisfaction. N. agreed to indorse the last notes on condition that G. should deposit in a bank in N.'s name $75 per week to secure him for such indorsation, & G. signed an agreement to that effect. N. indorsed G.'s notes, & they were given to G.'s creditors. On July 31, 1879, G., after having deposited $2,007.87 in N.'s name, in a bank, failed:—*Held:* the arrangement between G. & N., by which the money deposited in the bank by G. became pledged to N., was not void under Insolvent Act.—BEAUSOLEIL *v.* NORMAND (1883), 9 S. C. R. 711.—**CAN.**

d. ——.]—A trader in embarrassed circumstances offered a composition of 15*s.* in the pound, payable by instalments, which was accepted, but three of his creditors refused to execute the composition deed without security for the third & last instalment. To obtain the necessary security, the trader executed to one of his creditors, to whom a large sum was due, & who consented to be his surety in the composition bills, a mtge. of

7350. Smallness of additional advance relevant but not conclusive.]—Where debtor on the eve of his bkpcy. assigns all his property to a creditor to secure a past debt as well as a fresh advance, the smallness of the fresh advance, although not necessarily making the assignment an act of bkpcy., is strong evidence that the advance was made, not to enable the debtor to continue his trade, but to secure the past debt.

A trader applied to a creditor, who had previously advanced him £600, for a further advance of £100, which was made on debtor giving a conditional promise that if he did not repay the £100 within ten days, he would make an assignment of all his property to the creditor to secure both the past & fresh advance. Default was made in payment, & the assignment was executed. Shortly afterwards debtor became bkpt., & the property was sold for about £700 :—*Held :* having regard to the conditional nature of the promise & the smallness of the fresh advance, the assignment was void against the creditors.—*Re* ASH, *Ex p.* FISHER (1872), 7 Ch. App. 636 ; 41 L. J. Bcy. 62 ; 26 L. T. 931 ; 20 W. R. 849, L. JJ.

Annotations :—**Distd.** Harrison *v.* Cohen (1875), 32 L. T. 717. **Consd.** Philps *v.* Hornstedt (1875), 1 Ex. D. 62, Ex. Ch. **Distd.** *Re* King, *Ex p.* King (1876), 2 Ch. D. 256, C. A. **Consd.** *Re* Gibson, *Ex p.* Bolland (1878), 8 Ch. D. 230 ; *Re* Barker, *Ex p.* Kilner (1879), 13 Ch. D. 245, C. A. **Folld.** *Re* Tunstall, *Ex p.* Burton (1879), 13 Ch. D. 102, C. A. **Consd.** *Re* Hemingway, *Ex p.* Hauxwell (1883), 23 Ch. D. 626, C. A. **Distd.** Morris *v.* Morris, [1895] A. C. 625, P. C. **Consd.** *Re* Jackson & Bassford, [1906] 2 Ch. 467. **Refd.** *Re* Cook, *Ex p.* Izard (1874), 9 Ch. App. 271, L. JJ. ; *R. v.* Creese (1874), L. R. 2 C. C. R. 105, C. C. R. ; Heath *v.* Cochrane (1877), 46 L. J. Q. B. 727. **Mentd.** *Re* Bent, *Ex p.* Mackenzie (1873), 42 L. J. Bcy. 25, L. J. ; *Re* Columbian Fireproofing Co., [1910] 1 Ch. 758.

See, also, Nos. 541 *et seq., ante.*

7351. Surplus stock returned in consideration of further credit—No further goods supplied.]—A trader being in insolvent circumstances, applied to a creditor, to whom he owed £2,500 for goods supplied in the way of his business, to supply him with more goods on credit. The creditor refused to supply any more goods unless debtor paid £200 on account of the goods previously supplied. Debtor said he could not pay the money, & on being pressed, he returned goods to the amount of the £200, which he did not want. On the same day before any further goods were delivered, debtor filed his petition :—*Held :* the delivery of the goods to the creditor was not a fraudulent preference, & the trustee was not entitled to have the goods given up by the creditor on the ground that the delivery to him was on condition of his supplying fresh goods, which he had never done.—*Re* WALKER, *Ex p.* TOPHAM (1873), 8 Ch. App. 614 ; 42 L. J. Bcy. 57 ; 28 L. T. 716 ; 37 J. P. 628 ; 21 W. R. 655, L. JJ.

Annotations :—**Consd.** *Re* Brown, *Ex p.* London & County Banking Co., *Ex p.* Trickett (1873), L. R. 16 Eq. 391 ; Smith *v.* Pilgrim (1876), 2 Ch. D. 127 ; *Re* Bird, *Ex p.* Hill (1883), 23 Ch. D. 695, C. A. **Refd.** Butcher *v.* Stead (1875), L. R. 7 H. L. 839, H. L.

7352. Further advance for purpose of paying another creditor.]—A trader, in consideration of a past debt & a further advance, executed a bill of sale over all the household furniture & effects, which then or thereafter should be in or upon the hotel in which he carried on his business as an innkeeper :—*Held :* as it appeared that the further advance was merely for the purpose of paying off another creditor, the bill of sale was a fraudulent preference.—*Re* BOON, *Ex p.* BOON (1879), 41 L. T. 42.

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the trade premises, with the buildings & machinery thereon. The trader was adjudicated bkpt. two months after the execution of the deed :—*Held :* the mtge. was valid as against the assignees in bkpcy.—*Re* GASS (1867), 2 I. R. Eq. 284.—**IR.**

See, generally, Part XXIII., Sect. 10, sub-sect. 2, D, *post.*

f. *Unregistered mortgage to secure antecedent debt—& future advances.*]—Assignees of bkpt. alleged that a mtge. was fraudulent & void because it was in effect an absolute conveyance of all bkpt.'s property to secure an antecedent debt as well as future advances. They also impeached the mtge. on the ground that it was not registered but was kept secret, in consequence of which bkpts. obtained credit :—*Held :* the non-registration of a mtge. deed, affecting real property, will not be taken as evidence of fraudulent concealment of the security.—*Re* DAWSON, TATE & Co. (1868), 2 I. R. Eq. 218. —**IR.**

g. *Retention by creditor of money owing to debtor—As part of transaction in which further advance made.*]—Bkpt. within a month of his bkpcy. raised money from a creditor on a chattel security, & at the same time & as part of the same transaction, although not mentioned in the security, allowed the creditor to retain, in part-payment of a promissory note not then due, money which the creditor held as proceeds of a sale of stock of debtor's & which the creditor was otherwise bound to pay over to him :—*Held :* not a fraudulent preference.—*Re* FAIRBROTHER, OFFICIAL ASSIGNEE *v.* BADDELEY (1905), 25 N. Z. L. R. 546.— **N.Z.**

7351 i. *Mortgage to obtain renewal of bill—No further advance.*]—G. & Co., being unable to meet the bills of T. & Co., wrote to T. & Co., "If you do not arrange for renewal or payment of them, we must stop payment," &, knowing that they were insolvent, but for the purpose of delay, & not for any benefit to the estate, agreed to mtge. to T. & Co., the whole of the estate. T. & Co. renewed the bills, & the bills again falling due, & G. & Co. being unable to meet them, T. & Co., paid them. Shortly afterwards G. & Co. filed their petition of insolvency, without having carried out the agreement :—*Held :* the agreement was a fraud against the general body of the creditors.—TEIL *v.* GORDON (1867), 2 Ind. Jur. N. S. 142.—**IND.**

k. *Oral assignment of money due under fire policy—In respect of debt not yet due & further advance.*]—*Held :* void as a fraudulent preference within C. S. U. C. c. 26, s. 18.—BANK OF MONTREAL *v.* MCTAVISH (1867), 13 Gr. 395.—**CAN.**

l. *Power of attorney to pass mortgage bond—To secure past debt & further advance.*]—*Held :* the mtge. bond was not liable to be set aside as an undue preference.—SLATER'S TRUSTEE *v.* SMITH (J. O.) & CO. (1885), 5 E. D. C. 9.—**S. AF.**

m. *Confession of judgment—To secure further accommodation by guarantee.*]—W. being indebted to K. in £100 for money lent, applied to him for further accommodation by way of guarantee, which K. refused unless W. consented to give him judgment. W. signed a consent to judgment, & K. signed judgment & issued execution for £856 16*s.* 6*d.* W. became insolvent :—*Held :* the judgment & execution must be set aside except as to £100 & costs, & K. must refund to the official assignee the balance of the amount realised by the execution. —KYTE *v.* WILLIAMS (1870), 1 V. L. R. 129.—**AUS.**

n. —— *To secure future accommodation acceptances afterwards actually given.*]—*Held :* although the judgment debtor was in insolvent circumstances at the time of giving the confession, the judgment could not be impeached. —KINNEY *v.* RYERSON (1875), R. E. D. 488.—**CAN.**

7352 i. *Further advance for purpose of paying another creditor.*]—To pay one creditor out of money obtained from another on the verge of the payer's bkpcy., though it does not injure the estate, & merely decreases one debt & correspondingly increases the others, is fraudulently to prefer the creditor. —*Re* LAVENDER, *Ex p.* HYNDMAN & Co. (1894), 29 I. L. T. 128.—**IR.**

7352 ii. —— *Secured by notes under discount.*]—C., being indebted to H. & Co., gave them a chattel mtge. to secure such indebtedness, & also a further sum of about the same amount, advanced to him by H. & Co. at the time of the giving of the mtge., which C. represented was sufficient to pay off in full all his other creditors. C.'s indebtedness to H. & Co. was covered by his promissory notes, which, at the time of the execution of the mtge., were on discount with H. & Co.'s bankers :—*Held :* there was no fraud, & the fact that the notes were held by the mtgees.' bankers on discount did not invalidate the mtge.—HYMAN *v.* CUTHBERTSON (1885), 10 O. R. 443. —**CAN.**

7352 iii. —— *Security to cover both advance & prior debt.*]—A trader, being very heavily indebted to deft. & several other creditors, & unable to pay his debts as they became due, executed an assignment to deft., in consideration of his antecedent indebtedness to him, & a further advance of £200 to enable the trader to pay three of his cheques that had been dishonoured. The deed of assignment was intended by way of security only for the past indebtedness & the advance. The trader voluntarily sequestrated his estate within three months of the assignment :—*Held :* the assignment was a fraudulent

Sect. 12.—*Avoidance of preference: Sub-sect.* 4, *E. & F.*]

Annotation :—**Expld.** *Re* Wilkinson, *Ex p.* Stubbins (1881), 17 Ch. D. 58, C. A. The real point of the decision was that the goods were transferred as a security for a past debt (JAMES, L.J.).

7353. —— Act preventing debtor from carrying on business.]—A bill of sale over substantially the whole of debtor's property was given by debtor to an execution creditor to secure the execution debt & a fresh advance. The fresh advance was used in paying pressing creditors : —*Held :* as the effect of the granting of the bill of sale was to prevent debtor from carrying on his business the bill of sale was fraudulent & void.—*Re* WILKINSON, *Ex p.* CLATER, *Ex p.* BECKETT-DENISON (1883), 48 L. T. 648.

7354. Bill of sale given to prevent issue of execution on judgment.]—A trader on Aug. 28 executed a bill of sale of substantially the whole of his property to secure a debt, for which the grantee had recovered judgment on July 3, & another debt which he owed the grantee. The grantor had on July 7 written a letter to the grantee, undertaking, in the event of his not issuing execution on the judgment, to execute to him on demand a bill of sale to secure the judgment debt & such other sums as he owed him. The grantee did not enter into any agreement not to enforce the judgment, but in fact he did not issue execution. On Aug. 29 another creditor levied execution at the grantor's place of business, & on Sept. 1 the grantor filed a liquidation petition. He had between July 4 & Aug. 29 received by the carrying on of his business sums amounting to £10,000 :—*Held :* no equivalent had been given for the bill of sale, & it was void as against the trustee in liquidation.—*Re* BAUM, *Ex p.* COOPER (1878), 10 Ch. D. 313 ; 48 L. J. Bcy. 54 ; 39 L. T. 523 ; 27 W. R. 299, C. A.

Annotations :—**Consd. & Folld.** *Re* Cross, *Ex p.* Payne (1879), 11 Ch. D. 539, C. A. **Consd.** North Central Wagon Co. *v.* M. S. & L. Ry. Co. (1887), 35 Ch. D. 191, C. A. ; M. S. & L. Ry. Co. *v.* North Central Wagon Co. (1888), 13 App. Cas. 554, H. L. **Refd.** Salter *v.* Brooks (1879), De Colyar's County Court Cases, 82 ; *Re* Watson, *Ex p.* Official Receiver (1890), 7 Morr. 155, C. A. **Mentd.** Woodgate *v.* Godfrey (1879), 4 Ex. D. 59 ; Carrard *v.* Meek (1880), 50 L. J. Q. B. 187 ; Marsden *v.* Meadows (1881), 7 Q. B. D. 80, C. A. ; Haydon *v.* Brown (1888), 59 L. T. 330, D. C. ; *Re* Hood, *Ex p.* Burgess (1893), 9 T. L. R. 541, C. A.

7355. New bill of sale given to avoid seizure under old bill.]—The forbearance of the grantee under a bill of sale of the whole of the grantor's property, given for value, to seize the property comprised in it is not, as against the trustee of the grantor, good consideration for the giving of a new bill of sale in lieu of the first, but the new bill of sale given in such circumstances without any fresh advance to the grantor is void as against the trustee of the grantor.—*Re* CROSS, *Ex p.* PAYNE (1879), 11 Ch. D. 539 ; 40 L. T. 563 ; 27 W. R. 808, C. A.

Annotations :—**Apld.** Sanguinetti *v.* Stuckey's Banking Co., [1895] 1 Ch. 176. **Refd.** Lyons *v.* Tucker (1881), 6 Q. B. D. 660 ; *Re* Emery, *Ex p.* Chief Official Receiver (1888), 37 W. R. 21, C. A.

7356. ——.]—On Oct. 26, 1857, bkpt. by deed assigned furniture to trustees upon trust for his wife for life for her separate use with remainder over, & the deed was registered as a bill of sale. On June 23, 1881, he by deed assigned furniture to W. his son-in-law, as security for an advance of £50, & the deed was also registered. On Oct. 11, 1887, two further deeds were executed. The first was a deed affirming the assurance of 1857, & by it bkpt. assigned the furniture specified in the schedule thereto, which was the same furniture as that comprised in the deed of 1857, & the equity of redemption in the furniture assigned to W. as security to A. & W. upon the trusts of the deed of 1857. The second deed simply affirmed the assurance to W. of 1881, & was executed in consideration of a forbearance on the part of W. to seize. Both deeds were registered : —*Held :* forbearance to seize was not a sufficient consideration for an assignment of all debtor's property, & the deeds of 1887 were both voluntary & the furniture must be handed over to the trustee in bkpcy.—*Re* EMERY, *Ex p.* CHIEF OFFICIAL RECEIVER (1888), 21 Q. B. D. 405 ; 57 L. J. Q. B. 629 ; 37 W. R. 21 ; 4 T. L. R. 701, C. A.

Annotation :—**Refd.** *Re* Parsons & Furber (1893), 62 L. J. Q. B. 365, C. A.

7357. No agreement to make any further advance.]—A farmer gave a bill of sale over all his available property to secure a past debt & any further money that might be advanced but with no express agreement to make any further advances. Further small advances were in fact made by the mtgee., amounting to about £70, but they were recouped to the mtgee. by the sale of hay prior to any bkpcy. proceedings :—*Held :* as the bill of sale was given for a past debt with no agreement for further advances, it was void as against the trustee.—*Re* PARKER, *Ex p.* DANN (1881), 17 Ch. D. 26 ; 51 L. J. Ch. 290 ; 44 L. T. 760 ; 29 W. R. 771, C. A.

Annotations :—**Distd.** *Re* Berry, *Ex p.* Wilkinson (1883), 22 Ch. D. 788, C. A. **Folld.** *Re* Lewis, *Ex p.* Official Receiver (1912), 1 L. J. C. C. 86, C. A.

preference, & void.—MICHAEL *v.* OLDFIELD (1887), 13 V. L. R. 793.—**AUS.**

o. *Sale to creditor for purpose of paying another creditor.*]—A person being insolvent sold his property to a creditor, the consideration being a pre-existing debt & a sum in addition sufficient to make up the price agreed upon as the value of the property sold ; the amount so received by debtor being by him paid over, with the knowledge of the purchaser, to another creditor. Three months after the sale debtor made an assignment under Insolvent Act :—*Held :* the sale must be set aside.—COATES *v.* JOSLIN (1866), 12 Gr. 524.—**CAN.**

p. *Agreement to make further advances.*]—A trading partnership before its insolvency, assigned by mtge. all its assets to a creditor, who simultaneously made a substantial advance to the firm, agreeing to make future advances :—*Held :* the mtge. was not void, as against the other creditors & the official assignee.—KHOO KWAT SIEW *v.* WOOI TAIK HWAT (1891), I. L. R. 19 Calc. 223 ; 19 L. R. Ind. App. 15.—**IND.**

7357 i. *No agreement to make any further advance.*]—D. & Co., merchants, kept a banking account with the B. bank, & were allowed to overdraw their account up to Sept., 1879, when the bank refused further advances without additional security. D. & Co. requiring a further advance of $40,000 to enable them to carry on their business, without any specific arrangement with the bank, executed a bill of sale on Sept. 17, whereby in consideration of $40,000 alleged to be paid to them, they conveyed to the bank all their goods & stock-in-trade, & all book accounts due & owing to them, as security for the payment of the $40,000. The bill of sale was given by D. & Co. to the bank president, who informed the directors of it, but it did not appear that it was laid before the board, or that they approved of it, or agreed to advance the $40,000 to D. & Co., or that any subsequent communication was made to D. & Co. respecting it, but the bank discounted notes for them, the proceeds of which were placed to their credit, & they continued to draw on the bank. The bill of sale was not registered until Nov. 5, & on Nov. 22 D. & Co. went into insolvency, having suspended payment on Nov. 3 :—*Held :* the bill of sale being within thirty days of D. & Co.'s assignment was *primâ facie* invalid under Insolvent Act, 1875, s. 133.—*Re* DE VEBER, *Ex p.* BANK OF NEW BRUNSWICK (1882), 21 N. B. R. 401.—**CAN.**

7357 ii. —— *Further advances in fact made.*]—Within a month before his bkpcy., in Jan., 1893, M. gave F. a bill of sale containing an assignment of substantially the whole of his property, to secure a pre-existing debt. The bill of sale was expressed to be given as a security for the existing debt to F., & any further advances which F. might make, but it contained no agreement to make further advances, & F. made no promise to do so, although it was contemplated that he would, & he did, in fact, make further advances before the bkpcy. :—*Held :* the bill of sale was void.—*Re* MARSH (1893), 12 N. Z. L. R. 456.—**N.Z.**

r. *Mortgage in expectation of further advance—No advance actually*

7358. Agreement to obtain further advance for debtor.]—On Aug. 1, 1888, debtor gave to his solr., who had acted for him in previous litigation with petitioning creditor, a charge on his house for costs, the solr. at the same time agreeing to obtain for debtor an advance of £250 on such charge. On Aug. 31 a receiving order was made against debtor, & he was adjudicated bkpt. :—*Held :* the object of debtor being to benefit himself by getting the £250, & not to benefit the solr., the giving of the charge was not a fraudulent preference.—*Re* ARNOTT, *Ex p.* BARNARD (1889), 6 Morr. 215.

F. Transactions to relieve Sureties, preserve existing Debts or validate Security previously given.

7359. Transaction to relieve surety—Before surety called on to pay.]—Debtor borrowed from A. £260 on his promissory note, to which B. became surety. On debtor becoming insolvent he sold the effects of the hotel which he occupied, & ordered the proceeds to be handed over to A. A petition having been filed against debtor within three months of the payment to A. :—*Held :* the payment to A. was not made with a view of giving A. a preference, but to ease B. the surety, & the payment to A. was not a fraudulent preference.—*Re* MILLS, *Ex p.* OFFICIAL RECEIVER (1888), 58 L. T. 871 ; 4 T. L. R. 284 ; 5 Morr. 55, C. A.

Annotations :—**Apld.** *Re* Warren, *Ex p.* Trustee, [1900] 2 Q. B. 138, D. C. **Consd.** *Re* Blackpool Motor Car Co., Hamilton *v.* Blackpool Motor Car Co., [1901] 1 Ch. 77. **Apld.** *Re* Stenotyper, Hastings *v.* Stenotyper, [1901] 1 Ch. 250. **Refd.** *Re* Lane, *Ex p.* Gaze (1889), 23 Q. B. D. 74, D. C. **Mentd.** *Re* Paine, *Ex p.* Trustee *v.* Barnard (1896), 3 Mans. 309.

See, now, 1914 Act, s. 44 (1).

7360. —— ——.]—In order to constitute a fraudulent preference, a payment made by debtor to one of his creditors must be made to the creditor intended to be preferred. Where an insolvent debtor, who is jointly & severally liable with two sureties upon a promissory note, pays the amount of the note to the payee with the view of preferring the sureties by releasing them from their contingent liability upon the note, the payment is not a fraudulent preference, & the sureties cannot be ordered to pay over to the trustee the amount so paid by debtor.—*Re* WARREN, *Ex p.* TRUSTEE, [1900] 2 Q. B. 138 ; 82 L. T. 502 ; 48 W. R. 523 ; 44 Sol. Jo. 329, D. C.

Annotation :—**Apld.** *Re* Blackpool Motor Car Co., Hamilton *v.* Blackpool Motor Car Co., [1901] 1 Ch. 77.

See, now, 1914 Act, s. 44 (1).

7361. —— —— **Issue of debentures.**]—Creditors of a joint-stock co. were partly secured by an acceptance of the co., upon which the chairman of the co. was liable. The co. was known by its directors to be unable to pay its debts as they became due from its own money. In these circumstances the co. issued debentures to the creditors as collateral security for the payment of their debt :—*Held :* the main motive of the co. in issuing the debentures being to relieve its chairman from his liability on the acceptance, the debentures were not given with a view of preferring the creditors, although incidentally they would obtain a benefit by them, & they were valid.—*Re* STENOTYPER, LTD., HASTINGS BROTHERS *v.* STENOTYPER, LTD., [1901] 1 Ch. 250 ; 70 L. J. Ch. 94 ; 84 L. T. 149 ; 17 T. L. R. 151 ; 8 Mans. 203.

See, now, 1914 Act, s. 44 (1).

7362. Payment or transfer to surety—Before surety called on to pay.]—Deft., upon joining with bkpt. as surety in two bonds, received a counter-bond of indemnity, & previous to her bkpcy., before the two bonds became due, received a warrant of attorney to confess judgment from bkpt., & took possession of goods under it :—*Held :* he was entitled to retain them against the assignees, though the two bonds were not discharged by him till after the execution, nor had the obligees then threatened to resort to him for payment.—THOMPSON *v.* FREEMAN (1786), 1 Term Rep. 155 ; 99 E. R. 1026.

Annotations :—**Apld.** Hartshorn *v.* Slodden (1801), 2 Bos. & P. 582 ; Crosby *v.* Crouch (1809), 11 East, 256. **Consd.** Sharp *v.* Jackson, [1899] A. C. 419, H. L. **Refd.** Strachan *v.* Barton (1856), 11 Exch. 647.

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made.]—*Held :* void.—LONGWORTH *v.* MERCHANTS BANK OF HALIFAX (1877), R. E. D. 255.—**CAN.**

PART XX. SECT. 12, SUB-SECT. 4.—F.

7359 i. *Transaction to relieve surety.*]—A sum of money was paid by B. to a bank, when B. was admittedly insolvent, to pay off an overdraft which was guaranteed by D., & the guarantee was returned to D. :—*Held :* the payment could not be treated as a payment on D.'s behalf, but was a preferential payment.—MORRIS *v.* NATIONAL BANK OF AUSTRALASIA (1890), 11 N. S. W. 28 ; *affd.* on another point, [1892] A. C. 287.—**AUS.**

7362 i. *Payment or transfer to surety—On paying other creditors.*]—In Mar., 1889, M. sold to C. his dairy factory & other property in consideration of the payment by C. of M.'s overdraft on his bankers, which had been previously guaranteed by C., & of certain other debts of M. The debts so paid by C., amounting altogether to £1,032 17*s.* 7*d.*, were all the then ascertained debts of M., but an action had at the time been commenced against M. by H., claiming £740 damages for breach of contract. C. was also informed by M. that he had money coming from Scotland, sufficient to meet any small debts not being paid by C., & anything which might possibly be recovered against him by H. With that exception M. had no other property beyond that sold to C. Shortly afterwards H.'s action came on for trial, & the jury awarded him £500. In July, 1889, M. was adjudicated a bkpt. on his own petition. M.'s Scotch money proved to be a trust fund, his interest in which was mortgaged, & the equity of redemption of which he sold before bkpcy. for £40 :—*Held :* the sale to C. was void.—MARR'S OFFICIAL ASSIGNEE *v.* CHICK (1891), 9 N. Z. L. R. 622.—**N.Z.**

a. *Transaction to relieve indorser of promissory note.*]—J., who was in insolvent circumstances, with the concurrence of his brother, who was liable as indorser on some of insolvent's paper held by S. & M. effected a sale of all his stock-in-trade, book-debts, etc., to a *bonâ fide* purchaser, & the proceeds were paid to S. & M., who credited a portion thereof on the notes indorsed by the brother :—*Held :* this was not a fraudulent preference of S. & M.—HARVEY *v.* MCNAUGHTON (1884), 10 A. R. 616.—**CAN.**

b. ——.]—A trader in insolvent circumstances, for whom E. was liable as indorser on current notes, offered to sell E. his stock-in-trade, household furniture, etc., & E. bought it, paying $1,400, the excess in value of the goods over & above the notes, which he retired the same day. Next day the vendor absconded :—*Held :* the transaction was not liable to be impeached as a fraudulent preference.—LEWIS *v.* BROWN, ELLIOTT *v.* BROWN (1884), 10 A. R. 639.—**CAN.**

c. ——.]—Twenty days before a note for $500, which he had indorsed for a firm, became due, W. obtained from the firm's store goods to the value of $511.75, & on the same day gave his cheque for $500 to one of the firm who paid the note at maturity. One partner assigned all his individual & partnership property for the benefit of his creditors four days before the note became due, & the other partner, four days after it became due :—*Held :* the transfer was void under Assignments Act, as being made when the firm was in insolvent circumstances or on the eve of insolvency, with the intent to give W. an unjust preference.—FLEETWOOD *v.* WILTON (1917), 44 N. B. R. 318.—**CAN.**

d. ——.]—Debtor when he was hopelessly insolvent, & must have contemplated sequestration, paid the amount of a promissory note. The payment was made with the intention of securing the indorser of the note. The holder received payment of the note *bonâ fide :*—*Held :* the holder of the note had been, in fact, unduly preferred, & must refund the amount of the payment to the trustee.—THORNE'S TRUSTEE *v.* FRIEDLANDER (1875), Buch. 81.—**S. AF.**

f. *Cheque given in lieu of previous uncashed cheque.*]—O., agent for W. in the selling of cattle, on Jan. 30, sent to W. in England a cheque for the proceeds of sales, which cheque W. omitted to cash, & he came to Ireland leaving the uncashed cheque in England. On Feb. 4, W. met O., who informed him of his insolvency, &, at W.'s request, O. gave him a cheque for the same amount & bearing the

Sect. 12.—*Avoidance of preference: Sub-sect.* 4, *F. & G.*]

7363. —— ——.]—Deft.'s wife, whilst sole, made, as surety with F., a joint & several promissory note payable to L. F. having become embarrassed, delivered his effects to W. for the benefit of his creditors. Deft. applied to F. for money to take up the note, when F. voluntarily, & in contemplation of bkpcy., gave him an order upon W. for the amount, which was paid to deft. L., in whose hands the note was, refused to receive the amount, unless the whole of F.'s debt to him was paid, & deft. retained it as an indemnity. A fiat in bkpcy. having issued against F. :—*Held :* his assignees were entitled to recover from deft. the sum so paid to him, as money received for their use.—GROOM *v.* WATTS (1850), 4 Exch. 727 ; 19 L. J. Ex. 154 ; 154 E. R. 1408.

Annotation :—**Refd.** Marks *v.* Feldham (1869), 10 B. & S. 371.

7364. —— ——.]—Debtor assigned a patent to a surety, who had guaranteed the payment of a debt :—*Held :* the assignment was a fraudulent preference.—*Re* BEAR, *Ex p.* CHIEF OFFICIAL RECEIVER (1886), 3 Morr. 129.

7365. —— ——.]—A charge given to a surety, before he has been called upon to pay as surety, may be a fraudulent preference.—*Re* BLACKPOOL MOTOR CAR CO., LTD., HAMILTON *v.* BLACKPOOL MOTOR CAR CO., LTD., [1901] 1 Ch. 77 ; 70 L. J. Ch. 61 ; 49 W. R. 124 ; 45 Sol. Jo. 60 ; 8 Mans. 193.

Annotation :—**Mentd.** *Re* Lake, *Ex p.* Dyer, [1901] 1 K. B. 710.

7366. —— —— **No preference of creditor.**]—Defts., bankers, discounted for B., a customer, two bills, one of which was accepted by L. for B.'s accommodation, & the payment of the other guaranteed by L. Before the bills became due, B., who was in a state of insolvency, went to defts'. banking-house, accompanied by L., & paid in to his account a sum sufficient to cover the two bills, & then gave L., cheques for the amount of the bills, which L. handed to defts. in satisfaction of the bills :—*Held :* not a fraudulent preference of defts., the preference, if any, being given to L. —ABBOTT *v.* POMFRET (1835), 1 Bing. 462 ; 1 Hodg. 24 ; 1 Scott, 470 ; 4 L. J. C. P. 139 ; 131 E. R. 1195.

Annotations :—**Consd.** *Re* Mills, *Ex p.* Official Receiver (1887), 58 L. T. 235, D. C. **Refd.** Thomas *v.* Connell (1838), 4 M. & W. 267.

7367. Payment to prevent debt becoming statute-barred.]—Debtor paid part of a debt barred by Stat. Limitations, with the object of renewing the debt & enabling the creditor to prove in the bkpcy. for the balance due. The debt up to the date of such payment on account had always been treated by debtor & the creditor as a subsisting debt, & one which it was intended should be ultimately paid :—*Held :* the payment was not a fraudulent preference.—*Re* LANE, *Ex p.* GAZE (1889), 23 Q. B. D. 74 ; 58 L. J. Q. B. 373 ; 61 L. T. 54 ; 37 W. R. 671 ; 6 Morr. 143, D. C.

7368. Deposit of additional deeds—Accidentally omitted on previous occasion.]—An advance being agreed to be made on the security of a deposit of certain documents with a written memorandum containing a list of them, it was found that by accident one of the documents had not been brought with the rest. The lenders nevertheless advanced the money, the borrower promising to forward the missing document. On the bkpcy. of the borrower :—*Held :* the assignees were not bound to give the document up. —*Re* RIDGE, *Ex p.* GLYN (1842), 6 Jur. 839, Ct. of R.

7369. —— **Necessary to complete previous security.**]—Bkpt. deposited deeds with a creditor as security for a debt without any memorandum in writing. The creditor believed that all the deeds relating to the property were included. Six years later, two days before the issue of the fiat, bkpt. deposited two other material deeds. There was no imputation as to the *bona fides* of the transaction :—*Held :* the ct. would not impute to it the character of a fraudulent preference.—*Re* TAYLOR, *Ex p.* GILLETT (1843), 3 Mont. D. & De G. 458, Ct. of R.

7370. Security substituted by agent for goods sold by him—Bills of lading pledged by principal.]—A merchant pledged for value the bills of lading of an expected cargo, his property, in the profits of which his agents abroad were interested. His agents, without the knowledge of the owner or the pawnees, disposed of part of the cargo abroad. After the owner became bkpt., he induced the agents to replace the goods disposed of, by others, of which the agents gave him bills of lading, & sent them to the pawnees, to make good their security :—*Held :* the assignees of bkpt. might recover the substituted goods against the pawnees. —MEYER *v.* SHARPE (1813), 5 Taunt. 74 ; 2 Rose, 124 ; 128 E. R. 614.

7371. Security granted in lieu of previous defective security.]—Debtor had for good consideration given a bill of sale to his wife, which both parties intended to be good, but which turned out to be valueless owing to a decision of the cts.

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same date as the former, & in substitution therefor. That cheque W. immediately cashed. Earlier that day O. had instructed his solr. to file a petition for arrangement on his behalf, & the petition was filed later in the same day, & protection granted :—*Held :* the giving of the second cheque did not amount to a fraudulent preference of W. under 1872 Act, s. 53.—*Re* OLIVER, [1914] 2 I. R. 356.—**IR.**

g. *Mortgages given to secure payment of amounts previously advanced without security.*]—*Held :* void as against the trustee.—*Re* MORGAN, *Ex p.* TILBURY, [1903] S. R. Q. 108. —**AUS.**

k. *Absolute assignment substituted for previous mortgage.*]—Where debtor had assigned his book debts by way of mtge. to a creditor, & subsequently, when his bkpcy. was imminent, substituted for such assignment another, assigning absolutely certain book debts in full discharge of the claim, but with a proviso that debtor should be liable for any balance remaining unpaid :—*Held :* the latter deed was made with a view of giving the creditor a preference, & the deed set aside.—*Re* AICKIN, *Re* NEW ZEALAND DRUG CO., LTD., *Ex p.* OFFICIAL ASSIGNEE (1888), 7 N. Z. L. R. 168.—**N.Z.**

l. *Specific delivery order granted in lieu of one not specific.*]—A delivery order, although specific & duly intimated to custodiers, which had been granted in substitution of a prior delivery order which was not specific : —*Held :* invalid, it being granted in further security of a prior debt within sixty days of the grantor's insolvency contrary to 1696 Act, c. 5.—LAIRD & SON *v.* BANK OF SCOTLAND (1910), 47 Sc. L. R. 794.—**SCOT.**

m. *Invalid delivery orders exchanged for bills of lading.*]—A., the sole member of a firm of timber brokers in Glasgow, borrowed a sum of money from B., & gave in security of the loan delivery orders for timber belonging to him, & stored in a timber-yard belonging to a third person. A.'s firm became bkpt., & within sixty days of the bkpcy. B. handed over to A. the delivery orders in exchange for the bills of lading of a cargo of timber indorsed in his favour by A. The delivery orders were ineffectual to operate constructive delivery to B. :—*Held :* the indorsation of the bills of lading to B. was an illegal preference within 1696 Act, c. 5.—DOBELL, BECKETT & CO. *v.* NEILSON (1904), 42 Sc. L. R. 279 ; 12 S. L. T. 543. —**SCOT.**

n. *Corroborative deed granted to carry out original intention of parties.*]—W. lent money on the security of an estate, which he believed, on the representation of the borrower, to contain ninety-five acres. The borrower became bkpt., & it was discovered that the description of the lands charged in security to W. did not comprise more than six acres. W. applied to bkpt., & obtained from him a corroborative bond, reciting the former deed, & subjecting the whole ninety-five acres, as originally intended, to secure the loan, & W. obtained infeoffment

He then, just prior to bkpcy., gave a fresh security, with the sole object of remedying the defect in the first security being under the impression that he was obliged to do so :—*Held :* as debtor's intention was only to correct a previous error, that negatived any intention to prefer.—*Re* TWEEDALE, *Ex p.* TWEEDALE, [1892] 2 Q. B. 216 ; 61 L. J. Q. B. 505 ; 66 L. T. 233 ; 8 T. L. R. 327 ; 9 Morr. 110, D. C.

G. Other Cases.

7372. Delivery of goods to trustee for creditor—Creditor not assenting till after bankruptcy.]—Delivery of goods in satisfaction for a debt by a person, who after delivery became bkpt., to a third person for the use of the creditor :—*Held :* good, though the *cestui que trust,* not having notice, did not assent until after the bkpcy.—ATKIN *v.* BERWICK (1719), 10 Mod. Rep. 431 ; 11 Mod. Rep. 295 ; 88 E. R. 795 ; *sub nom.* ATKYNS *v.* BERWICK, Fortes. Rep. 353 ; *sub nom.* ATKIN v. BARWICK, 1 Stra. 165.

Annotations :—**Dbtd.** Alderson *v.* Temple (1768), 1 Wm. Bl. 660. **Consd.** Harman *v.* Fishar (1774), 1 Cowp. 117 ; Salte *v.* Field (1793), 5 Term Rep. 211. **Distd.** Smith *v.* Field (1793), 5 Term Rep. 402 ; Barnes *v.* Freeland (1794), 6 Term Rep. 80. **Consd.** Neate *v.* Ball (1801), 2 East, 117 ; Richardson *v.* Goss (1802), 3 Bos. & P. 119 ; Bartram *v.* Farebrother (1828), 4 Bing. 579. **Distd.** James *v.* Griffin (1831), 2 M. & W. 623, Ex. Ch. **Consd.** Sadler *v.* Belcher (1843), 2 Mood. & R. 489. **Refd.** Tooke *v.* Hollingworth (1793), 5 Term Rep. 215 ; Mills *v.* Ball (1801), 2 Bos. & P. 457 ; James *v.* Griffin (1836), 1 M. & W. 20 ; Lyon *v.* Holt (1839), 5 M. & W. 250 ; Van Casteel *v.* Booker (1848), 2 Exch. 691 ; Heinekey *v.* Earle (1857), 8 E. & B. 410 ; Cook *v.* Lister (1863), 13 C. B. N. S. 543 ; Hutchings *v.* Nunes (1863), 1 Moo. P. C. C. N. S. 243, P. C.

7373. Bill sent to creditor—Without his knowledge.]—Preference of one creditor by bkpt. in sending him, without his knowledge, a bill by the post is fraudulent & void, when done on the eve of the bkpcy.—ALDERSON *v.* TEMPLE (1768), 4 Burr. 2235 ; 1 Wm. Bl. 660 ; 98 E. R. 165.

Annotations :—**Folld.** Harman *v.* Fishar (1774), 1 Cowp. 117. **Distd.** Hartshorn *v.* Slodden (1801), 2 Bos. & P. 582. **Consd.** Nichols *v.* Clent (1817). 3 Price, 547 ; Marks *v.* Feldman (1870), L. R. 5 Q. B. 275, Ex. Ch. **Refd.** Whitfield *v.* Savage (1800), 2 Bos. & P. 277 ; Jones *v.* Yates (1829). 9 B. & C. 532 ; Belcher *v.* Prittie (1834), 10 Bing. 408. **Mentd.** Janson *v.* Willson (1779), 1 Doug. K. B. 257 ; Fox *v.* Chester (1829), 3 Bli. N. S. 123, H. L. ; Cook *v.* Rogers (1831), 7 Bing. 438 ; *Re* Craven & Marshall, *Ex p.* Craven (1870), L. R. 10 Eq. 648.

7374. —— —— With avowed object of giving preference.]—A trader, in contemplation of absconding, inclosed bills to F. a creditor, in discharge of his debt, saying, he had the honour to show him that preference which he conceived was his due. It was done without the privity of F. & was followed by an act of bkpcy. before the notes could possibly be delivered :—*Held :* the essential motive being to give a preference & the act itself incomplete, it was void, though in favour of a very meritorious creditor.—HARMAN *v.* FISHAR (1774), 1 Cowp. 117 ; Lofft, 472 ; 98 E. R. 998.

Annotations :—**Folld.** Barnes *v.* Freeland (1794), 6 Term Rep. 80. **Distd.** Hartshorn *v.* Slodden (1801), 2 Bos. & P. 582. **Consd.** Cook *v.* Rogers (1831), 7 Bing. 438. **Distd.** *Re* Wilkinson, *Ex p.* Stubbins (1881), 17 Ch. D. 58. **Refd.** Rust *v.* Cooper (1777), 2 Cowp. 629 ; Fidgeon *v.* Sharpe (1814), 5 Taunt. 539 ; Poland *v.* Glyn (1826), 12 Moore, C. P. 109, n. ; Fox *v.* Chester (1829), 3 Bli. N. S. 123, H. L. ; Belcher *v.* Prittie (1834), 10 Bing. 408 ; James *v.* Griffin (1837), 2 M. & W. 623 ; Sadler *v.* Belcher (1843), 2 Mood. & R. 489, N. P. ; Bills *v.* Smith (1865), 6 B. & S. 314 ; *Re* Craven & Marshall, *Ex p.* Craven (1870), 18 W. R. 1022. **Mentd.** Tooke *v.* Hollingworth (1793), 5 Term Rep. 215 ; Neate *v.* Ball (1801), 2 East, 117 ; *Ex p.* Joseph (1811), 18 Ves. 340 ; Bartram *v.* Farebrother (1828), 4 Bing. 579 ; Jones *v.* Yates (1829), 9 B. & C. 532 ; Hutchings *v.* Nunes (1863), 9 L. T. 125 ; Marks *v.* Feldman (1870), L. R. 5 Q. B. 275, Ex. Ch. ; Read *v.* Bailey (1877), 26 W. R. 223, H. L.

7375. —— To be discounted & surplus returned to bankrupt.]—A. shortly before his bkpcy., on being applied to by B., to whom he owed £47, to pay the debt, gave him a bill of exchange to get it discounted to pay his own debt & pay over the surplus. Before the bill was discounted A. became a bkpt. :—*Held :* B. could not retain the bill against the assignees.—HUMPHRIES *v.* WILSON (1819), 2 Stark. 566, N. P.

7376. Sale to creditor—Fraudulently to cheat other creditors.]—Defts., creditors of bkpt., employed agents to buy from bkpt. goods, which he had bought on credit & at an under value :—*Held :* the transaction was fraudulent & void, as giving an iniquitous & illegal priority to a particular creditor.—MARTIN *v.* PEWTRESS (1769), 4 Burr. 2477 ; 98 E. R. 299.

Annotations :—**Refd.** Billiter *v.* Young (1856), 6 E. & B. 1, Ex. Ch. ; Young *v.* Billiter (1860), 8 H. L. Cas. 682, H. L.

7377. —— Fictitious sale.]—A pretended sale, though of part of a trader's goods only, to a particular creditor, or any other contrivance not in the course of trade, but calculated merely to give a fraudulent preference, & to defeat the equality of the bkpcy. laws, is void, though the delivery of the goods to such creditor, & his assent to the transaction be complete, before any act of bkpcy. committed.—RUST *v.* COOPER (1777), 2 Cowp. 629 ; 98 E. R. 1277.

Annotation :—**Refd.** Billiter *v.* Young (1856), 6 E. & B. 1, Ex. Ch.

7378. —— Collusive sale—Whether demand & refusal necessary before trover.]—A trader on the eve of bkpcy. made a collusive sale of goods to A. :—*Held :* the assignees could not maintain trover for them, without proving a demand & refusal.—NIXON *v.* JENKINS (1793), 2 Hy. Bl. 135 ; 126 E. R. 471.

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on such latter security before the trustee in the sequestration completed his feudal title :—*Held :* the supplemental bond was void as against the trustee.—INGLIS *v.* MANSFIELD (1835), 3 Cl. & Fin. 362.—**SCOT.**

o. *Security granted to consolidate previous securities.*]—H. was in the habit of purchasing sheep from M. & Co. On the purchase of each lot H. executed an instrument under Chattels Transfer Act, 1889, in favour of M. & Co., over the sheep purchased to secure the purchase money, & also gave promissory notes, which were stated to be given as collateral security. H. was also in the habit of reselling the same sheep through M. & Co., the proceeds going to her credit. On Nov. 25, 1896, there were three instruments in existence. Two of the promissory notes given in respect of them were overdue, & the third was just about to mature. H., at the request of M. & Co., executed an instrument in their favour over the unsold sheep included in the above instruments, to secure the balance then owing on such instruments. No new liability was incurred by H., nor was any additional property included in the instrument of Nov. 25, but the previous instruments were retained by M. & Co. The transaction was admittedly for the convenience of M. & Co.'s banking arrangements. H., within four months of the date of the last instrument, *viz.* on Feb. 12, 1897, was adjudged a bkpt. :—*Held :* the last instrument was void under 1892 Act, s. 79 (2), but its execution did not cancel the three previous instruments, & M. & Co. were entitled to retain the proceeds of the sheep by virtue of such previous instruments.—*Re* HILL, OFFICIAL ASSIGNEE *v.* MATSOM & CO. (1897), 16 N. Z. L. R. 129.—**N.Z.**

PART XX. SECT. 12, SUB-SECT. 4.—G.

7378 i. *Sale to creditor—Collusive sale—Debtor allowed to retain possession.*]—F., an hotel keeper, being largely indebted, sold to A., his principal creditor, on Jan. 19, 1875, the bulk of his estate, comprising the hotel & furniture. No delivery took place, & ten months later F., who remained in possession of the property under a lease from A. of the same date as that of the sale, became bkpt. :—*Held :* the object of the transaction was to defeat F.'s creditors generally, & the deeds of sale & lease of Jan. 19, 1875, were null & void.—RICKABY *v.* BELL (1878), 2 S. C. R. 560.—**CAN.**

7378 ii. —— —— ——.]—Action to annul a sale of an immovable, made by insolvent three months previous to his insolvency. The property was very valuable & was hypothecated to different persons to the amount of $6,500. The sale was to a brother, & was made subject to the charge of paying not only the hypothecs but sums due to relatives to the amount

Sect. 12.—Avoidance of preference: Sub-sect. 4, G.]

Annotations :—**Distd.** Soames *v.* Watts (1824), 1 C. & P. 400, N. P. **Apld.** Stevenson *v.* Newnham (1853), 13 C. B. 285, Ex. Ch. **Consd.** Billiter *v.* Young (1856), 6 E. & B. 1, Ex. Ch.; Heilbut *v.* Nevill (1870), L. R. 5 C. P. 478, Ex. Ch. **Mentd.** Exley *v.* Inglis (1868), L. R. 3 Exch. 247.

7379. —— —— After execution issued by creditor.]—P. recovered judgment for a sum exceeding £50 from a trader, & on Aug. 8 lodged an execution in the hands of the sheriff, who seized six of his horses. On Aug. 11, before any sale had been made by the sheriff, debtor agreed with P. to sell him the six horses, which the sheriff had seized for the amount of the debt & the sheriff's charges, & P. withdrew the execution, but he left the horses in debtor's stables, & signed an agreement to let debtor have the use of them for a certain payment per day. On Aug. 15, P. removed the horses, & soon afterwards sold them for about the same price as he gave for them. Debtor was at the time of the sale insolvent, & on Aug. 15 he filed a petition for liquidation, & trustees were appointed, who claimed the price of the horses from P. :—*Held :* the sale was a fraudulent preference of the creditor.—*Re* MORTIMER, *Ex p.* PEARSON (1873), 8 Ch. App. 667; 42 L. J. Bcy. 44; 28 L. T. 796; 21 W. R. 688, L. JJ.

Annotation :—**Refd.** *Re* Wilkinson, *Ex p.* Clater, *Ex p.* Beckett-Denison (1883), 48 L. T. 648.

7380. Act interfering with equality of distribution —Security given to brother for immediate advance.]—A trader, in consideration of a loan of £120 without interest, being in insolvent circumstances, assigned one third part of all his effects to the lender, who was his brother, & absconded within two days after the making the deed, & was declared a bkpt. :—*Held :* the giving the brother, who was a *bonâ fide* creditor, the preference was a fraud upon all the laws concerning bkpts., which proceeded upon equality, & said that all the creditors should come *in pari passu*, & the deed was void. —LINTON *v.* BARTLET (1770), 3 Wils. 47; 95 E. R. 926.

Annotations :—**Refd.** Rust *v.* Cooper (1777), 2 Cowp. 629. **Mentd.** Harman *v.* Fishar (1774), Lofft, 472; Abbott *v.* Burbage (1836), 2 Scott, 656.

7381. —— Fraud on bankruptcy law.]—Down to the time of his actual bkpcy. a trader has the unrestrained dominion over his own property. The only exception to the rule is that if he disposes of any part of it contemplating bkpcy. at the time, & intending to prevent the equal & just distribution provided by the law, he thereby commits a fraud. The principle upon which voluntary payments to favoured creditors made before the commission of an act of bkpcy. are avoided is that such payments are a fraud upon the bkpcy. laws.—ATKINSON *v.* BRINDALL (1835), 2 Bing. N. C. 225; 2 Scott, 369; 1 Hodg. 336; 5 L. J. C. P. 73; 132 E. R. 88.

Annotation :—**Refd.** Aldred *v.* Constable (1843), 4 Q. B. 674.

7382. —— No intention to benefit creditor—& no creditor benefited.]—If a party contemplating bkpcy. voluntarily makes a payment, by which the equal distribution of his property under the fiat will be defeated, such payment is a fraudulent preference, though bkpt., in making it, did not intend to benefit, nor did in fact benefit, the particular creditor. As if he pays off a mtge. on property settled to the use of his wife, who had joined in such mtge., without previous notice to, or request by, the creditor, to whom it would have been equally beneficial to retain the mtge., bkpt. intending only, by such payment, to liberate the wife's property for his own & her benefit.—MARSHALL *v.* LAMB (1843), 5 Q. B. 115; 1 Dav. & Mer. 315; 13 L. J. Q. B. 75; 1 L. T. O. S. 385; 7 Jur. 850; 114 E. R. 1192.

Annotations :—**Distd.** *Re* Mills, *Ex p.* Official Receiver (1888), 58 L. T. 871, C. A. **Refd.** Bourne *v.* Graham (1856), 2 Jur. N. S. 1225. **Mentd.** Ganvill *v.* Utting (1845), 9 Jur. 1081.

of $2,594, & subject also to a right of *rémeré*. The property, which was worth more than the total of the charges, remained in the actual possession of insolvent :—*Held :* the sale must be presumed to have been made in fraud of insolvent's other creditors.—BRAIS *v.* RACETTE (1880), 3 L. N. 398.—**CAN.**

p. —— *"Effect of preferring"—Creditor placed in position to prefer himself.*]—S. being embarrassed, sold to D., then a creditor, property for £600. £200 was paid to S. at once, & it was agreed that D. should pay the £400 when required. Before S. became insolvent D. actually paid the £400 to S. The old debt to D. remained unpaid :—*Held :* whether a deed had the "effect of preferring" within 5 Vict. No. 17, s. 8, must be judged by its ultimate result, & not by the fact that it put the creditor in a position to prefer himself.—STEPHEN *v.* DOYLE (1882), 3 N. S. W. Eq. 1.—**AUS.**

q. —— *Before insolvency—Payment after.*]—22 Vict. c. 26, s. 18, against preferences, does not apply to a conveyance of real estate sold by debtor before his insolvency, but not paid for.—CARRADICE *v.* CURRIE (1872), 19 Gr. 108.—**CAN.**

r. —— *Being wife — Purchase-money used to prefer creditors—Repayment to wife of part of purchase-money.*]—*Held :* void.—LANGLEY *v.* BEARDSLEY (1909), 18 O. L. R. 67; 13 O. W. R. 349.—**CAN.**

s. —— *Sale of shares in part satisfaction of claim.*]—*Held :* valid.—IMPERIAL BANK OF CANADA *v.* REID (1917), 11 O. W. N. 357.—**CAN.**

t. —— *Part of purchase price satisfied by set-off of debt due by vendor.*]—A *bonâ fide* sale by a person when in insolvent circumstances will not be set aside as an undue preference, merely on the ground that part of the purchase price has been satisfied by setting off a debt due by the seller to the purchaser.—SAND & CO. *v.* PINCHUK (1912), W. L. D. 26; 6 Biss. & Sm. 382.—**S. AF.**

7381 i. *Act interfering with equality of distribution—Fraud on bankruptcy law.*]—S. & W., becoming embarrassed, arranged with H., the manager of J. G. & Co., their principal creditor, to give security for their debt, & a chattel mtge. was given by S. & W. on everything they had in their business to P., a brother-in-law of J. G. :—*Held :* the mtge. must be treated as if given to J. G. & Co., for it was made to P. only as a device to avoid the statute against fraudulent preferences, & was void as against creditors.—POWELL *v.* CALDER (1885), 8 O. R. 505.—**CAN.**

7381 ii. ——.]—In order to give a preference to a particular creditor, debtor, who was in insolvent circumstances, executed a chattel mtge. upon the stock-in-trade in favour of a money-lender, by whom a loan was made. The money, which was in the hands of the mtgee.'s solr., who also acted for the preferred creditor throughout the transaction, was at once paid over to the creditor :—*Held :* the whole affair was one transaction contrived to evade the consequences of illegally preferring a particular creditor over others.—BURNS *v.* WILSON (1897), 28 S. C. R. 207.—**CAN.**

7381 iii. —— ——.]—NEWTON *v.* REIN (1909), 11 W. L. R. 363.—**CAN.**

w. —— *Indorsement & delivery of promissory notes to creditor.*]—LEVY *v.* SMITH (1865), 4 N. S. W. S. C. R. 329.—**AUS.**

x. —— *Goods handed over to creditor on eve of bankruptcy.*]—WHITE *v.* LONSDALE & CO., [1909] S. R. Q. 254.—**AUS.**

y. —— *Attempt to create solicitor's lien.*]—A trader who procures an order for the assignee to receive & possess his estate, cannot, even by special arrangement with his attorney, lodge with, or transfer to him any portion of his assets, as security for his costs, so as to create a lien in the attorney's favour. An attempt to establish a special lien, by special contract, on a trader's assets, of which the attorney has got possession, as security for his costs, those assets being bound by an order of the ct., procured by that attorney, must fail, since it would be against the rights & equities of the several creditors bound by the vesting order.—*Re* NORTH (1865), 17 Ir. Jur. 297.—**IR.**

z. —— *Direction to auctioneer to sell & pay named creditors out of proceeds.*]—Debtor, being indebted to auctioneers, placed his business in their hands for sale, at the same time giving them an order to pay out of the proceeds £178 14s., the balance due to a creditor on an agreement to mtge. the business, to retain the amount of their own debt, & to pay the balance to debtor. He also verbally instructed the auctioneers to pay an amount due to another creditor. On the sale of the business by the auctioneers the proceeds were applied in paying the amounts under debtor's order :—*Held :* unless the payment could be impeached as a fraudulent preference, the creditor was entitled to retain the money against the official

7383. Return of goods bought—With consent of seller.]—Where a sale of goods has been completed by actual delivery to the buyer, who afterwards becomes insolvent, before they are paid for, he cannot rescind the contract & return the goods with the consent of the seller so as to give the seller a preference to his other creditors.—BARNES *v.* FREELAND (1794), 6 Term Rep. 80; 101 E. R. 447.

Annotation :—**Consd.** Bartram *v.* Farebrother (1828), 4 Bing. 579.

7384. —— Bankrupt entitled to return at once —Delay in returning.]—A trader ordered bags of wool of defts. in Dec., which were delivered on Feb. 19 following, & by the course of dealing the trader had the option of returning the wool for which he had no call, though previously ordered. The trader being from home when the bags were delivered, on his return the same day gave directions not to have them opened or entered in his books, but only weighed off to see that they agreed with the invoice, he being then in embarrassed circumstances & intending not to take them into the account of his stock, if in the event he found himself unable to pursue his business. Afterwards on Mar. 4 & 5, being then avowedly insolvent, he returned the bags with a letter to the merchants declaring his situation, & hoping that they would have no objection to take back the wool, & requesting the favour of a line of approbation thereof, which letter was received & the approbation given after an act of bkpcy. committed on the same day the letter was sent: —*Held :* by the trader keeping possession of the goods so long, his option, which ought to have been exercised on the receipt of them was gone, & being in a state of insolvency & on the eve of bkpcy., he could not exercise the power of restoring the goods to the vendors, though without any fraudulent concert with them, & the trader's assignees were entitled to the property.—NEATE *v.* BALL (1801), 2 East, 117; 102 E. R. 313.

Annotations :—**Distd.** Gibson *v.* Bray (1817), 8 Taunt. 76. **Refd.** Richardson *v.* Goss (1802), 3 Bos. & P. 119.

See, further, Nos. 6527, 6820 *et seq., ante.*

7385. Undue bills taken up—Bills not due till after bankruptcy.]—Bankers having accepted bills for the accommodation of a trader, he, after committing an act of bkpcy., but before a commission was sued out, lodged money with them to take up the bills, which did not become due till after a commission was sued out, & were then regularly paid by the acceptors :—*Held :* they were bound to refund this money to the assignees, & they could not protect themselves under 19 Geo. 2, c. 32, as having received the money in payment of bills of exchange in the ordinary course of trade.—TAMPLIN *v.* DIGGINS (1809), 2 Camp. 312, N. P.

Annotation :—**Refd.** Kinder *v.* Butterworth (1826), 6 B. & C. 42.

7386. Transaction bonâ fide—Evidence of bona fides.]—A. & B., traders living in London, were in the course of ordering goods of defts., cotton manufacturers at Manchester, to be sent to M. & Co. at Hull, for the purpose of being afterwards sent to the correspondents of A. & B. at Hamburg. On Mar. 31 A. & B. sent orders to defts. for goods to be sent to M. & Co. at Hull, to be shipped for Hamburg as usual :—*Held :* (1) it was competent to A. & B. who became insolvent some time in July, but committed no act of bkpcy. till Sept. 26, to agree *bonâ fide*, & not from motives of voluntary & undue preferences, to give up the goods to defts., in the latter end of July; (2) the circumstances of bkpts. having called a meeting of their creditors, & having taken legal advice, & being encouraged by the result of such meeting & advice to give up the goods, was evidence for the jury to find that the goods were given up *bonâ fide*, &

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assignee in a subsequent bkpcy.—*Re* WALTON, OFFICIAL ASSIGNEE *v.* MCKAY BROTHERS (1909), 28 N. Z. L. R. 948.—**N.Z.**

a. —— *Delivery to auctioneers of crop, stock, & effects in satisfaction or security of debt.*]—*Held :* struck at by 1696 Act, c. 5.—MACINTOSH *v.* MACDONALD, FRASER & CO., LTD. (1902), 4 F. (Ct. of Sess.) 1132; 10 S. L. T. 201.—**SCOT.**

7383 i. *Return of goods sent without order—Bills of lading indorsed to agent of sender—Portion of goods sold by debtor & price paid to agent.*]—C. & Co., merchants in London, sent S., a merchant, in Dublin, unordered (as was their custom), three hundred hogsheads of porter. S., finding he could not pay for them, immediately, on the receipt of the invoice & bills of lading, indorsed them over to defts., as agents of C. & Co. A commission issued against S. Defts. permitted S. to sell some of the porter, & S. directed the money to be paid to defts. :—*Held :* there was no undue preference, as S. had only done what was his duty.—SMYTH *v.* SAYERS (1799), Rowe, 571.—**IR.**

b. *Return to lender of goods lent to debtor—Within three months of adjudication—After issue of writ.*]—*Held :* a fraudulent preference.—*Re* BEATTIE (BANKRUPT) (1907), 41 I. L. T. 42.—**IR.**

c. *Chattel mortgage for price of goods bought—Original agreement for cash—Option to vendor to take back goods or receive mortgage.*]—*Held :* no preference.—HERSEE *v.* WHITE (1869), 29 U. C. R. 232.—**CAN.**

d. *Bank taking bill of sale as collateral security on discounting bill of exchange—Valid notwithstanding drawer's insolvency.*]—NEWTON *v.* ONTARIO BANK (1868), 13 Gr. 652; 15 Gr. 283.—**CAN.**

7386 i. *Transaction bonâ fide—Evidence of bona fides.*]—A., a trader, being pressed by his creditors, employed J. to negotiate for the sale of his business and stock-in-trade; a sale was made to pltf. who took possession of the goods & the building containing them. Pltf. acted solely in his own interest & without knowledge of any collusion between A. and his creditors :—*Held :* pltf. was a *bonâ fide* purchaser for value, & the sale was not a fraudulent preference within the stat. relating to fraudulent preferences.—DAVIES *v.* MCMILLAN (1893), 13 C. L. T. 207; Cam. Cas. 306.—**CAN.**

7386 ii. —— ——.]—Where the relation of supplier & supplied exists, & large advances constituting the consideration are made, payments & delivery of produce are such as might be made in the ordinary course of business between the parties, an assignment to secure such advances is not void as being fraudulently preferential. —*Re* SAINT (1883), 6 Nfld. L. R. 477; *subsequent proceedings,* 7 Nfld. L. R. 109.—**NFLD.**

7386 iii. —— ——.]—In Dec., 1874, D. executed a mtge. for $2,000 in favour of his sons, to secure money advanced by them for the erection of buildings on the mtge. premises, & in July following he conveyed the same property, with other lands, to his daughter in trust for his wife, who had advanced $700 for the same purpose. Subsequently the sons, intending to benefit their mother, executed a statutory discharge of their mtge. In July, 1876, D. became insolvent. The ct. having negatived fraud made a decree for redemption, declaring the wife entitled to be paid the two sums of $700 & $2,000, & her costs. The maxim "*Ignorantia juris neminem excusat*" treated of & explained.—SMITH *v.* DREW (1877), 25 Gr. 188. —**CAN.**

7386 iv. —— ——.]—WADE *v.* ELLIOTT (1907), 11 O. W. R. 38.—**CAN.**

7386 v. —— ——.]—An assignment by A. in insolvent circumstances of goods to B. & Co. who did not know of such insolvency in return for a money advance, without any fraudulent or preferential intent :—*Held :* valid.—LANGLEY *v.* SIMON'S FRUIT CO. (1914), 26 O. W. R. 433; 6 O. W. N. 449.—**CAN.**

7386 vi. —— ——.]—A transfer of property made to certain creditors fraudulently & in contemplation of the insolvency of the transferor is not voidable at the suit of another creditor, if the transferees were purchasers in good faith & for consideration.—GOPAL *v.* BANK OF MADRAS (1893), I. L. R. 16 Mad. 397.—**IND.**

7386 vii. —— ——.]—R. S. O. 1887 (c. 124), s. 2, does not apply to a chattel mtge. given in consideration of an actual *bonâ fide* advance by the mtgee., without knowledge of mtgor.'s insolvency or of any intention on his part to defeat or delay creditors.—CAMPBELL *v.* PATTERSON, MADER *v.* MCKINNON (1893), 21 S. C. R. 645. —**CAN.**

7386 viii. —— —— *Onus of proof.*]—Evidence that debtor has, within three months prior to his bkpcy., sold goods

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not from any motive of voluntary & undue preference to defts., though done by bkpts. in a situation of impending bkpcy. at the time, defts., at the time of such giving up of the goods by bkpts., holding possession of the goods upon a claim of right to stop them *in transitu.*—DIXON *v.* BALDWEN (1804), 5 East, 175; 102 E. R. 1036.

Annotations:—**Mentd.** Rowe *v.* Pickford (1817), 1 Moore, C. P. 526; Coates *v.* Railton (1827), 6 B. & C. 422; Tucker *v.* Humphrey (1828), 4 Bing. 516; James *v.* Griffin (1837), 2 M. & W. 623; Jackson *v.* Nichol (1839), 5 Bing. N. C. 508; Dodson *v.* Wentworth (1842), 4 Man. & G. 1080; Wentworth *v.* Outhwaite (1842), 10 M. & W. 436; Valpy *v.* Gibson (1847), 4 C. B. 837: Griffiths *v.* Perry (1859), 5 Jur. N. S. 1076; Coventry *v.* Gladstone (1868), L. R. 6 Eq. 44; *Re* Whitworth, *Ex p.* Gibbes (1875), 1 Ch. D. 101; Kendal *v.* Marshall, Stevens (1883), 11 Q. B. D. 356, C. A.; *Re* Isaacs, *Ex p.* Miles (1885), 15 Q. B. D. 39, C. A.; Bethell *v.* Clark (1888), 20 Q. B. D. 615, C. A.; Lyons *v.* Hoffnung (1890), 15 App. Cas. 391, P. C.; *Re* Gurney, *Ex p.* Hughes (1892), 67 L. T. 598; Taylor *v.* G. E. Ry. (1901), 70 L. J. K. B. 499; Oppenheimer *v.* Frazer (1907), 97 L. T. 3, C. A.

7387. —— Act done secretly.]—A transaction, *e.g.* a delivery of goods by a trader being *bonâ fide* & not colourable, will not be impeached by the secrecy with which the delivery was made by the trader, in order to save his own credit in view of the world.—CROSBY *v.* CROUCH (1809), 11 East, 256; 2 Camp. 166; 103 E. R. 1003.

Annotations:—**Mentd.** Cook *v.* Rogers (1831), 7 Bing. 438; Belcher *v.* Prittie (1834), 10 Bing. 408; Van Casteel *v.* Booker (1848), 2 Exch. 691; Strachan *v.* Barton (1856), 11 Exch. 647; Bills *v.* Smith (1865), 6 B. & S. 314.

7388. Act injurious to creditors.]—A party is not permitted to do an act in contemplation of bkpcy., which is injurious to creditors.—FOX *v.* CHESTER (BISHOP) (1829), 3 Bli. N. S. 123; 6 Bing. 1; 1 Dow & Cl. 416; 4 E. R. 1287, H. L.

Annotations:—**Mentd.** Gully *v.* Exeter (1828), 2 Moo. & P. 105; Alston *v.* Atlay (1837), 7 Ad. & El. 289, Ex. Ch.; Walsh *v.* Lincoln (1875), L. R. 10 C. P. 518; Spiers *v.* Hunt, [1908] 1 K. B. 720.

7389. Granting warrant of attorney.]—Debtor within three months before the commencement of his imprisonment, being then in insolvent circumstances, with the view of petitioning the Insolvent Ct., voluntarily executed a warrant of attorney in favour of deft., a creditor, for the express purpose, by arrangement between them, of enabling deft. to take debtor's goods in execution in satisfaction of his debt. Deft. immediately entered up judgment on the warrant of attorney, & issued execution thereon, & directed & assisted the sheriff in the seizure & sale of the goods:—*Held:* the warrant of attorney, being voluntarily given for the purpose of enabling a favoured creditor to take the goods, was fraudulent & void as against the assignees.—YOUNG *v.* BILLITER (1860), 8 H. L. Cas. 682; 30 L. J. Q. B. 153; 7 Jur. N. S. 269; 11 E. R. 596; *sub nom.* BILLITER *v.* YOUNG, 3 L. T. 196, H. L.

Annotations:—**Refd.** Marks *v.* Feldman (1869), L. R. 4 Q. B. 481; Heilbut *v.* Nevill (1870), L. R. 5 C. P. 478. **Mentd.** Fitzmaurice *v.* Bayley (1858), 4 Jur. 506, Ex. Ch.; Hollingsworth *v.* White (1862), 6 L. T. 604; Topping *v.* Keysell (1864), 33 L. J. C. P. 225; Marks *v.* Feldman (1870), L. R. 5 Q. B. 275, Ex. Ch.; Clough *v.* L. & N. W. Ry. Co. (1871), L. R. 7 Exch. 26, Ex. Ch.

7390. Vesting property in one creditor—To protect bankrupt from other creditors.]—Debtor cannot vest his property in one of his creditors for the purpose of protecting himself against his other creditors. A deed executed for such purpose is fraudulent & void against the latter, & the creditor taking such conveyance is a party to the fraud, & cannot be in a better position than debtor.—SMITH *v.* HURST (1852), 10 Hare, 30; 22 L. J. Ch. 289; 20 L. T. O. S. 303; 17 Jur. 30; 68 E. R. 826.

Annotations:—**Consd.** Neale *v.* Day (1858), 32 L. T. O. S. 143; New, Prance & Garrard's Trustee *v.* Hunting, [1897] 2 Q. B. 19, C. A. **Mentd.** Coventry *v.* Gladstone (1868), 37 L. J. Ch. 492; *Re* Cowbridge Ry. Co. (1868), L. R. 5 Eq. 413.

7391. Payment by agent to principal—Principal ignorant of agent's condition—Ordinary course of business.]—Goods were consigned to, & sold by, a *del credere* agent, who, without any intention to prefer, paid the proceeds to his principal in the ordinary course of business. The principal had no knowledge of the state of his agent's affairs:—*Held:* not a fraudulent preference.—*Re* CHEESEBROUGH, *Ex p.* BLACKBURN (1871), L. R. 12 Eq. 358; 25 L. T. 76; 19 W. R. 973; *sub nom. Re* CHEESEBROUGH, *Ex p.* HITCHCOCK, 40 L. J. Bcy. 79.

Annotations:—**Apprvd.** *Re* Walker, *Ex p.* Topham (1873), 8 Ch. App. 614, L. JJ. **Consd.** *Re* Meldrum, *Ex p.* Butcher (1874), 9 Ch. App. 595, L. JJ. **Refd.** *Re* Bird, *Ex p.* Hill (1883), 23 Ch. D. 695, C. A. **Mentd.** Butcher *v.* Stead (1875), 33 L. T. 541, H. L.

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to a creditor for an antecedent consideration, with the intention of preferring the creditor, does not necessarily avoid the sale under 1883 Act, s. 78, but throws the *onus* of proof of the creditor's *bona fides* upon him. The absence of proof of an intention on the part of debtor to prefer the creditor is *primâ facie* evidence of good faith on the part of the creditor.—*Re* TURNBULL, *Ex p.* NEILL BROTHERS (1884), 3 N. Z. L. R. 344.—**N.Z.**

7386 ix —— *Evidence of mala fides.*]—A transaction is not *bonâ fide* if the creditor, although he has no notice of an available act of bkpcy., yet knows, or ought to know, that debtor is insolvent, & that the transaction will have the effect of preferring such creditor.—*Re* MACADAM (1913), 13 S. R. N. S. W. 206.—**AUS.**

7388 i. *Act injurious to creditors—Jurisdiction of court to prevent creditor of one partner obtaining undue preference over creditors of firm.*]—FELAN *v.* MCGILL (1870), 3 Ch. Ch. 68.—**CAN.**

7388 ii. —— *Unregistered bill of sale.*]—A bill of sale executed over the whole of bkpt.'s property, & not registered at the grantor's request, because, as a professional man, he does not wish his name made public in connection with a bill of sale, is void under Bkpcy. Act.—*Re* COOK, *Ex p.* OFFICIAL ASSIGNEE & MORRIS (1893), 14 N. S. W. B. 77.—**AUS.**

e. *Payment on unrecorded judgment.*]—$700 were paid within thirty days of assignment by H. to defts. on a judgment entered up at the suit of defts. shortly before the assignment, but not recorded because it would injure H.'s credit:—*Held:* the payment, although made on judgment was within 1869 Act.—COCHRAN *v.* CHIPMAN (1877), 2 R. & C. 254.—**CAN.**

7389 i. *Granting warrant of attorney—Collusion.*]—MCLEOD *v.* WIGHTMAN (1906), 1 E. L. R. 146, 260.—**CAN.**

7389 ii. *Cognovit.*]—A *cognovit* given in contemplation of bkpcy., & to give deft. a preference, is void.—BRENT *v.* PERRY (1850), 7 U. C. R. 24.—**CAN.**

f. —— *Withdrawal of defence.*]—A withdrawal of defence under Division Courts Act, R. S. O., 1887 (c. 51), s. 113, is not a confession of judgment of *cognovit actionem* within Assignments & Preferences Act, R. S. O., 1887 (c. 124), s. 1.—BAILEY *v.* HAMILTON BANK (1894), 21 A. R. 156.—**CAN.**

7390 i. *Vesting property in one creditor—To protect insolvent from other creditors.*]—H. knew he was insolvent when he made a conveyance of land to his daughter, who was a creditor & entitled to be paid what was due her, in order to withdraw the property from the reach of his creditors:—*Held:* the conveyance was intended merely as security & not as an absolute conveyance.—CASSERLEY *v.* HUGHES (1905), 6 O. W. R. 70.—**CAN.**

7390 ii. *Vesting property in some creditors—No intention to prefer.*]—Where debtor assigns his stock-in-trade & effects by an absolute conveyance to two of his creditors, there is no foundation for asking the ct. to engraft upon a deed, which is in its express terms a grant for the benefit of two individuals, an equity which would compel them to share that benefit amongst all the creditors of their debtor, it being admitted that the assignment was not made with the fraudulent intention of giving undue preference to creditors.—THOMAS *v.* TASKER & BRUCE (1858), 4 Nfld. L. R. 197.—**NFLD.**

7390 iii. —— *Unfair advantage to particular creditor.*]—At a meeting of the members of a firm & their three principal creditors, on July 21, 1914, an arrangement was made by which the creditors formed themselves into a committee to look after the affairs of the firm, upon the basis that all the creditors were to be paid *pro ratâ.* In Feb. 1915, the firm made a mtge. to a co., a creditor. *Semble:* the preference given by the mtge., while unjust if regarded in the light of the arrangement of July, 1914, was not strictly within Assignments & Preferences Act.—MORTIMER *v.* FESSERTON TIMBER CO., LTD. (1917), 40 O. L. R. 86; 39 D. L. R. 781.—**CAN.**

7392. Payment without intention to prefer.]—C. shortly before his bkpcy. paid a sum of more than £1,000 to a creditor. The trustee under the bkpcy. claimed that sum, on the ground that the payments amounted to a fraudulent preference. The question was tried by a jury, who, in answer to questions put to them by the county ct. judge, found that bkpt. when he made the payment was unable to pay his debts as they became due from his own money, but that he did not make the payment with the view of giving the creditor a preference over his other creditors. The county ct. judge thereupon decided that the payment amounted to a fraudulent preference, & ordered the creditor to refund the money:—*Held:* the jury having found as a fact that the payment was not made with the view of preferring the creditor, & there being no suggestion that the county ct. judge had misdirected the jury, or that the verdict was against the evidence, the ct. could not go behind the verdict, & the decision of the county ct. judge was wrong, & the payment was good as against the trustee.—*Re* CHERRY, *Ex p.* BOLLAND (1871), 7 Ch. App. 24; 25 L. T. 646; 20 W. R. 136, L. JJ.

Annotation:—**Refd.** *Re* Wilcoxon, *Ex p.* Griffith (1883), 23 Ch. D. 69, C. A.

7393. Payment before expiry of credit—Payee unaware of debtor's condition.]—Debtor bought goods upon credit, & just before the credit expired, being on the eve of bkpcy., paid his creditor, who had no knowledge or suspicion of debtor's circumstances:—*Held:* a protected transaction.—BUTCHER *v.* STEAD (1875), L. R. 7 H. L. 839; 44 L. J. Bcy. 129; 33 L. T. 541; 24 W. R. 463, H. L.

Annotations:—**Consd.** *Re* Tate, *Ex p.* Tate (1876), 35 L. T. 531, C. A. **Distd.** Tomkins *v.* Saffery (1877), 3 App. Cas. 213, H. L. **Refd.** Mackintosh *v.* Pogose, [1895] 1 Ch. 505; Sharp *v.* Jackson, [1899] A. C. 419, H. L. **Mentd.** *Re* Washington Diamond Mining Co., [1893] 3 Ch. 95, C. A.; *Re* Hirth, *Ex p.* Official Receiver (1899), 68 L. J. Q. B. 287, C. A.

7394. Payment to assignee of Stock Exchange—Only good when no outside creditors.]—The rules of the Stock Exchange provided that a member, who was unable to meet his engagements should be declared a defaulter, & thereupon cease to be a member, & should not be readmitted, unless he paid at least one-third of his Stock Exchange debts, & also that the official assignees of the Stock Exchange should obtain from the defaulter & examine his books of account, collect his assets & administer his estate in conformity with the directions of the Stock Exchange creditors. C., a member, was declared a defaulter. His Stock Exchange liabilities amounted to £24,790, & he also owed £107,000 to another creditor. His assets amounted to £8,000, including £5,000, his balance at his bankers'. The secretary of the Stock Exchange gave notice to the bankers not to part with the balance. Next day debtor attended with his books of account a meeting of his Stock Exchange creditors, & stated he had no outside creditors. He was then informed that if he could pay to his Stock Exchange creditors a dividend of 13*s.* 4*d.* in the pound, his readmission would not be opposed. He then handed to the assignees a cheque for the £5,000, & out of that sum a dividend was distributed among the Stock Exchange creditors. He was subsequently adjudicated a bkpt.:—*Held:* (1) the Stock Exchange rules could only apply where there were no external creditors; (2) the payment of the £5,000 was a *cessio bonorum*, & also a fraudulent preference, which the trustee in the bkpcy. was entitled to recover.—TOMKINS *v.* SAFFERY (1877), 3 App. Cas. 213; 47 L. J. Bcy. 11; 37 L. T. 758; 26 W. R. 62, H. L.

Annotations:—**Distd.** *Re* Plumbly, *Ex p.* Grant (1880), 13 Ch. D. 667, C. A. **Consd.** Richardson *v.* Stormont, Todd, [1900] 1 Q. B. 701, C. A.; *Re* Halstead, *Ex p.* Richardson, [1916] 2 K. B. 902. **Refd.** Ratcliff & Dealtry *v.* Mendelssohn, [1902] 2 K. B. 653, C. A.; Lomas *v.* Graves, [1904] 2 K. B. 557, C. A. **Mentd.** Pearson *v.* Scott (1878), 9 Ch. D. 198; *Re* Sharp, *Ex p.* Gundry *v.* Johnston (1900), 83 L. T. 416.

7395. Mortgage for previous debt—Mortgagee not party to fraud.]—Bkpt. mortgaged all his property to B., without her collusion, to secure money previously lent by her:—*Held:* the mtge. deed must be set aside as a fraudulent preference, B., though no party to the fraud, being able to take no benefit from the fraud of another.—*Re* YATES, *Ex p.* BROWN (1879), 27 W. R. 651, C. A.

Annotations:—**Mentd.** *Re* Harrison, *Ex p.* Harrison (1880), 49 L. J. Bcy. 30; *Re* Lowenthal, *Ex p.* Beesty (1884), 13 Q. B. D. 238; *Re* Barnett, *Ex p.* Reynolds (1885), 15 Q. B. D. 169, C. A.; Sharp *v.* McHenry, Sharp *v.* Brown (1886), 55 L. T. 747.

7396. Suffering judgment by default—In suspicious circumstances—Insufficient evidence of preference.]—Debtor, who owed large sums to his father-in-law & was in pecuniary difficulties, consulted his father-in-law's solr. The latter issued a writ against him, & after telling him that he could only act for his father-in-law, & must leave him to take his own course, he proceeded with the action. Debtor did not appear to the writ, & judgment was obtained against him, upon which a writ of *elegit* was issued, & his goods were seized & delivered to the father-in-law. Debtor then filed a petition, which was the first act of bkpcy. committed by him:—*Held:* although the circumstances of the case were suspicious, there was not sufficient evidence to show that by suffering judgment to go by default against him debtor had intended to give his father-in-law a fraudulent preference over his other creditors.—*Re* MARSDEN, *Ex p.* LANCASTER (1883), 25 Ch. D. 311; 53 L. J. Ch. 1123; 50 L. T. 223; 32 W. R. 483, C. A.

Annotation:—**Apld.** *Re* Laurie, *Ex p.* Green (1898), 67 L. J. Q. B. 431.

g. *Absolute conveyance to creditor of land purchased by bankrupt—Subject to defeasance not executed.*]—*Held:* an imperfect mtge., giving the creditor a specific lien in preference to the other creditors.—CARD *v.* JAFFRAY (1805), 2 Sch. & Lef. 374.—**IR.**

7395 i. *Mortgage for previous debt—Mortgagee not party to fraud.*]—A mtge. given fourteen days before a declaration of insolvency to secure a pre-existing debt is valid, when the mtgee. was not aware & had no notice of the insolvent condition of the mtgor.—*Re* MUDGE & MUDGE & CO.'s INSOLVENT ESTATE (1865), 5 Nfld. L. R. 164.—**NFLD.**

7395 ii. —— ——.]—A creditor in good faith, & without knowledge that debtor was insolvent, took from him a chattel mtge. The transaction was straightforward & honest, but the effect of it was to give the mtgee. a preference over other creditors:—*Held:* the mtge. was void as against creditors.—STEPHENS *v.* MCARTHUR (1890), 6 Man. L. R. 496; 19 S. C. R. 446.—**CAN.**

7396 i. *Suffering judgment by default.*]—On Mar. 28, 1882, a writ was issued by C. against M., for $32,155.33, indorsed with particulars of claim on account stated & settled between C. & M. No appearance was entered, & on Apr. 8 judgment was recovered for the amount, & writs of execution issued:—*Held:* C.'s judgment was not void as being a preference prohibited by R. S. O. c. 118.—MACDONALD *v.* CROMBIE (1885), 11 S. C. R. 107.—**CAN.**

7396 ii. —— *Defendant defending another action.*]—The fact that debtor defends one action brought against him by a creditor, & allows judgment by default for want of an appearance in another suit, is not such an undue preference of one creditor as will render the judgment void under 22 Vict. c. 96, ss. 18 & 19.—YOUNG *v.* CHRISTIE (1859), 7 Gr. 312.—**CAN.**

7396 iii. *Giving confession of judgment.*]—Giving a confession of judgment payable immediately for a sum justly due to a creditor, who has pressed debtor for payment, there being other creditors:—*Held:* not a voluntary & fraudulent procuring of debtor's goods to be taken in execution in contemplation of bkpcy. within 7 Vict. c. 10.—BEEKMAN *v.* WORKMAN (1845), 1 U. C. R. 531.—**CAN.**

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7397. Sending stock to creditor for agistment.]—Debtor sent calves to his father, to whom he was indebted, for agistment & to be returned again:—*Held:* not a fraudulent preference.—*Re* KEMP, *Ex p.* LUCK (1883), 49 L. T. 809; 32 W. R. 296.

7398. Payment to creditor—Acceptor for bankrupt's accommodation.]—A trader on the day after he stopped payment sent a £100 note to a particular creditor, saying it was to help him over his payments:—*Held:* such trader afterwards becoming bkpt., his assignees might recover the money in *assumpsit*, although it appeared that, at the time of payment, a bill for a larger amount was becoming due, which had been accepted by the creditor for bkpt.'s accommodation, & for which he had promised to provide, & the creditor could not be considered as the agent of bkpt. to pay the money for the bill, because, he being a party to it, the payment operated *pro tanto* in his discharge.—GUTHRIE *v.* CROSSLEY (1826), 2 C. & P. 301, N. P.

7399. —— Against his will—Fictitious assignment.]—Debtor, after an act of bkpcy. committed to the knowledge of a creditor, offered to make him a payment by way of fraudulent preference, which the creditor declined to accept. The creditor subsequently assigned the debt for its face value, to an assignee named by debtor who was ignorant of the transaction. The money paid to the creditor had in reality been borrowed by debtor for the purpose of paying the creditor:—*Held:* a fraudulent preference, & the money so received must be repaid by the creditor to the trustee.—*Re* ROBERTS, *Ex p.* DANIEL (1888), 5 Morr. 213.

7400. Goods sent to creditor for realisation—Allegation that they were sent for custody—To avoid distress.]—On Dec. 5 bkpt. told A., his brother-in-law who had previously lent him money, that he feared his landlord was going to put in a distress for rent due. A. inquired about the debt due to him, & a promise was made by bkpt. that the money or something else should be sent, & next day bkpt. sent to A. a mare & colt, which were sold & the proceeds retained by A. On Dec. 7 a distress was put by the landlord into bkpt.'s premises. On Dec. 18 bkpt. executed a deed of assignment for the benefit of his creditors, on which a petition was subsequently founded:—*Held:* the transaction must be set aside, on the ground that it was a fraudulent preference.

The substantial motive of bkpt. in sending the mare & colt to his brother-in-law, *primâ facie* was to prefer his brother-in-law. If the motive had been to cheat the landlord, bkpt. would have sent the mare & colt to his brother-in-law to keep for him, whereas he really sent them to turn into money for his own benefit (A. L. SMITH, J.).—*Re* RICHBELL, *Ex p.* TRUSTEE (1890), 6 T. L. R. 376, D. C.

7401. Goods delivered under belief of moral obligation.]—Debtor delivered goods to a creditor partly in the hope of staving off his bkpcy., & partly from a belief that he was under a moral obligation to the preferred creditor:—*Held:* a fraudulent preference.—*Re* VINGOE & DAVIES, *Ex p.* VINEY & NORTON (1894), 1 Mans. 416.

Annotation:—**Folld.** *Re* Blackburn, Buckley's Case, [1899] 2 Ch. 725.

7402. Indorsing bill of lading to agent—& instructing him to sell same for consignor.]—Pltf., who was a creditor of bkpt. for goods supplied & money lent, consigned him goods under a bill of lading. Bkpt., knowing he was insolvent, did not take physical possession of the goods, but indorsed the bill of lading to a clerk, & directed

k. *Debtor facilitating judgment against himself.*]—Defts. being insolvent, pltfs. on Jan. 7, issued a writ, which was served on the 12th. On the 17th an appearance was entered & a consent given two days after to withdraw same, which was filed on the 23rd, & judgment entered for want of appearance on the same day. Execution was issued on the 30th. On Jan. 12 defts, dissolved partnership, & on the 23rd, L., one of defts., absconded:—*Held:* the withdrawal of the appearance by L. showed sufficient grounds for setting aside the execution for fraud & collusion.—WHITE *v.* LORD (1863), 13 C. P. 289.—**CAN.**

l. —— *On specially indorsed writ—Previous understanding between debtor and judgment creditor.*]—MCKENZIE *v.* HARRIS, 10 C. L. J. N. S. 213.—**CAN.**

m. ——.]—The fact that debtor facilitates one creditor in obtaining speedy judgment in a mode other than those prohibited by Administration of Justice Act, 1885, s. 122 (R. S. M., c. 1, s. 60), does not, of itself, render the judgment void as against other creditors.—NEWMAN *v.* LYONS (1892), 8 Man. L. R. 271.—**CAN.**

n. ——.]—In pursuance of an agreement made between H., then in insolvent circumstances, & certain of his creditors, a document was executed, by which the creditors assigned all their claims to D. in order that an action might be brought for the recovery of all the claims. It was at the same time verbally agreed that such an action should at once be brought, & that H. should facilitate the obtaining of the judgment. On the day after the execution of the document, a writ was issued, declaration & pleas were filed on the same day, on the day following, deft. was examined on his plea, & on the next an order was made striking out the pleas, upon which judgment was signed & execution issued:—*Held:* the judgment was not void as a fraudulent preference.—UNION BANK *v.* DOUGLASS (1885), 2 Man. L. R. 309.—**CAN.**

o. ——.]—C. defended an action brought against him by pltfs., while in an action brought against him by S., he entered an appearance & filed a plea some days before the plea was due, & on the same day filed a *relictâ verificatione*, whereupon judgment was signed & execution issued:—*Held:* such proceedings did not offend against R. S. O. 1877 (c. 118), s. 1.—HEAMAN *v.* SEALE (1881), 29 Gr. 278.—**CAN.**

p. *Suffering adverse judgment.*]—Deft. made an assignment fourteen days after a judgment had been registered against him, such judgment having been obtained not by confession, but adversely:—*Held:* Insolvent Act did not destroy the preference obtained by a *bonâ fide* judgment creditor, whose judgment had been recorded before attachment or assignment.—MURDOCK *v.* WALSH, Cong. Dig. 685.—**CAN.**

q. *Bought & sold note to secure money previously advanced.*]—*Held:* void, under 1892 Act, s. 79 (2), having been executed within four months prior to adjudication.—LEE *v.* PARKE'S OFFICIAL ASSIGNEE IN BANKRUPTCY (1903), 22 N. Z. L. R. 747.—**N.Z.**

r. *Suffering goods to be seized—Refraining from entering appearance—Whether procuring goods to be taken in execution—Question of fact for court.*]—WORTHINGTON *v.* HAMILTON, 10 C. L. J. N. S. 304.—**CAN.**

s. *Goods obtained by member from co-operative store company—On account of credit to which entitled—Company insolvent—Transaction set aside.*]—MCDONALD *v.* MCADAM (1903), 40 N. S. R. 596.—**CAN.**

7398 i. *Payment to creditor—Being banker—By purchaser of debtor's stock—Purchaser having account with same bank—Nature of transaction.*]—A trader in insolvent circumstances sold his stock-in-trade in good faith & directed the purchaser to pay as part of the purchase-money a debt due by the trader to his bankers, who held, as collateral security, a chattel mtge. on the stock-in-trade. The purchaser had an account with the same bankers, & gave to them a cheque on such account for the amount of their claim, there being funds at his credit to meet the cheque:—*Held:* a payment of money to a creditor & the bankers were not liable to account for the amount received.—GORDON MACKAY & CO. *v.* UNION BANK OF CANADA (1899), 26 A. R. 155.—**CAN.**

7398 ii. —— *By bankrupt's debtor under garnishee order nisi—No objection by bankrupt to payment.*]—*Held:* no fraudulent preference by bkpt. in not objecting to the payment by debtor.—THE OFFICIAL ASSIGNEE *v.* WOLLERMAN (1910), 29 N. Z. L. R. 481.—**N.Z.**

him to sell & account for the proceeds to pltf. On the same day bkpt. executed a deed of assignment, on which he was adjudicated bkpt. The proceeds were claimed by pltf. & the trustee, & an interpleader issue was directed. The jury found that the property in the goods had passed to bkpt., & that he had acted in the belief that the goods were pltfs., & not with any wish to prefer: —*Held:* there was no fraudulent preference, but as the indorsement of the bill of lading did not pass the property, it remained part of bkpt.'s estate & passed to his trustee.—LAURITZEN *v.* CARR (1894), 72 L. T. 56; 11 T. L. R. 164.

7403. Advance in good faith—Bill of sale registered at last possible moment.]—Applt. advanced money in good faith to a person, who appeared to be solvent, taking a bill of sale which included all debtor's stock-in-trade, book debts, & other property, but without taking delivery or registering the bill of sale until just in time to prevent its being avoided under Bills of Sale Acts:—*Held:* his title thereunder prevailed against debtor's assignee, no intent being shown to have existed at the date thereof to defeat or delay creditors.—MORRIS *v.* MORRIS, [1895] A. C. 625; 64 L. J. P. C. 136; 72 L. T. 879; 44 W. R. 65; *sub nom. Re* COOK, MORRIS *v.* MORRIS, 11 R. 554, P. C.

7404. Giving bill of exchange with knowledge of insolvency—Paying same in course of business when due.]—A trader, with knowledge of his insolvency, gave a bill in the ordinary way of trade, paid it on maturity, & became bkpt. within three months:—*Held:* bills of exchange given by a trader in the ordinary way of business were in a special position, & the payment of the holder in due course was not in itself a fraudulent preference. —*Re* CLAY & SONS, *Ex p.* TRUSTEE (1895), 3 Mans. 31, D. C.

Annotation:—**Distd.** *Re* Eaton, *Ex p.* Viney, [1897] 2 Q. B. 16.

7405. Payment of bill of exchange after due date —Bill held over at debtor's request.]—Where a bill of exchange accepted by debtor is not presented for payment at maturity, but is held over by creditor at debtor's request, its subsequent payment by debtor is not a payment in the ordinary course of business, & may constitute a fraudulent preference.—*Re* EATON & Co., *Ex p.* VINEY, [1897] 2 Q. B. 16; 66 L. J. Q. B. 491; 4 Mans. 111.

Annotations:—**Mentd.** *Re* Laurie, *Ex p.* Green (1898), 46 W. R. 491; Bulteel & Colmore *v.* Parker & Bulteel Trustee (1916), 32 T. L. R. 661.

7406. Bill of sale given to wife of bankrupt.]—While a husband & wife were living together in Jan. or Feb., 1915, the husband bought furniture for their house at a cost of £950. Although the house was taken in the wife's name, the rent, rates, & taxes were paid out of money provided by the husband, but partly, it was alleged, out of money contributed by their children. The wife had a separate banking account, into which the husband paid large sums for household expenses in addition to other money. The husband was adjudged bkpt. on Apr. 25, 1917, & the wife claimed the furniture in the bkpcy. proceedings. In support of her claim she produced a receipt of July, 1915, for £350, given to her by her husband, & alleged that the purchase-money was provided by various loans & pawning her jewellery:—*Held:* (1) the receipt of 1915 was a security for a loan which the wife had made to bkpt. of £350 on the furniture; (2) the document was bad as being a bill of sale within Bills of Sale (1878) Amendment Act, 1882 (c. 43), & the property belonged to the trustee.—*Re* LAVEY, *Ex p.* TRUSTEE, [1918–19] B. & C. R. 116.

7405 i. *Payment of bill of exchange before due date—Not in ordinary course of business.*]—Debtor borrowed a sum of money, for which he gave bills, which he paid before they arrived at maturity. He was at that time unable to pay his trade debts, & within three months afterwards was adjudicated bkpt.:—*Held:* this was distinct evidence of a preferential payment not made in the ordinary course of business, & the transaction was not protected by the *bona fides* of the creditor, who had received the money.—*Re* SMITH (1890), 8 N. Z. L. R. 408.—**N.Z.**

t. *Release of debt—Without receiving payment.*]—The release by insolvent of a debt due to him without receiving payment:—*Held:* an undue preference.—*Re* HORMARJI ARDESIR HORMARJI 1892), I. L. R. 17 Bom. 313.—**IND.**

u. —— *As consideration for conveyance to creditor.*]—Where the consideration for a conveyance executed within sixty days preceding an order for sequestration of the grantor's estate is the release of a debt due by the grantor to the grantee, such conveyance is a "preferring" of the releasing creditor within 5 Vict. No. 17, s. 8.—JACOMB *v.* DONOVAN (1864), 1 W. W. & A'B. 66.—**AUS.**

w. *Abandonment of current speculation.*]—A firm, though insolvent, may part with or put an end to a current speculation, the result of which is still uncertain, on the best terms procurable, without any imputation of fraud; so also the abandonment of a speculation whilst the result is uncertain may be both honest & politic, as it entirely differs from undue preference of one creditor to others after a debt has been incurred. —BARLOW *v.* COCHRANE, MILLER *v.* BARLOW (1871), 2 B. L. R. 56; 14 Moo. Ind. App. 209.—**IND.**

x. *Payments under composition.*]—Payments under a composition must be considered as having been paid at the same time & no question of preference can arise in respect to any one separated from the others.—*Re* BATCHELOR, *Ex p.* LAYCOCK'S OFFICIAL ASSIGNEE (1894), 15 N. S. W. L. R. 75.—**AUS.**

7406 i. *Bill of sale given to wife of bankrupt—For purchase-money due to her but paid to husband's creditor.*]—W., being in insolvent circumstances, & pressed by one of his creditors, G., procured his wife to convey her house to G., who, by consent of Mrs. W., applied part of the purchase-money in payment of W.'s debt to him, & paid the balance to W., who made a chattel mtge. on his stock-in-trade to his wife for the amount of the purchase-money which she should have received:—*Held:* the chattel mtge. was void under R. S. O. 1887 (c. 124).—STODDART *v.* WILSON (1888), 16 O. R. 17; *dbtd. Johnson* v. *Hope*, 17 A. R. 10.—**CAN.**

7406 ii. *Notes given to wife of insolvent —To bar supposed right of dower— & for money advanced.*]—In an action to have it declared that certain notes made to wife were fraudulent & void as against pltf., the notes having been given to bar the wife's supposed dower & for money she had advanced to her husband:—*Held:* if debtor made a payment, believing in good faith & on reasonable grounds that he was, although in fact he was not, legally bound to make it, such payment was not a fraudulent preference.—MCDONALD *v.* CURRAN (1909), 14 O. W. R. 838; 1 O. W. N. 121; *affd.* (1910), 15 O. W. R. 218.—**CAN.**

y. *Assignment under Collection Act—Collusion.*]—Where an assignment under Collection Act is obtained by collusion between the creditor & debtor, such assignment comes within the category of transfers made "with intent to give the creditor an unjust preference over other creditors," & will not give the assignee a better title than the assignor himself had.—ZWICKER *v.* ROSS (1907), 3 E. L. R. 75; 41 N. S. R. 332.—**CAN.**

a. *Assignment for creditors by partner.*]—One of two partners, a few days before an attachment against both under 1864 Act had issued, assigned his estate for the benefit of his creditors:—*Held:* void as against the official assignee.—WILSON *v.* STEVENSON (1866), 12 Gr. 239.—**CAN.**

b. *Novation of contract—Creditor accepting purchaser from debtor in place of debtor.*]—A firm being indebted to G. carried out an arrangement whereby the firm sold their stock to L. & received the price in cash less the amount of G.'s claim, which was assumed by L., G. giving time to L. for payment, & releasing the firm. Within sixty days the firm made an assignment under Assignments Act, R. S. M., 1902 (c. 8), for the benefit of creditors generally:—*Held:* the transaction could not be impeached under the above Act.—NEWTON *v.* LILLY (1906), 16 Man. L. R. 39; 24 C. L. T. Occ. N. 250; 3 W. L. R. 537.—**CAN.**

c. —— *Existing securities cancelled on further advance being made.*]—G. & Co., made advances from time to time to B., a grazier, on the security of stock mtges. on the usual form, covering stock in his possession. In June, 1888, the debt due to G. & Co. was £5,474, for which they had security over stock worth £6,637 10*s.* G. & Co., then advanced £2,700 more, & in order to secure that amount, G. & Co., cancelled the existing mtges. & took one mtge. over seven thousand five hundred sheep & all the other stock which came within the other mtges. as a security for the £2,700

SUB-SECT. 5. "WITHIN THREE MONTHS."

7407. How time calculated.]—*Held:* the day on which the petition was presented was not to be included in calculating the three months.—*Re* DAWES, *Ex p.* OFFICIAL RECEIVER (1897), 4 Mans. 117.

7408. Bill of sale more than three months before petition.]—A person in insolvent circumstances assigned the whole of his goods, except about £10 worth, by bill of sale to deft., one of his creditors, for a debt then due, & the goods were conveyed away by night, etc. More than three months afterwards he filed his petition in the Insolvent Ct., & pltf. was appointed his assignee, who sued to recover from deft, the value of such goods:—*Held:* pltf. was not entitled to recover, as the bill of sale was made prior to three months before the filing of the petition.—THOYTS *v.* HOBBS (1852), 7 Exch. 810; 21 L. J. Ex. 340; 19 L. T. O. S. 169; 155 E. R. 1177.

7409. Mortgage to creditor eight days before liquidation petition—Subsequent bankruptcy seven years after date of petition.]—On Aug. 7, 1879, M. executed a mtge. & a bill of sale to S. to secure £24,639, of which £5,000 was then advanced by S. to M. On Aug. 15 M. presented a petition, under 1869 Act, in the statutory form, for liquidation of his affairs, by arrangement, admitting that he was unable to pay his debts, & resolutions for a composition were duly passed & confirmed in Oct., 1883. On Mar. 25, 1886, the ct. adjudicated M. a bkpt. under s. 126, on the ground that the composition under that sect. could not proceed without injustice or undue delay, to the creditors:—*Held:* as the power to adjudicate debtor a bkpt. under s. 126 was an independent power, & was not made on the act of bkpcy., constituted by the filing of the liquidation petition, there was no relation back of the trustee's title to that act of bkpcy. unless committed within six months, or at the most twelve months, of the adjudication, &, having regard to the time which had elapsed, the mtge. was not a fraudulent preference voidable under s. 92.—SHARP *v.* MCHENRY, SHARP *v.* BROWN (1887), 38 Ch. D. 427; 57 L. J. Ch. 961; 57 L. T. 606; 3 T. L. R. 847.

Annotations:—**Mentd.** *Re* McHenry, *Ex p.* McDermott (1888), 21 Q. B. D. 580, C. A.; Tuck *v.* Southern Counties Deposit Bank (1889), 42 Ch. D. 471, C. A.; Barron *v.* Potter, [1915] 3 K. B. 593, C. A.

7410. Delivery of security partly before & partly after three months before bankruptcy—Inquiry as to date at which remainder of security delivered.]—In Mar., 1888, bkpt. being unable to pay the half-year's rent due in respect of a farm of which she was the tenant, applied to applts. for assistance, who agreed to advance the amount necessary, on certain growing crops of wheat, barley, & hay being made liable for the repayment of the money. A promissory note was given by bkpt. for the advance, & applts. thereupon paid the rent, & also in Aug. made a further advance for the purpose of paying the rent for the next half-year. On Sept. 17 a man was sent by applts. to the farm to obtain possession & delivery of the wheat, barley, & hay, & on Sept. 18 the wheat was consigned by him to applts., the barley being sent on Sept. 22, & the whole being forwarded by Sept. 26. On Dec. 22 a petition was presented against bkpt., & upon the application of the official receiver as trustee the transaction with applts. was subsequently set aside by the county ct. judge, on the ground that it was a fraudulent preference within 1883 Act, s. 48:—*Held:* (1) the wheat being actually delivered on Sept. 18 was outside the limit of the three months necessary in order to make the transaction with respect to it a fraudulent preference, but the barley being delivered on Sept. 22 was within the three months & belonged to the trustee; (2) there being no evidence to show when delivery of the hay was completely effected, the case must go back to the county ct. judge for inquiry on that point, with the direction that the trustee would be entitled to all the hay delivered on or after Sept. 22.—*Re* HARVEY, *Ex p.* HARVEY & CO. (1890), 7 Morr. 138, D. C.

7411. Payment made after petition.]—Two payments of money were made by bkpt. to creditors on Aug. 13 & Sept. 5. The bkpcy. petition was presented against debtor on Aug. 5:—*Held:* so far as 1883 Act, s. 48, was concerned, the payments were not a fraudulent preference.—*Re* BADHAM, *Ex p.* TRUSTEE (1893), 69 L. T. 356; *sub nom. Re* BADHAM, *Ex p.* PALMER, 9 T. L. R. 646; 37 Sol. Jo. 720; 10 Morr. 252; 5 R. 521.

Annotations:—**Distd.** *Re* Dunkley, *Ex p.* Waller, [1905] 2 K. B. 683. **Refd.** *Re* Hirth, *Ex p.* Official Receiver (1899), 68 L. J. Q. B. 287, C. A.; *Re* Rooker, *Ex p.* Rooker, [1916] W. N. 293, C. A.

SUB-SECT. 6.—AVOIDANCE OF PREFERENCE AND EFFECT OF AVOIDANCE.

7412. Whether preference can be impeached—Fiat on bankrupt's petition—Sufficient debt to support creditor's petition.]—*Qu.:* whether a fraudulent preference can be impeached, under a fiat on bkpt.'s own petition, if there was at the time of such fraudulent preference a sufficient debt to constitute a petitioning creditor's debt.—STEVENSON *v.* NEWNHAM (1853), 13 C. B. 285;

to be advanced & the £5,474 already due to them. In Mar., 1889, B. became bkpt.:—*Held:* the giving of the mtge. was not a preference.—*Re* BRAY (1890), 11 N. S. W. L. R. 301.—**AUS.**

d. —— *Valid security treated as merged in fresh security—All parties intending preference—Fresh security wholly void.*]—ROBIN HOOD *v.* MAPLE LEAF (1916), 33 W. L. R. 776; 9 W. W. R. 1453; 26 Man. L. R. 238.—**CAN.**

e. *Creditor holding security on two stocks—Further unsecured advances—Retained by creditor on sale of one of stocks—No preference.*]—STEPHENS *v.* BOISSEAU (1896), 26 S. C. R. 437.—**CAN.**

PART XX. SECT. 12, SUB-SECT. 5.

f. *Transfer more than three months before adjudication.*]—H., the owner of land subject to mtge., in Nov., 1906, promised to transfer the land, subject to the mtge., to resps., who had worked for him while minors, in consideration for the work they had done for him, & in Feb., 1908, unknown to resps. transferred the land to them, the consideration in the transfer being stated at £100. H. was adjudicated bkpt. in Oct.:—*Held:* the transfer was not a fraudulent preference, because not made within three months before the date of the adjudication.—*Re* HUME, *Ex p.* THE OFFICIAL ASSIGNEE (1909), 28 N. Z. L. R. 793.—**N.Z.**

PART XX. SECT. 12, SUB-SECT. 6.

g. *Jurisdiction of Court of Bankruptcy—Grantee declining to submit.*]—A Ct. of Bkpcy. has power & jurisdiction to set aside a transfer or assignment made to defeat creditors, though the grantee declines to submit to the jurisdiction. In such cases the ct. will exercise all the powers of a Ct. of Equity.—*Re* DUNNE (1893), 28 I. L. T. 35.—**IR.**

k. —— *Foreign grantee claiming in sequestration.*]—The trustee of a sequestrated estate claimed that B., a domiciled Englishman, who had claimed in the sequestration, had obtained an illegal preference & brought an action with the view of cutting it down. B. pleaded that he was a domiciled Englishman possessing no heritable property in Scotland, that no arrestment of his funds had been used, & that no ground existed on which a jurisdiction could be founded against him:—*Held:* B. was bound to answer to the challenge of his alleged illegal preference.—ORD *v.* BARTON (1847), 9 Dunl. (Ct. of Sess.) 541.—**SCOT.**

l. *Jurisdiction of Lord Chancellor in Bankruptcy—To order repayment of money.*]—The Lord Chancellor has no

22 L. J. C. P. 110; 20 L. T. O. S. 279; 17 Jur. 600; 138 E. R. 1208, Ex. Ch.

Annotations:—**Consd.** *Re* Willmett, *Ex p.* Goss (1864), 9 L. T. 734; Marks *v.* Feldman (1869), L. R. 4 Q. B. 481. **Refd.** Billiter *v.* Young (1856), 6 E. & B. 1, Ex. Ch.; Monk *v.* Sharp (1857), 2 H. & N. 540; Paull *v.* Best (1863), 3 B. & S. 537; Topping *v.* Keysell (1864), 16 C. B. N. S. 258; *Re* Clark, *Ex p.* Beardmore, [1894] 2 Q. B. 393, C. A. **Mentd.** Morgan *v.* Couchman (1853), 2 C. L. R. 53; Jeffries *v.* G. W. Ry. Co. (1856), 5 E. & B. 802; Young *v.* Billiter (1860), 8 H. L. Cas. 682, H. L.; Hardman *v.* Booth (1863), 32 L. J. Ex. 105; Clough *v.* L. & N. W. Ry. Co. (1871), L. R. 7 Exch. 26, Ex. Ch.; *Re* Johnson, *Ex p.* Rayner (1872), 41 L. J. Bcy. 26; *Re* Meldrum, *Ex p.* Butcher (1874), 9 Ch. App. 595, L. JJ.; London & County Banking Co. *v.* London & River Plate Bank (1887), 4 T. L. R. 179; *Re* O'Sullivan, *Ex p.* Baller (1892), 61 L. J. Q. B. 228; Allen *v.* Flood, [1898] A. C. 1, H. L.; Quinn *v.* Leathem, [1901] A. C. 495, H. L.; Fitzroy *v.* Cave, [1905] 2 K. B. 364, C. A.; Valentine *v.* Hyde, [1919] 2 Ch. 129.

7413. —— Whether bankrupt proper party to suit brought by trustee.]—Bkpt. is not a proper party to a suit instituted by the trustee to set aside a conveyance executed by bkpt. with intent to delay or defeat his creditors. The rule that a person implicated in a fraudulent transaction may be made a party to a suit impeaching the transaction, for purposes of discovery & costs, is confined to cases in which the deft. fills the position of agent (including that of attorney or solr.) or arbitrator.—WEISE *v.* WARDLE (1874), L. R. 19 Eq. 171; 23 W. R. 208.

Annotation:—**Refd.** Tabor *v.* Cunningham (1875), 24 W. R. 153.

jurisdiction in bkpcy. to make an order to recall money paid in contemplation of bkpcy. from a third person who has received it from his accountable debtor.—*Re* ATKINSON, *Ex p.* STEPHENSON (ASSIGNEE OF PEPPER & LOCKE) (1828), 1 Mol. 416. —**IR.**

m. —— *In what court proceedings may be taken.*]—An improperly appointed trustee speculated with the trust funds, investing them by taking up land on "perpetual lease," making the required statutory declaration that he did so solely for his own use & benefit. He made a profit on this, which he paid into his private account. A judgment being obtained against him, he was adjudicated bkpt. He claimed that the above-mentioned profits belonged to the trust estate, & paid into a trust account the whole money still remaining in his private account:—*Held:* it was open to the official assignee to proceed by action, even if there was a remedy for proceedings under the bkpcy.—DAVIES *v.* DAVIES' DEPUTY OFFICIAL ASSIGNEE (1904), 24 N. Z. L. R. 161.—**N.Z.**

n. *Jurisdiction of county court.*]—A county ct. has no equitable jurisdiction other than that conferred by County Cts. Act, C. S. B. C., 1888 (c. 25), s. 44, & cannot entertain an action to set aside a chattel mtge. as being a fraudulent preference.—PARSONS' PRODUCE CO. *v.* GIVEN (1896), 5 B. C. R. 58.—**CAN.**

7412 i. *Whether preference can be impeached—No act of bankruptcy available to creditor for petition.*]—Debtor paid certain sums to his creditors under a composition made with them. At that time he had three other creditors, besides those bound by the composition. Subsequently a debt was incurred with another creditor & debtor's estate sequestrated, & the official assignee made an application to set aside one of the payments made under the composition as being a preference in fact of a creditor who had notice of an available act of bkpcy.:—*Held:* the payment could not be set aside, the act of bkpcy. not having been available to any creditor for the purposes of a petition.—*Re* BATCHELOR, *Ex p.* LAYCOCK'S OFFICIAL ASSIGNEE (1894), 15 N. S. W. B. 75.—**AUS.**

o. —— *Payment of note to relieve indorser of liability.*]—A trader being in embarrassed circumstances, sold out his business, & out of the proceeds satisfied a promissory note on which his brother was indorser, before it had become due, & shortly afterwards went into insolvency. The evidence did not show that the indorser was aware or was a party to the payment in any way, & it was by no act of his that the note was so paid:—*Held:* in the circumstances, the assignee in insolvency had no right to call upon the indorser to refund the amount of such note.—BOTHAM *v.* ARMSTRONG (1876), 24 Gr. 216.—**CAN.**

7413 i. —— *Whether bankrupt proper party to suit brought by trustee.*]—An insolvent debtor, who has made an assignment for the benefit of his creditors, is neither a necessary nor a proper party to an action by the assignee to set aside a fraudulent preference given by him.—SCHWARTZ *v.* WINKLER, 22 C. L. T. 401; 14 Man. L. R. 197.—**CAN.**

7413 ii. *S. P.* BEATTIE *v.* WENGER (1897), 24 A. R. 72.—**CAN.**

7413 iii. —— *Whether grantee proper party to proceedings.*]—If it is desired to impeach the validity of a bill of sale by proceedings in bkpcy., the grantee must be made a party to the proceedings.—*Re* FENTON, *Ex p.* NESBIT (1892), 11 N. Z. L. R. 603.—**N.Z.**

7413 iv. —— *Whether assignee necessary party.*]—Insolvent having made an assignment for creditors, his wife purchased from the assignee, certain creditors becoming responsible for the purchase-money. By a secret arrangement they received security from her upon the goods purchased, not only for the amount for which they had become responsible, but also for the full amount of their claims as creditors:—*Held:* the assignee was a necessary party to an action by another creditor for an account.—SEGSWORTH *v.* ANDERSON (1893), 23 O. R. 573; 24 S. C. R. 699.—**CAN.**

7413 v. —— —— *Action commenced before assignment.*]—Where, after the commencement of a suit by creditors, to set aside a bill of sale, as constituting a fraudulent preference, the grantor made an assignment for the benefit of his creditors, the assignee was added as pltf.—TOOKE BROTHERS, LTD. *v.* BROCK & PATTERSON, LTD. (1907), 3 E. L. R. 270; 3 N. B. Eq. Rep. 496.—**CAN.**

7413 vi. —— *Whether consent of assignee to be added as party required.*]—The assignee can not be added as pltf. in an action to set aside a conveyance as fraudulent without his previous consent.—BANK OF LONDON *v.* WALLACE (1889), 13 P. R. 176. —**CAN.**

7413 vii. —— *When creditors proper parties.*]—M. & B. having a lien on property of insolvent deft., under a recorded judgment, brought an action as co-pltfs. with the assignee to set aside a judgment next previous to theirs, alleged to have been fraudulently obtained:—*Held:* although under Insolvent Act, 1875, the assignee had the exclusive right to sue for the rescinding of instruments made in fraud of creditors generally, & should then be the only pltf. in the suit, it was otherwise where the instrument was made in fraud of certain individuals irrespective of the other creditors & M. & B. had been properly made parties to the suit.—PATTERSON *v.* ARCHIBALD (1878), R. E. D. 313. —**CAN.**

p. —— *By action of trover—No demand by trustee.*]—Debtor assigned all his property to a creditor, in consideration of a sum of money which was paid, but immediately handed back to the creditor. The creditor then had the greater part of such property sold by auction, & himself became the purchaser. Afterwards debtor's estate was compulsorily sequestrated, but no demand of the property assigned was made by the official assignee, nor did he give any indication, before action, of an intention to treat the assignment as a fraudulent preference. In an action by the official assignee against the creditor, in trover, & upon money counts for the proceeds of part of the property sold by him:—*Held:* (1) there was evidence to go to a jury of fraudulent preference, but deft. was entitled to proceed in the plea of "not guilty" as the transfer had been made by debtor, while fully competent to make it; (2) though a formal demand by the assignee was not essential, debtor was entitled to be fairly informed of the intention of the assignee to dispute the assignment. —SIMSON *v.* MITCHELL (1868), 5 W. W. & A'B. 114.—**AUS.**

q. —— *By action of ejectment.*]—Where there has been a conveyance of real property, fraudulent within 5 Vict. No. 17, ss. 6 & 9 of the official assignee may recover the lands in an action of ejectment against the transferee, without going into equity to set aside the deed.—SANDEMAN *v.* LEE (1879), 2 N. S. W. S. C. R. N. S. 200.—**AUS.**

r. —— *By action for amount whereby creditor preferred.*]—Where the result of the set-off of a debt due by a vendor to the purchaser, in part satisfaction of the purchase price, has been unduly to prefer the purchaser for the amount thereof before the then creditors of the vendor, the proper course for the latter's trustee to pursue is to sue the purchaser for the amount whereby he has been preferred.—SAND & CO. *v.* PINCHUK (1912), W. L. D. 26.—**S. AF.**

s. —— *Other grounds relied on.*]—A receiving order was obtained against S. & Co. more than three months, but less than six months after, the giving of a bill of sale to T., a creditor, & they were subsequently adjudicated bkpt. The official receiver took proceedings in bkpcy. to set aside the bill of sale under 1892 Act, s. 46 (2):—*Held:* a bill of sale to secure a past debt, which was impeachable as a fraudulent conveyance or a fraudulent preference, was not invalidated under the above sub-sect. by the mere fact that it was given within six months of the bkpcy. of the grantor.—*Re* STEWART BROTHERS, TUXFORD *v.* OFFICIAL RECEIVER (1900), 2 W. A. L. R. 42.—**AUS.**

t. —— ——.]—An assignee proceeded by bill in equity to procure the calcellation of a conveyance made by insolvent, charging that the conveyance had been made contrary to Insolvent Act, 1869, with intent to give an unjust preference to certain

Sect. 12.—*Avoidance of preference: Sub-sect.* 6.]

7414. —— After lapse of time.]—If the time be past within which the execution of a deed is an available act of bkpcy., or within which the deed can be set aside as a fraudulent preference, it cannot be treated as void under the bkpcy. law.—*Re* BAMFORD, *Ex p.* GAMES (1879), 12 Ch. D. 314; 40 L. T. 789; 27 W. R. 744, C. A.

Annotations:—**Consd.** Glegg *v.* Bromley (1911), 81 L. J. K. B. 334. **Mentd.** *Re* Reis, *Ex p.* Clough, [1904] 2 K. B. 769, C. A.; *Re* Gunsbourg, *Ex p.* Trustee, [1918–19] B. & C. R. 108.

7415. Necessity for setting aside—Cannot be set off against claim for taxed costs.]—A trustee cannot refuse to pay out of the estate the taxed costs of the solr. appearing for debtor on the filing of his own petition, by reason of the fact that certain payments have been made by debtor to such solr. shortly before the bkpcy., which the trustee is of opinion amount to a fraudulent preference, but in such case the trustee must pay the taxed costs of the solr., & move the ct. to set aside the previous payments in the ordinary way.—*Re* COSTER & TACK, *Ex p.* RAPHAEL (1890), 39 W. R. 190; 7 Morr. 284.

7416. Whether trustee ought to take proceedings or allow his name to be used—Reduction not for benefit of creditors at large.]—Where the result of recovering property alleged to have been delivered to a creditor by way of fraudulent preference would not be for the benefit of the creditors at large, but of an individual creditor who claims it as a security for a sum exceeding its value, the trustee ought not to take proceedings for the recovery of the property himself, nor allow the creditor to take them in his name.—*Re* ZUCCO, *Ex p.* COOPER (1875), 10 Ch. App. 510; 44 L. J. Bcy. 121; 33 L. T. 3; 23 W. R. 782, L. JJ.

Annotations:—**Consd.** Willmott *v.* London Celluloid Co. (1886), 34 Ch. D. 147, C. A.; *Re* Arnold, *Ex p.* Official Receiver (1891), 66 L. T. 121, D. C.

7417. Whether judgment void against creditors.]—*Semble:* 7 Geo. 4, c. 57, s. 32, as to voluntary preferences by insolvent debtors, did not render a judgment void as against the creditors, unless obtained by collusion with insolvent.—THORPE *v.* EYRE (1834), 1 Ad. & El. 926; 3 Nev. & M. K. B. 214; 110 E. R. 1462.

7418. Whether transaction voidable or void.]—Debtor caused his goods to be taken in execution by pltf., one of his creditors, by way of fraudulent preference, after which deft. distrained on them for rent. Debtor became bkpt., & pltf. sued deft. for excessive distress. After the commencement of the action, the assignees gave pltf. notice of their election to treat the execution as void, & claimed the goods from deft.:—*Held:* the execution, as a fraudulent preference, was voidable, not void, & the goods belonged to the pltf., until the assignees assumed their rights, & all mesne dispositions to persons not parties to, or not cognisant of, the fraud, were valid.—STEVENSON *v.* NEWNHAM (1853), 13 C. B. 285; 22 L. J. C. P. 110; 20 L. T. O. S. 279; 17 Jur. 600; 138 E. R. 1208.

Annotations:—**Consd.** *Re* Willmett, *Ex p.* Goss (1864), 9 L. T. 734; Marks *v.* Feldham (1869), 10 B. & S. 371. **Refd.** Billiter *v.* Young (1856), 6 E. & B. 1, Ex. Ch.; Monk *v.* Sharp (1857), 2 H. & N. 549; Paull *v.* Best (1863), 3 B. & S. 537; Topping *v.* Keysell (1864), 16 C. B. N. S. 258; *Re* Clark, *Ex p.* Beardmore, [1894] 2 Q. B. 393, C. A. **Mentd.** Morgan *v.* Couchman (1853), 2 C. L. R. 53; Jeffries *v.* G. W. Ry. Co. (1856), 25 L. J. Q. B. 107; Young *v.* Billiter (1860), 8 H. L. Cas. 682, H. L.; Hardman *v.* Booth (1863), 32 L. J. Ex. 105; Clough *v.* L. & N. W. Ry. Co. (1871), L. R. 7 Exch. 26, Ex. Ch.; *Re* Johnson, *Ex p.* Rayner (1872), 41 L. J. Bcy. 26;

creditors, & fraudulently to impede, obstruct, or delay creditors in their remedies, & with the knowledge of the grantees, or reasonable cause on their part to know & believe that the grantor was unable to meet his engagements. The jury found that the grantor was at the time unable to meet his engagements, but that the grantees did not know, & had not reasonable cause to know or believe that such inability existed, & they negatived any intent fraudulently to impede, obstruct, or delay the creditors:—*Held:* the conveyance could not be set aside under s. 88, & pltf. could not attack it under s. 89, as having been made in contemplation of insolvency, as that was not charged in the bill.—FORREST *v.* MUIR (1878), 3 R. & C. 457; R. E. D. 57.—**CAN.**

w. —— *Remaining liabilities too small for sequestration.*]—Where debtor, who is practically insolvent, makes an alienation in favour of one creditor in circumstances which would amount to an undue preference, but the remaining liabilities of the estate are so small that sequestration cannot take place as a preliminary to setting aside the transaction, the alienation will be set aside at common law, if there are circumstances to show that the transaction was a fraud on the other creditors.—LOESCHER *v.* PEISER, KRUGER & Co. (1895), 9 E. D. C. 195; 1 Biss. & Sm. 1238.—**S. AF.**

7414 i. —— *After lapse of time.*]—Pltfs. brought action on Nov. 2, 1903, on "behalf of themselves & all other creditors of C. . . . who are willing to join in & contribute towards the payment of the expenses thereof," to set aside, as a fraudulent preference, an assignment by C. dated Sept. 5, 1903. C. had not assigned under the Assignments Act, R. S. M., 1902, c. 8. On Dec. 4, 1903, pltfs., amended by adding after the words quoted, "& the same is brought for the benefit of the creditors generally of the said debtor":—*Held:* there was no suit brought for the benefit of the creditors generally, or of such as had been injured, delayed, or prejudiced, to impeach the transaction in question, until the amendment of Dec. 4 was made, which was more than sixty days after the date of the impeached transaction.—FERGUSON *v.* BRYANS (1904), 24 C. L. T. Occ. N. 194; 15 Man. L. R. 170.—**CAN.**

7414 ii. —— ——.]—DUNN *v.* DUNN, 1 C. L. J. N. S. 239.—**CAN.**

7414 iii. —— ——.]—D., tenant for life, in 1799 demised land to trustees upon trust to pay D. an annuity of £10,000 *per annum*, & to apply the residue in payment of his creditors who should come in & avail themselves of the benefit of such deed. In 1822 a resettlement of the estates took place by a deed whereby, after giving D. a power of charging the estates with £217,000 & B. a power of charging the estates likewise upon the death of D. with £100,000, those estates were limited to trustees upon trust to pay B. an annuity of £5,000 *per annum* immediately with an additional £1,000 *per annum* upon his marriage. B. subsequently mortgaged to pltf. the annuity together with the £100,000, for the purpose of securing advances made to him from time to time by pltf. On a bill filed by pltf. for the purpose of obtaining the benefit of the securities, to which bill certain of the creditors who claimed under the trust deed of 1799 were made parties, they alleged that pltf. was not entitled to any portion of the relief prayed in respect of the annuity of £6,000 until the creditors had been repaid the amount of the sums received by D. over & above the annuity of £10,000, the same having been received in violation of the deed of 1799:—*Held:* the creditors never having raised such equity in any of the previous proceedings, but having in all such proceedings confined their relief to the carrying the trusts of that deed into effect, were not entitled to rely upon it as against pltf. who was a purchaser for valuable consideration.—WALLACE *v.* DONEGAL (MARQUIS), *affd. sub nom.* HOULDITCH *v.* WALLACE (1838), 1 Dr. & Wal. 490, H. L.—**IR.**

7418 i. *Whether transaction voidable or void.*]—In Insolvent Act, s. 8, the words "absolutely void" mean "void at the election of the official assignee."—BROUGHTON *v.* BARKER (1862), 1 N. S. W. S. C. R. 78.—**AUS.**

7418 ii. ——.]—Under the insolvency law of the colony such deeds are void as are given to secure undue preference to creditors.—RUTHERFORD *v.* PIKE (1864), 5 Nfld. L. R. 39.—**NFLD.**

7418 iii. ——.]—*Held:* even if the case were within Insolvent Act, 1864, s. 8 (2), the contract would be voidable only under the order of a competent tribunal, upon such terms as to the protection of the person from actual loss or liability as the ct. might direct.—BANK OF MONTREAL *v.* MCWHIRTER (1867), 17 C. P. 506.—**CAN.**

7418 iv. ——.]—Pltf. before judgment garnisheed money in the hands of an insurance co. coming to deft. in respect of a loss. Deft., a physician, previous to commencement of the proceedings assigned, for valuable consideration, his interest in the policy. Deft. was insolvent:—*Held:* the assignment giving undue preference over other creditors, was void.—MCKINNON *v.* COFFIN (1906), 2 E. L. R. 176.—**CAN.**

7418 v. —— *Promissory note given to secure amount of preference.*]—A promissory note to secure the amount of a fraudulent preference given by insolvent to a particular creditor is wholly void.—BRIGHAM *v.* BANQUE JACQUES, CARTIER (1900), 30 S. C. R. 429.—**CAN.**

7418 vi. —— *May be upheld as to part*

Re Meldrum, *Ex p.* Butcher (1874), 9 Ch. App. 595, L. JJ.; London & County Banking Co. *v.* London & River Plate Bank (1887), 4 T. L. R. 179; *Re* O'Sullivan, *Ex p.* Baller (1892), 61 L. J. Q. B. 228; Allen *v.* Flood, [1898] A. C. 1, H. L.; Quinn *v.* Leathem, [1901] A. C. 495, H. L.; Fitzroy *v.* Cave, [1905] 2 K. B. 364, C. A.; Valentine *v.* Hyde, [1919] 2 Ch. 129.

7419. ——.]—F. intending to petition the Insolvent Debtors' Ct., voluntarily gave Y., a creditor, a warrant of attorney on which Y. entered up judgment, & issued execution, & the sheriff seized & sold the goods. F. afterwards presented his petition, & an assignee was appointed:—*Held:* (1) the words "fraudulent & void as against the assignee" contained in Judgments Act, 1838 (c. 110), s. 59, did not mean fraudulent & void absolutely, but only as to the assignee, so that a transaction forbidden by that sect., & declared "fraudulent & void as to the assignee" might be valid as to other persons; (2) the assignee could not treat the transaction as void from the beginning, & maintain trover against Y. on an alleged wrongful conversion at the time of the seizure.—YOUNG *v.* BILLITER (1860), 8 H. L. Cas. 682; 30 L. J. Q. B. 153; 7 Jur. N. S. 269; 11 E. R. 596; *sub nom.* BILLITER *v.* YOUNG, 3 L. T. 196, H. L.

Annotations:—**Expld.** Fitzmaurice *v.* Bayley (1858), 4 Jur. N. S. 506, Ex. Ch.; Topping *v.* Keysell (1864), 33 L. J. C. P. 225. *Young v. Billiter* turned entirely upon a point of pleading (WILLES, J.); Marks *v.* Feldman (1869), L. R. 4 Q. B. 481. **Refd.** Heilbut *v.* Nevill (1870), L. R. 5 C. P. 478, Ex. Ch.; Marks *v.* Feldman (1870), L. R. 5 Q. B. 275, Ex. Ch. **Mentd.** Hollingsworth *v.* White (1862), 6 L. T. 604; Clough *v.* L. & N. W. Ry. Co. (1871), L. R. 7 Exch. 26, Ex. Ch.

7420. —— **Proceeds recoverable from creditor preferred.**]—Where goods have been assigned to a creditor by debtor on the eve of bkpcy. in circumstances which make it a fraudulent preference, & the goods have been sold by the creditor before the bkpcy., the assignees may recover the proceeds from the creditor, as a transaction amounting to a fraudulent preference is voidable at the election of the assignees, as contrary to the spirit of the bkpcy. laws.—MARKS *v.* FELDMAN (1870), L. R. 5 Q. B. 275; 39 L. J. Q. B. 101, Ex. Ch.

Annotations:—**Refd.** *Re* Craven & Marshall, *Ex p.* Craven (1870), L. R. 10 Eq. 648; Jones *v.* Harber (1870), 23 L. T. 606.

7421. —— **Effect on right of unpaid vendor to stop in transitu.**]—*Semble:* a retransfer void as a fraudulent preference was void for all purposes, & would not defeat an unpaid vendor's right to stop *in transitu.*—*Re* JOHNSON, *Ex p.* WRIGHT (1908), 99 L. T. 305; 52 Sol. Jo. 622.

7422. Avoidance of assignment of book debts.]—Book-debts due to bkpt. paid to a third party under an assignment, subsequently avoided in bkpcy., belong to the assignee of bkpt., & may be recovered by him in an action for money had & received.—PENSON *v.* MOON (1866), 15 L. T. 444.

7423. Effect of proviso in 1869 Act, s. 92, in favour of purchaser, payee or incumbrancer.]—*Held:* the proviso in the above sect., in favour of a purchaser, payee, or incumbrancer, in good faith & for valuable consideration, extended to a case where the consideration was the payment of a pre-existing debt.—*Re* GOLDEN, *Ex p.* NORTON (1873), L. R. 16 Eq. 397; 21 W. R. 402.

Annotation:—**Mentd.** *Re* Simpson, *Ex p.* Morgan (1876), 2 Ch. D. 72, C. A.

7424. Position of creditor—No lien for amount paid—To redeem pawned goods.]—Debtor gave a creditor a pawnbroker's duplicate, by way of fraudulent preference. The creditor redeemed the pledged goods:—*Held:* the creditor, as against the assignees, had no lien on the goods for the amount paid to take them out of pawn.—AYLING *v.* WILLIAMS (1832), 5 C. & P. 399.

Annotation:—**Mentd.** Scarfe *v.* Morgan (1838), 4 M. & W. 270.

7425. —— **Part of advance applied in repaying valid bills of sale.**]—At the time when a bill of sale was executed, the mtgee. had notice of an act of bkpcy. committed by the mtgor., upon which he was afterwards adjudicated a bkpt. The money secured by the deed consisted in part of a sum paid by the mtgee. in discharge of the claim of the holder of two prior registered bills of sale executed before the act of bkpcy. was committed. The old bills of sale were not transferred to the new mtgee., & satisfaction of them was entered up. The new bill of sale was registered:—*Held:* the new bill of sale was valid as against the trustee to the extent of the sum paid to the prior mtgee.—*Re* JAMES, *Ex p.* HARRIS (1874), L. R. 19 Eq. 253; 44 L. J. Bcy. 31; 31 L. T. 621; 23 W. R. 536.

7426. —— **Not trustee for trustee in bankruptcy—Within Debtors Act, 1869 (c. 62), s. 4.**]—A creditor, who has received money from bkpt. by way of fraudulent preference, & has been ordered to repay it to the trustee of bkpt.'s estate, is not a person holding money in a fiduciary capacity under the above sect., & cannot be committed to prison under that sect.—*Re* CHAPMAN & SHAW, *Ex p.* HOOSON (1872), 8 Ch. App. 231; 42 L. J. Bcy. 19; 28 L. T. 4; 21 W. R. 152, L. JJ.

Annotations:—**Consd.** *Re* Bishop, *Ex p.* Claxton (1891), 7 T. L. R. 610. **Refd.** *Re* Hind, *Ex p.* Sharp (1877), 37 L. T. 168.

7427. *S. P. Re* BISHOP, *Ex p.* CLAXTON (1891), 7 T. L. R. 610; 8 Morr. 221, D. C.

See, generally, Part XXII., *post.*

7428. —— **Not liable for loss on sale before avoidance.**]—The trustee of bkpt.'s estate applied to the Ct. of Bkpcy. to declare a bill of sale, made by bkpt. previously to his bkpcy., fraudulent & void as against himself as trustee, & to order the assignee under the bill of sale, who had previously

& declared void as to rest.]—CAMPBELL *v.* PATTERSON, MADER *v.* MCKINNON 1893), 21 S. C. R. 645.—**CAN.**

7422 i. *Avoidance of assignment of book debts—Preferred creditor must refund to trustee amount collected.*]—MEHARG *v.* LUMBERS (1894), 23 A. R. 51.—**CAN.**

7424 i. *Position of creditor—Not party to transaction.*]—A deed which is annulled as made in fraud of creditors, is annulled only as against such creditors; as to those who were parties to it, it continues to subsist. —GAUDET *v.* TREMBLAY (1908), Q. R. 35 S. C. 303.—**CAN.**

7428 i —— *Who has sold assigned property before avoidance.*]—Before the commencement of an action to have a bill of sale declared void, as being made with intent to give the grantee a preference the grantee had sold the goods to a *bonâ fide* purchaser for value & received the purchase money:—*Held:* the grantee could not be called upon to account for the purchase money.—CASCADEN *v.* MCINTOSH (1892), 2 B. C. R. 268.—**CAN.**

7428 ii. —— ——.]—Where, before proceedings to impeach a transfer of goods to a creditor as a fraudulent preference, the creditor has transferred the goods to a *bonâ fide* purchaser for value, the creditor cannot be called on to make good the value of the goods as if he were a debtor.—STUART *v.* TREMAIN (1883), 3 O. R. 190; *dbtd. Union Bank* v. *Barbour* (1898), 12 Man. L. R. 171.—**CAN.**

7428 iii. —— *Measure of damages.*]—Where an assignment before the date of a bkpcy. is avoided by the official assignee, but the assigned property has been sold before the date of the avoidance, the measure of damages is the amount received on account of the sale.—*Re* WATERS, *Ex p.* HODGINS (1887), 5 N. Z. L. R. 431.—**N.Z.**

7428 iv. —— *Taking share in proceeds of goods transferred in trust for several creditors.*]—Within sixty days of the making of an assignment for the benefit of creditors, insolvent transferred to a person in trust for certain creditors a quantity of butter, which was sold, realising $1,800, & the proceeds were distributed amongst such creditors in proportion to their claims, whereby they acquired a preference. The assignee sued one of the creditors to recover back the money paid him as his share, the amount so sought to be recovered being within the jurisdiction of the division ct.:—*Held:* the transfer was divisible into as many parts as there were shares,

Sect. 12.—*Avoidance of preference: Sub-sect.* 6. *Sect.* 13: *Sub-sect.* 1.]

to the bkpcy. sold the goods comprised therein, to pay over the proceeds of the sale to himself as such trustee. The Ct. of Bkpcy. having made the order, & the assignee having paid over the proceeds of the sale:—*Held:* the trustee could not afterwards bring an action of trover against the assignee under the bill of sale to recover the difference between the value of the goods & the amount realised by the sale, as by the proceedings in bkpcy. to recover the proceeds of the sale he had affirmed such sale & waived the tort.—SMITH *v.* BAKER (1873), L. R. 8 C. P. 350; 42 L. J. C. P. 155; 28 L. T. 637; 37 J. P. 567.

Annotations:—**Consd.** Roe *v.* Mutual Loan Fund (1887), 19 Q. B. D. 347, C. A.; Comitti *v.* Maher (1905), 94 L. T. 158; *Re* Wilson, [1916] 1 K. B. 382. **Reid.** Mercer *v.* Vans Colina (1897), 4 Mans. 363; Rice *v.* Reed, [1900] 1 Q. B. 54, C. A.; Davis *v.* Petrie (1905), 93 L. T. 511.

7429. Position of creditor's partner—Liability for proceeds of security.]—In Aug., 1821, A., a trader, being indebted to B. & C., then in partnership, but about to separate, gave a warrant of attorney to secure payment by instalments to B. alone, who knew that A. was then insolvent. In Oct., A. committed an act of bkpcy., & in Nov., at B.'s desire, he sent goods to the warehouse of B. & C. as a further security for the debt. In Dec., B. & C. dissolved partnership, & the former afterwards received from A. several sums of money on account of the

& the division ct. had jurisdiction to entertain the action.—BEATTIE *v.* HOLMES (1898), 29 O. R. 264.—**CAN.**

7428 v. —— —— *Indemnity from trustee in sequestration.*]—A creditor received payment of a promissory note from the maker shortly before the surrender of the maker's estate. The creditor had *bonâ fide* given up the promissory note. The payment was an undue preference made with the intention of preferring the indorser, who had since assigned his estate, & the creditor was ordered to refund the amount paid to him on receiving from the trustee of the insolvent estate of the maker a guarantee of indemnity under Insolvent Ordinance, s. 90. The note had not been protested at its maturity, nor had any notice been given to the indorser, in consequence of the payment by the maker. The creditor having sued on the indemnity bond, the ct. gave judgment for the creditor for the amount which at the time the note became due he might have recovered from the indorser. —FRIEDLANDER *v.* THORNE'S TRUSTEE (1876), Buch. 72.—**S. AF.**

7428 vi. —— ——.]—Where under Ord. 6 of 1843, s. 90, the trustee of an insolvent estate has given a creditor an indemnity against any loss which may arise in consequence of his having to refund the amount of an undue preference, it is competent for such creditor, in an action against him for the amount of such undue preference, to tender the amount claimed, & then to set up the indemnity in a claim in reconvention, & to claim under it for the amount of his loss.—DOUBELL'S TRUSTEE *v.* METCALF & CO. (1904), 18 E. D. C. 29.—**S. AF.**

x. —— *Service of statement of claim outside jurisdiction on non-resident mortgagee.*]—The mere taking of a chattel mtge., without taking possession of the mortgaged goods, although it may constitute a fraudulent preference under Assignments Act, is not a tort within King's Bench Act, R. S. M., 1902, c. 40, s. 201 (*e*), & there is no jurisdiction to serve a statement of claim out of the jurisdiction in an action against a non-resident to set aside such a chattel mtge., although given to him by a resident debtor on goods within the jurisdiction.—ANCHOR ELEVATOR CO. *v.* HENEY (1908), 8 W. L. R. 735; 18 Man. L. R. 96.—**CAN.**

y. *Who can bring action to set aside preference—Whether assignee can.*] —*Held:* as debtor could not institute such an action, his assignee could not. —DIEHL *v.* WALLACE (1905), 2 W. L. R. 24.—**CAN.**

z. —— ——.]—*Held:* 48 Vict. c. 26, s. 4 (since repealed) did not vest in an assignee the right to maintain an action to recover back money paid by a person in insolvent circumstances within one month of an assignment by him under the Act.—CLARKSON *v.* ONTARIO BANK (1888), 15 A. R. 166. —**CAN.**

a. —— ——.]—An assignee for creditors is, by virtue of 55 Vict. c. 26, s. 2, entitled to take advantage of irregularities or defects in a chattel mtge. made by the assignor, where such mtge. is by reason of such defect void against creditors.—KERRY *v.* JAMES (1894). 21 A. R. 338; *dbtd. Hope v. May*, 24 A. R. 16.—**CAN.**

b. —— ——.]—Insolvents' assignee brought an action to set aside a transfer of goods to a creditor:—*Held:* he had a status to maintain the action.—FLEETWOOD *v.* WILTON (1917), 44 N. B. R. 318.—**CAN.**

c. —— —— *After proceedings begun by official assignee.*]—Pltf., as official assignee of M., took proceedings to recover back money paid to defts. in fraud of creditors. Subsequently the creditors' assignee, on being appointed, obtained a rule *nisi* calling on defts. to show cause why he should not be allowed to file a supplemental bill & become pltf.:—*Held:* pltf. was entitled to file a supplemental bill.—BLIGH *v.* KENNY (1879), R. E. D. 344.—**CAN.**

d. —— —— *Not being creditor—Preference made before assignment.*]—A creditor's assignee, not himself a creditor, cannot sustain an action to set aside a fraudulent conveyance or transfer made by debtor, prior to the assignment under which he claims to be such assignee.—LUMSDEN *v.* SCOTT (1883), 4 O. R. 323.—**CAN.**

f. —— —— *Defendant in previous action to foreclose impeached mortgage.*] —Pltf. as assignee for the benefit of creditors under 48 Vict. c. 26, brought an action to set aside as fraudulent a mtge. made by his assignor, while insolvent, to defts. Defts. set up as a defence, a judgment for foreclosure on the mtge. to which pltf. as assignee was a party deft.:—*Held:* the judgment of foreclosure was no bar.—GLASS *v.* GRANT (1888), 16 O. R. 233.—**CAN.**

g. —— *Not trustees under deed executed under Hong Kong Bankruptcy Ordinance, 1864, art.* 165.]—BENECKE *v.* WHITTALL (1877), 2 App. Cas. 602; 46 L. J. P. C. 81; 37 L. T. 73; 25 W. R. 913, P. C.—**HONG KONG.**

k. —— *Creditors in general—Effect of Assignments Act, s.* 48 (3).]—CANADIAN BANK OF COMMERCE *v.* MCAULEY (1914), 28 W. L. R. 597; 6 W. W. R. 1169; 24 Man. L. R. 561. —**CAN.**

l. —— —— *Whether leave required.*]—The effect of an order adjudicating a person an insolvent under Provincial Insolvency Act, s. 16 (1), is to vest the administration of his estate including the realisation of his assets under the control of the ct. Hence from such an order a creditor (whether decree holder or otherwise) is by s. 16 (2) (b) prevented from instituting, without the leave of the Ct. of Insolvency, a suit to set aside a transfer made by the insolvent as being in fraud of creditors.—VASUDEVA KAMATH *v.* LAKSHMINARAYANA RAO (1918), I. L. R. 41 Mad. 684.—**IND.**

m. —— —— *Duty to call on assignee to take proceedings.*]—Defts. resisted proceedings by pltf., to foreclose a mtge., on the ground that the mtge. was made in contemplation of insolvency, & was void under Insolvent Act:—*Held:* defts., seeking as creditors of insolvent, to impeach the mtge., solely on the ground that it was in contravention of the Act, should have called on the assignee to take proceedings to set it aside, & upon his refusal, should have applied to the judge for leave to proceed in his name, & defts. should have proved their claim in order to entitle them so to proceed. —GRANT *v.* WHEELER (1880), R. E. D. 388.—**CAN.**

n. —— *Execution creditor.*]—Execution creditors of W. attacked a mtge. made by him:—*Held:* no assignment for creditors having been made, an execution creditor might attack the security & take advantage of R. S. O., 1887 (c. 124), s. 2.—MOLSONS BANK *v.* HALTER (1889), 16 A. R. 323; 18 S. C. R. 88.—**CAN.**

o. —— *Judgment creditor.*]—Where an assignment under the statute had been made to a sheriff, who died shortly after, & proceedings were subsequently taken in their own names by judgment creditors of the assignor to set aside a transfer of property as fraudulent:—*Held:* pltfs., suing alone, had no *locus standi* to maintain the action.—BROWN *v.* GROVE (1889), 18 O. R. 311.—**CAN.**

p. —— —— *Right not affected by Assignments Act, R. S. M.*, 1902 (*c.* 8), *s.* 48 (*b*).]—GUNN *v.* VINEGRATSKY (1911), 17 W. L. R. 54; 20 Man. L. R. 311.—**CAN.**

q. —— —— *Not if judgment recovered in respect of tort.*]—GUROFSKI *v.* HARRIS (1896), 27 O. R. 201; 23 A. R. 717.—**CAN.**

r. —— *Secured creditor.*]—H., a secured creditor of S., sought to have a chattel mtge. made by the latter declared void as a fraudulent preference:—*Held:* in the absence of proof that the security held by him was inadequate he could not succeed. —CLARK *v.* HAMILTON PROVIDENT & LOAN SOCIETY (1885), 9 O. R. 177. —**CAN.**

s. —— —— *Holding security on property of third party.*]—Creditors are not debarred, by the fact that they hold security on the estate of a third party, from attacking a mtge. made to other creditors, on the ground that same constitutes a preference.—ROBIN HOOD *v.* MAPLE LEAF (1916), 33 W. L. R. 776; 9 W. W. R. 1453; 26 Man. L. R. 238.—**CAN.**

t. —— *Simple contract creditor.*] —C. made a chattel mtge. of his stock-in-trade to defts. to secure a debt, & afterwards executed a general assignment to F. for creditors. Pltfs., who were simple contract creditors of C., & whose debts were not due, brought an action on behalf of themselves & all other creditors of C. except

warrant of attorney, & also sold the goods, towards satisfaction of the debt. A commission issued against A. in Jan., 1823, & in Nov. of that year B. died:—*Held:* A.'s assignees might recover from C. the money paid by A. on the warrant of attorney by an action for money had, & received, & the value of the goods by an action of trover.—BIGGS *v.* FELLOWS (1828), 8 B. & C. 402; 2 Man. & Ry. K. B. 450; Dan. & Ll. 121; 6 L. J. O. S. K. B. 357; 108 E. R. 1092.

SECT. 13.—**PROTECTION OF BONÂ FIDE TRANSACTIONS—VALIDITY OF PAYMENTS TO BANKRUPT AND ASSIGNEE.**

See, now, 1914 Act, ss. 37, 45, 46 & 47.

SUB-SECT. 1.—IN GENERAL.

Rights of execution creditors.]—*See* Sect. 10, *ante.*

Avoidance of preference.]—*See* Sect. 12, *ante.*

7430. General rule.]—A. purchased of a man, who had committed an act of bkpcy., but without notice thereof. Afterwards a commission was taken out, & there being a term standing out in trustees, the assignee brought a bill against them & the purchaser to have the term assigned to him. The bill was dismissed.—WILKES *v.* BODINGTON (1707), 2 Vern. 599; 23 E. R. 991.

Annotations:—**Mentd.** Fitzgerald *v.* Fauconberge (1729), Fitz-G. 207; Willoughby *v.* Willoughby (1787), 1 Term Rep. 763; Cholmondeley *v.* Clinton (1820), 2 Jac. & W. 1; Taylor *v.* London & County Banking Co., London & County Banking Co. *v.* Nixon, [1901] 2 Ch. 231, C. A.; *Re* Slobodinsky, *Ex p.* Moore, [1903] 2 K. B. 517; *Re* Hart, *Ex p.* Green, [1912] 3 K. B. 6, C. A.

7431. General effect of statutes—1 Jac. 1, c. 15—19 Geo. 2, c. 32.]—No payments made either by or to bkpt. are protected by the above Acts, when the party either paying or receiving has knowledge of an act of bkpcy. committed, & a banker is not justified in paying the drafts of a person who has placed money in his hands, after he has notice of an act of bkpcy. committed by him.—VERNON *v.* HANKEY (1787), 2 Term Rep. 113; Cooke's Bankrupt Laws, 7th ed., pp. 111, 559; 100 E. R. 62; *subsequent proceedings, sub nom.* HANKEY *v.* VERNON (1791), 3 Bro. C. C. 313, L. C.

Annotations:—**Conds.** *Re* Tyrie, *Ex p.* Morris (1866), 14 L. T. 606. **Refd.** Foster *v.* Allanson (1788), 2 Term Rep. 479. **Mentd.** Fewler *v.* Padget (1798), 7 Term Rep. 509; Balme *v.* Hutton (1831), 2 Cr. & J. 19; Garland *v.* Carlisle (1833), 2 Cr. & M. 31, Ex. Ch.; Taylor *v.* Sheppard (1835), 1 Y. & C. Ex. 271; Waters *v.* Waters (1848), 2 De G. & Sm. 591; *Re* Lawford & Lawrence, *Ex p.* Trustee, [1902] 2 K. B. 445.

7432. —— 6 Geo. 4, c. 16, s. 82—Retrospective.]—*Held:* the words in the above sect. "that all payments made, or which hereafter shall be made," were extremely strong, if not conclusive, to show that the legislature intended to protect all

M. & Co., to have the mtge. declared void under R. S. O., 1877 (c. 118):—*Held:* pltfs. could maintain the action.—MCDONALD *v.* MCCALL (1885), 12 A. R. 593; S. C. *sub nom.* MCCALL *v.* MCDONALD (1886), 13 S. C. R. 247. —**CAN.**

w. *Action by trustee for creditors under Assignments Act, R. S. M.*, 1892 (*c.* 7), *s.* 39, *to set aside preference—Need not show benefit of assignment accepted by or communication thereof to other creditors.*]—SCHWARTZ *v.* WINKLER (1901), 13 Man. L. R. 493.—**CAN.**

x. *Against whom action to set aside preference must be brought—Creditor receiving preference—Not against bankrupt's agent making payment at bankrupt's request.*]—BISPHAM'S OFFICIAL ASSIGNEE *v.* HUNTER (1898), 16 N. Z. L. R. 608.—**N.Z.**

y. *Pleading in action to set aside preference.*]—To a declaration by the official assignee containing counts under Insolvent Act, ss. 6 & 8, in respect of a promissory note for £150 10*s.* 9*d.* delivered by insolvents to deft., it was pleaded that insolvents paid with the promissory note for certain goods then sold & delivered to them by deft. to the value of £42, & also a then previously owing debt of £75 17*s.* 6*d.*, & that deft. also at the same time gave in cash to insolvents the balance of the money represented by the promissory note, & that pltf. had never offered to repay defts. the difference or balance between the sum of £75 17*s.* 6*d.* & the full amount of the promissory note:—*Held:* a bad plea. —LYONS *v.* SAMUEL (1877), Knox, 177.—**AUS.**

z. ——.]—It is not sufficient in a bill impeaching a conveyance as fraudulent against creditors to allege that it was made for the purpose & intent, &c., without alleging the purpose & intent to have been those of the grantor.—WESTERN CANADA LOAN CO. *v.* SNOW (1890), 6 Man. L. R. 317.—**CAN.**

a. ——.]—In an action to set aside a conveyance of land as a fraudulent preference, the non-averment that pltfs. sued on behalf of all other creditors, is not ground for demurrer, but a mere informality to be dealt with under O. J. Act, rules 103, 104.—SCANE *v.* DUCKETT (1883), 3 O. R. 370.—**CAN.**

b. —— *Where consequential relief sought under* 1903–4 *Acts, c.* 31.]—PITTS *v.* CAMPBELL (1911), 9 E. L. R. 469; 45 N. S. R. 458.—**CAN.**

c. *Costs—Suspicious circumstances.*]—Claim on a note made by insolvent in favour of her brother seven days before she was put into insolvency. Claimant proved consideration given for the note, *viz.*, goods sold:—*Held:* as the note was given in suspicious circumstances the contestation would be dismissed but without costs.—GARON *v.* GLOBENSKY (1880), 3 L. N. 182.—**CAN.**

d. —— *Of upholding transaction —Conduct of favoured creditor.*]—Where a *bonâ fide* transaction takes place between a failing debtor & a favoured creditor, it is the duty of the creditor to employ all practicable means to free the transaction from undeserved suspicion, & afford to the other creditors reasonable satisfaction, as to the moral character of the transaction; &, if this duty is neglected, the favoured creditor may have to bear his own costs of afterwards establishing the transaction, if impeached in this ct. by the other creditors whom it disappointed.—HEALEY *v.* DANIELS (1868), 14 Gr. 633.—**CAN.**

e. —— *Findings of lower court as to absence of fraud—Not disturbed.*]—SCHUEL *v.* HAMILTON (1906), 8 O. W. R. 563.—**CAN.**

f. *Appeal—Verdict negativing fraud —Set aside.*]—The ct. will review a verdict negativing fraud in an assignment of personal property to a creditor, & set it aside when contrary to a strong preponderance of evidence.—FALCONER *v.* SAWYER (1851), James, 277.—**CAN.**

PART XX. SECT. 13, SUB-SECT. 1.

7430 i. *General rule.*]—A transaction entered into by an insolvent is not impeachable, unless the person claiming the benefit of the transaction had notice or knowledge of insolvency & did not act in good faith.—JOHNSON *v.* HOPE (1890), 17 A. R. 10.—**CAN.**

7430 ii. ——.]—Equity will not relieve the assignees of bkpt. against a purchaser of bkpt.'s lands, without notice of the act of bkpcy.—CHANDOS *v.* BROWNLOW (1791), 2 Ridg. Parl. Rep. 345.—**IR.**

7430 iii. ——.]—*Held:* applt. had a right to set off bills remitted for another purpose towards a debt due to himself before the person remitting same became bkpt. or had committed any act of bkpcy., as no act of bkpcy. had been proved before the remitting of the bills.—HEWIT *v.* ELLIOT (1775), 2 Pat. App. 381.—**SCOT.**

7430 iv. ——.]—The valid cession of a right of action completed before the insolvency of the cedent entitles the cessionary to the full benefit of it, notwithstanding such subsequent insolvency.—MILLS & SONS *v.* BENJAMIN BROTHERS' TRUSTEES (1876), Buch. 115.—**S. AF.**

7432 i. *General effect of statutes*—1898 *Act, ss.* 57, 58.]—WILLIAMS *v.* OFFICIAL ASSIGNEE OF DUNN'S ESTATE (1903), 6 C. L. R. 425.—**AUS.**

7432 ii. —— *Whether retrospective—* 48 *Vict. c.* 26.]—Pltf. sought to invalidate payments of money made by insolvent within thirty days prior to an assignment under the above Act, but before it came into force:—*Held:* the statute was not retrospective.—CLARKSON *v.* ONTARIO BANK (1887), 13 O. R. 666.—**CAN.**

7432 iii. —— —— ——.]—Deft. advanced money, on default of repayment the borrower covenanted to assign securities. The securities were assigned & within two months thereafter debtor assigned under the above Act. In an action by the assignee to recover the amount realised from the securities:—*Held:* the statute was not retrospective so as to apply to a transfer made in pursuance of a valid pre-existing agreement for valuable consideration.—CLARKSON *v.* STERLING (1888), 15 A. R. 234.—**CAN.**

7432 iv. —— —— 54 *Vict. c.* 20.]—*Held:* the above statute is not retrospective, & does not apply to any gift, transfer, etc., made before the passing thereof.—ORMSBY *v.* JARVIS, CHAPMAN *v.* JARVIS (1892), 22 O. R. 11.—**CAN.**

7432 v. —— —— 1916 *Act.*]—When

Sect. 13.—*Protection of bonâ fide transactions—validity of payments to bankrupt and assignee: Sub-sect.* 1.]

payments actually made at the time of the passing of the Act, on May 2, 1825, & even those made before that day.—CHURCHILL *v.* CREASE (1828), 5 Bing. 177; 2 Moo. & P. 415; 7 L. J. O. S. C. P. 63; 130 E. R. 1028.

Annotations:—**Follid.** Terrington *v.* Hargreaves (1829), 5 Bing. 489. **Refd.** Luckin *v.* Simpson (1840), 6 Bing. N. C. 353.

7433. —— —— ——.]—Where the bkpcy. took place on June 26, 1822, & bkpt. paid deft., who knew of his insolvency, a sum of money on Aug. 4, 1822, & a commission was sued out against bkpt. in May, 1823:—*Held:* the above sect. was retrospective, & the assignees could not, subsequently to the time when the Act came into operation, sue deft. for money had & received.—TERRINGTON *v.* HARGREAVES (1829), 5 Bing. 489; 3 Moo. & P. 137; 7 L. J. O. S. C. P. 207; 130 E. R. 1150.

Annotation:—**Refd.** Luckin *v.* Simpson (1840), 6 Bing. N. C. 353.

7434. —— —— **Less than two months before commission.**]—If money had been paid into ct. to abide the event of the suit under 7 & 8 Geo. 4, c. 71, s. 2, & deft. wishes to take it out on perfecting special bail, under s. 3, he must do so before issue joined. If paid in after an act of bkpcy., & less than two months before a commission issued, it is not within the protection of 6 Geo. 4, c. 16, s. 82.—FERRALL *v.* ALEXANDER (1831), 1 Dowl. 132.

Annotations:—**Consd.** Murray *v.* Arnold (1862), 3 B. & S. 287; Cooke *v.* Bell (1863), 2 New Rep. 174; Culverhouse *v.* Wickens (1868), L. R. 3 C. P. 295. **Mentd.** Reynolds *v.* Wedd (1838), 4 Bing. N. C. 694.

7435. —— —— **Must be specially pleaded.**]—A trader committed a secret act of bkpcy. by leaving his house; but, before he left, desired deft., his foreman, who had been accustomed to manage his business for him, to carry it on in his absence. Deft. did so, & received several sums of money for debts due to bkpt., & for goods sold after the act of bkpcy. He also made several *bonâ fide* payments, some to creditors of bkpt. for the expenses of housekeeping, & retained some for wages due to himself. The money was received & payments made without notice of the act of bkpcy. An action having been brought by the assignees to recover the money so received as money had & received to their use, deft. pleaded never indebted, & set-off:—*Held:* deft. was liable to the assignees for all money received by him after the act of bkpcy. *Semble:* deft. might have protected himself by a special plea, as to payments & disbursements made by him without notice of the act of bkpcy. under 6 Geo. 4. c. 16, s. 82, & 1839 Act, s. 1.—KYNASTON *v.* CROUCH (1845), 14 M. & W. 266; 14 L. J. Ex. 324; 5 L. T. O. S. 430; 9 Jur. 584; 153 E. R. 476.

Annotations:—**Refd.** Cannan *v.* S. E. Ry. Co. (1852), 7 Exch. 843. **Mentd.** Mayhew *v.* Herrick (1849), 7 C. B. 229.

7436. —— —— **Purchaser entitled to retain goods—Lien for sum paid.**]—A. purchased of B., a hop merchant, a library, & paid him the value. B., at that time, had committed an act or bkpcy., of which A. had no knowledge:—*Held:* the assignees could not recover the value of the books, without at least tendering the price, inasmuch as the payment made by A. was declared valid by the above sect., & in order to give full effect to that enactment, A. must, at least, have a lien on the books, in respect of which he had made the payment, until the assignees tendered him the sum paid.—HILL *v.* FARNELL (1829), 9 B. & C. 45; Dan. & Ll. 264; 7 L. J. O. S. K. B. 139; 109 E. R. 17.

Annotations:—**Distd.** Cannan *v.* Denew (1833), 3 Moo. & S. 761. **Consd.** Baxter *v.* Pritchard (1834), 1 Ad. & El. 456; Willis *v.* Bank of England (1835), 4 Ad. & El. 21; Pearson *v.* Graham (1837), 6 Ad. & El. 899. **Expld.** Devas *v.* Venables (1837), 4 Scott, 123. **Refd.** Carter *v.* Breton (1830), 6 Bing. 617; Fearnley *v.* Wright (1840), 6 Bing. N. C. 446, Ex. Ch.

7437. —— **1849 Act, s. 133—Effect on doctrine of relation back.**]—1861 Act, s. 103, has reference to a prisoner for debt "brought up" before the county ct., & adjudged bkpt., upon his own petition *in formâ pauperis*, under ss. 98, 99, & as the adjudication has relation back to the commitment absolutely, & not merely as an act of bkpcy., a *bonâ fide* dealing with bkpt. after the commitment is void, & cannot be protected by 1849 Act, s. 133.

Goods were assigned by S. to deft., but S. remained in possession of them up to his arrest under a *ca. sa.* After his commitment to gaol deft. took possession of the goods, & S. was afterwards adjudged bkpt. on his own petition *in formâ pauperis* under 1861 Act, ss. 98, 99:—*Held:* the goods passed to S.'s assignee under 1849 Act, s. 125, as in his order & disposition with the consent of the true owner, & deft. could not avail himself of the protection of s. 133.—BRAMWELL *v.* EGLINTON (1866), L. R. 1 Q. B. 494; 7 B. & S. 537; 14 L. T. 735; 14 W. R. 739; *sub nom.* EGLINTON *v.* BRAMWELL, 35 L. J. Q. B. 163; 12 Jur. N. S. 702, Ex. Ch.

Annotation:—**Mentd.** *Re* Southam, *Ex p.* Southam (1874), L. R. 17 Eq. 578.

7438. —— **1869 Act—Contract before adjudication—Payment after adjudication.**]—Debtor, after presentation of a petition against him, but before adjudication, contracted for the sale of leasehold property, the purchaser paying a deposit. After adjudication, the purchaser, who had no knowledge of the adjudication or of the bkpcy. petition, or of the commission of any act of bkpcy. by the vendor, paid the remainder of the purchase-money to bkpt., & obtained possession of the title deeds & of the property, but no assignment to him was executed:—*Held:* the trustee being the legal owner of the property, subject to the equity of the purchaser to have it assigned to him on payment of the balance of the purchase-money, the purchaser could not enforce his equitable right except upon paying to the trustee the balance of the purchase-money.—*Re* POOLEY, *Ex p.* RABBIDGE (1878), 8 Ch. D. 367; 48 L. J. Bcy. 15; 38 L. T. 663; 26 W. R. 646, C. A.

Annotations:—**Consd.** Powell *v.* Marshall, Parkes, [1899] 1 Q. B. 710, C. A.; Pearce *v.* Bastable's Trustee in Bkpcy., [1901] 2 Ch. 122; *Re* Taylor, *Ex p.* Norvell, [1910] 1 K. B. 562, C. A.

7439. —— —— **Effect of Bills of Sale Act, 1845 (c. 36).**]—On May 2 a farmer executed a bill of sale of his furniture & growing crops, being the whole of his property, to P., the only consideration for it being the forbearance of P. to seize the property under a bill of sale given to him four months previously, as he alleged, for value, & not registered. On May 3 the grantor gave a bill of sale of the same property to C. in consideration of a present advance of money. C. had no notice

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debtor's estate is sequestrated the provisions of the above Act are retrospective only in so far as they are the same in principle as those existing prior to the Act coming into operation.—DU PLESSIS *v.* RAUBENHEIMER, [1917] C. P. D. 104.—S. AF.

7436 i. —— *Pledgee entitled to retain deeds—Lien for amount loaned.*]—A deposit of title deeds to secure payment of a debt entitles the pledgee to hold the deeds until payment. Where the pledgor becomes bkpt., his trustee cannot recover the title deeds without repaying to the pledgee the amount for which they were pawned.—HARE *v.* TIFFEN, 2 J. R. N. S. 263.—N.Z.

of P.'s bill of sale. Neither of the bills of sale was registered. C. took possession of the property on Aug. 20, & P. on Aug. 23. On Aug. 26 the grantor filed a liquidation petition, & on Oct. 1 he was adjudicated a bkpt. :—*Held :* (1) C.'s bill of sale, so far as regarded the growing crops, was a protected transaction by virtue of 1869 Act, ss. 94, 95, & was good as against the trustee ; (2) so far as regarded the furniture C.'s bill of sale was void as against the trustee for want of registration, notwithstanding the fact that he had no notice of the act of bkpcy. to which the trustee's title related back.—*Re* CROSS, *Ex p.* PAYNE (1879), 11 Ch. D. 539 ; 40 L. T. 563 ; 27 W. R. 808, C. A.

Annotations :—**Apld.** Sanguinetti *v.* Stuckey's Banking Co., [1895] 1 Ch. 176. **Refd.** Lyons *v.* Tucker (1881), 6 Q. B. D. 660 ; *Re* Emery, *Ex p.* Chief Official Receiver (1888), 37 W. R. 21.

See, further, BILLS OF SALE.

7440. —— 1883 Act, s. 49—Value of decisions on previous statutes.]—Decisions under 1849 Act, whereby the transactions protected were to be deemed valid "notwithstanding any prior act of bkpcy. by such bkpt. committed," are of no value with regard to the construction of 1883 Act, s. 49, which is a positive enactment in plain terms, to which the ct. is bound to give effect according to their ordinary meaning.—SHEARS *v.* GODDARD, [1896] 1 Q. B. 406 ; 65 L. J. Q. B. 344 ; 74 L. T. 128 ; 44 W. R. 402 ; 3 Mans. 24, C. A.

Annotations :—**Consd.** Bullock *v.* Ardern (1901), 17 T. L. R. 285, C. A. **Mentd.** *Re* Sharp, *Ex p.* Gundry & Johnston (1900), 83 L. T. 416 ; *Re* Jukes, *Ex p.* Official Receiver, [1902] 2 K. B. 58 ; Sturmey's Trustee *v.* Sturmey (1912), 107 L. T. 718.

7441. —— —— Effect on doctrine of relation back.]—If a person by a dealing, which is a protected transaction under the above sect., takes possession of goods, the doctrine of relation back ceases to have any application, & the creditor must be treated as getting possession before an act of bkpcy. is committed, or, in other words, as if no act of bkpcy. had been committed.—*Re* SEAMAN, *Ex p.* FURNESS FINANCE CO., LTD., [1896] 1 Q. B. 412 ; 65 L. J. Q. B. 348 ; 74 L. T. 151 ; 44 W. R. 496 ; 40 Sol. Jo. 318 ; 3 Mans. 19.

7442. —— —— —— "In good faith" to be read into section.]—The effect of the trustee's title by relation back under 1883 Act, s. 43, is excluded by s. 49 if there has been a contract, or conveyance, or assignment for valuable consideration, provided that the transferee has not at the time notice of any available act of bkpcy., & although the words "in good faith" do not occur in the sect. they must be deemed to be inserted, because in all former Acts those words have been inserted, & it has been since held that the omission was not intended to make any difference, & that the person who takes the conveyance of debtor's property cannot claim the benefit of s. 49, if he had notice of anything wrong or anything that really put him upon inquiry (WRIGHT, J.).—*Re* SLOBODINSKY, *Ex p.* MOORE, [1903] 2 K. B. 517 ; 72 L. J. K. B. 883 ; 89 L. T. 190 ; 52 W. R. 156 ; 19 T. L. R. 616 ; 47 Sol. Jo. 710 ; 10 Mans. 341.

Annotations :—**Refd.** *Re* Goldburg, *Ex p.* Silverstone, [1912] 1 K. B. 384 ; *Re* Hart, *Ex p.* Green, [1912] 3 K. B. 6, C. A. **Mentd.** Gonville's Trustee *v.* Patent Caramel Co., Gonville's Trustee *v.* Gonville, Jarvis, [1912] 1 K. B. 599.

See, also, No. 7446, *post.*

See, generally, Sect. 3, *ante.*

7443. —— —— ——.]—On Dec. 1 a bkpcy. petition was presented against debtor, & on Dec. 5 he assigned to a creditor a sum of money due to him. The assignment was made in good faith, & the creditor had no notice of the petition. On Dec. 10 the receiving order was made against the debtor :—*Held :* the assignment was a protected transaction.—*Re* DUNKLEY & SON, *Ex p.* WALLER, [1905] 2 K. B. 683 ; 74 L. J. K. B. 963 ; 93 L. T. 248 ; 54 W. R. 171 ; 21 T. L. R. 707 ; 49 Sol. Jo. 686 ; 12 Mans. 384.

7444. —— —— Transaction in itself act of bankruptcy.]—An assignment by debtor made for valuable consideration before the date of a receiving order against debtor to a person having at the time no notice of any available act of bkpcy. by debtor, is protected under the above sect., notwithstanding such assignment constitutes itself an act of bkpcy. —SHEARS *v.* GODDARD, [1896] 1 Q. B. 406 ; 65 L. J. Q. B. 344 ; 74 L. T. 128 ; 44 W. R. 402 ; 12 T. L. R. 234 ; *sub nom. Re* SILLS, SHEARS *v.* GODDARD, 3 Mans. 24, C. A.

Annotations :—**Distd.** *Re* Sharp, *Ex p.* Gundry *v.* Johnston (1900), 83 L. T. 416. **Foll.** Bullock *v.* Ardern (1901), 17 T. L. R. 285, C. A. **Distd.** *Re* Jukes, *Ex p.* Official Receiver, [1902] 2 K. B. 58. **Mentd.** Sturmey's Trustee *v.* Sturmey (1912), 107 L. T. 718.

7445. —— —— ——.]—By a marriage settlement the husband conveyed all his property giving his wife an immediate life interest. The wife did not know that the conveyance included all the husband's property. Within three months thereof a petition in bkpcy. was presented against the husband for having failed to comply with a bkpcy. notice, & he was adjudicated bkpt. thereon : —*Held :* assuming the settlement was an act of bkpcy., as it was made for valuable consideration, & the wife had no notice of the act of bkpcy., the settlement was protected by the above sect.—BULLOCK *v.* ARDERN (1901), 17 T. L. R. 285, C. A.

7446. —— —— ——.]—A creditor who takes a transfer of substantially the whole of the property of his debtor in payment of a past debt, with notice that there are other creditors, cannot

7441 i. —— *On doctrine of relation back*—1864 *Act.*]—The title of the official assignee does not, under the above Act relate back to the assignment.—THORNE *v.* TORRANCE (1868), 18 C. P. 29 ; *dbtd.* MCLEAN *v.* GARLAND (1885), 13 S. C. R. 366.—**CAN.**

7441 ii. —— —— 1865 *Act.*]—A writ of *fi. fa.* against R. was given to the sheriff who levied. Later on the same day C. sued out against R. an attachment in insolvency. On same day, 1865 Act came into force :—*Held :* the attachment prevailed over the execution.—CONVERSE *v.* MICHIE (1865), 16 C. P. 167.—**CAN.**

7441 iii. —— —— 1880 *Act.*]—Where the holder of an unregistered bill of sale makes a seizure after the time has expired for filing his bill of sale, & after the mtgor. has committed an act of bkpcy. to which a subsequent adjudication relates back, the security & seizure are void as against the creditors' trustee of the mtgor.—THOMAS' TRUSTEE *v.* COHEN (1884), 2 N. Z. L. R. 352.—**N.Z.**

7441 iv. —— —— 1883 *Act.*]—A debtor owed debts amounting to £270 & had assets worth £180 ; he mortgaged property worth £150 to secure debts amounting to £240, & within six months became bkpt. :—*Held :* it was not an act of bkpcy. having relation back under the above sect.—*Re* SMITH (1886), 5 N. Z. L. R. 90.—**N.Z.**

7441 v. —— ——.]—If money is claimed by relation back to a prior act of bkpcy. it must clearly appear that an act of bkpcy. has been committed upon which a creditor's petition could have been founded, & upon which the ct. would have adjudicated debtor bkpt. It must also be shown either that the money was received after the act of bkpcy., or that the payment of the money itself was an act of bkpcy.—*Re* WALTON, OFFICIAL ASSIGNEE IN BANKRUPTCY *v.* MCKAY BROTHERS (1909), 28 N. Z. L. R. 948.—**N.Z.**

7441 vi. —— *Charge upon money due to bankrupt—Contractors' & Workmen's Lien Act*, 1892.]—The doctrine of relation back does not affect a charge to which a sub-contractor is entitled under the above Act upon money due to a bkpt. contractor, even if his act of bkpcy. was committed before notice of claim to a charge was given by the sub-contractor.—*Re* WILLIAMS, *Ex p.* OFFICIAL ASSIGNEE (1899), 17 N. Z. L. R. 712.—**N.Z.**

7444 i. —— *Transaction in itself act of bankruptcy*—1887 *Act, s.* 57.]—A transaction with bkpt. which is an act of bkpcy. is not protected by the above sect.—*Re* KEITH, *Ex p.* OFFICIAL ASSIGNEE, JOSS (1896), 17 N. S. W. B. 1.—**AUS.**

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be said to be acting in good faith, & is not entitled to the protection of 1883 Act, s. 49, & such a transaction is an act of bkpcy. & *primâ facie* a fraudulent preference on the part of debtor.—*Re* JUKES, *Ex p.* OFFICIAL RECEIVER, [1902] 2 K. B. 58; 71 L. J. K. B. 710; 86 L. T. 456; 50 W. R. 560; 46 Sol. Jo. 452; 9 Mans. 249.

See, also, No. 7442, *ante.*

7447. —— —— —— Transaction not in ordinary course of trade.]—In Dec., 1899, S., a publican, owed about £3,000 to trade creditors, his trade premises were mortgaged to W. & Co., his lessors, & he was insolvent. It was agreed that S. should surrender his lease, that W. & Co. should release the mtge. & should take over the stock-in-trade, being the whole of S.'s assets, for £2,800, which sum was the total amount of a list of his debts furnished by S. & stated to be a complete list, & a cheque for £2,800 was handed by W. & Co., to S., who, according to the arrangement, immediately indorsed & delivered it to resps., who proceeded to pay all the debts set out in the list furnished by S. The list did not in fact contain all the creditors. The arrangement was entered into honestly & without any fraudulent motive. A receiving order having been made against S. within three months of the above transaction, the trustee sought to recover the £2,800 from resps.:—*Held:* the above sect. did not protect payments made, not in the ordinary course of business, but for the purpose of doing that which in law constituted an act of bkpcy., & the present transaction was not protected by that sect.—*Re* SHARP, *Ex p.* GUNDRY *v.* JOHNSTON (1900), 83 L. T. 416.

Annotation:—**Refd.** *Re* David & Adlard, *Ex p.* Whinney, [1914] 2 K. B. 694.

7448. —— —— Contract protected—Payment under contract not protected.]—On a contract for sale of a lease a day was fixed for completion, & pltf., the purchaser, paid a deposit to defts. as stakeholders. It was a term of the contract that the deposit should be forfeited, in case the purchaser refused to perform his part of the agreement. Before the date fixed for completion the vendor committed an act of bkpcy., which came to the notice of the purchaser, who refused to complete, & demanded the return of the deposit:—*Held:* though the contract for sale was protected by the above sect., the assignment & the payment of the purchase-money, after notice of the act of bkpcy., would not have been protected, & the purchaser was not bound to complete, & was entitled to recover the deposit.—POWELL *v.* MARSHALL, PARKES & Co., [1899] 1 Q. B. 710; 68 L. J. Q. B. 477; 80 L. T. 509; 47 W. R. 419; 15 T. L. R. 289; 43 Sol. Jo. 382; 6 Mans. 157, C. A.

7449. —— —— Transaction contrary to policy of bankruptcy law.]—Where two payments were made by bkpt. to creditors on Aug. 13, & Sept. 5, respectively, the bkpcy. petition having been presented against debtor on Aug. 5, but the creditors having at the time no notice of any act of bkpcy.:—*Held:* the ct. was not bound to give the benefit of the above sect. to any transaction which was contrary to the policy of the bkpcy. laws, & as the money paid by bkpt. to the creditors was in fact the property of the trustee at the time when the payments were made, such payments were not protected.—*Re* BADHAM, *Ex p.* TRUSTEE (1893), 69 L. T. 356; *sub nom. Re* BADHAM, *Ex p.* PALMER, 9 T. L. R. 646; 37 Sol. Jo. 720; 10 Morr. 252; 5 R. 521.

Annotations:—**Consd.** *Re* Dunkley, *Ex p.* Waller, [1905] 2 K. B. 683. **Refd.** *Re* Hirth, *Ex p.* Official Receiver (1899), 68 L. J. Q. B. 287, C. A.; *Re* Rooker, *Ex p.* Rooker, [1916] W. N. 293, C. A.

7450. "Payment"—1 Jac. 1, c. 15, s. 14—Giving bill of exchange.]—A factor gave his acceptance to his principal for the amount of goods sold on account after a secret act of bkpcy. of the principal, but without notice to the factor, & after notice of the bkpcy., the factor paid his acceptance to the holder of the bill:—*Held:* the payment was protected by the above sect., as giving a bill of exchange was deemed a payment in satisfaction, provided the bill was paid when due.—WILKINS *v.* CASEY (1798), 7 Term Rep. 711; 101 E. R. 1213.

Annotations:—**Consd.** Willis *v.* Freeman (1810), 12 East, 656; Spratt *v.* Hobhouse (1827), 4 Bing. 173. **Distd.** Yates *v.* Hoppe (1850), 14 Jur. 372. **Refd.** Cannan *v.* Wood (1837), 2 M. & W. 465 **Mentd.** Cash *v.* Young (1823), 3 Dow. & Ry. K. B. 652.

7451. —— —— Assignment of bond.]—A bond, assigned after a secret act of bkpcy. by the assignor, as security for money, afterwards paid to his use, cannot be retained against the assignees under the commission.—HAMMERSLEY *v.* PURLING (1798), 3 Ves. 757; 30 E. R. 1257.

7452. —— —— Bills of exchange never in bankrupt's possession.]—An action of trover cannot be maintained by the assignees of bkpt., to recover bills of exchange from the holder, who drafted them with a knowledge of bkpt.'s insolvency, & after compelling such bkpt. to sign as drawer, induced his creditors, who were not aware of his circumstances, to accept them.—WALKER *v.* LAING (1817), 7 Taunt. 568; 1 Moore, C. P. 281; 129 E. R. 226.

7453. —— —— Bill of exchange given before bankruptcy.]—A bill of exchange given in payment to a person who becomes bkpt., is a good payment, though the bill does not become payable till after the bkpcy., if the party paying did not know of the insolvency of bkpt.—BENNETT *v.* SPACKMAN (1824), 1 C. & P. 274.

7454. —— 6 Geo. 4, c. 16, s. 82—Delivery of goods—In discharge of dishonoured acceptance.]—In an action to recover back a large quantity of books, which defts. had procured from bkpt. under the threat of arrest, in discharge of a dishonoured acceptance after an alleged act of bkpcy., & before the date of the commission, the act of bkpcy. was disputed, & defts. contended that the transaction was protected as a payment under the above sect.:—*Held:* this was not a payment

7450 i. "*Payment*"—*Giving cheque of third person*—1887 *Act.*]—The handing by debtor to his creditor of the cheque of a third person upon a bank in the place where the creditor lives, the maker of the cheque having funds there to meet it, is a "payment of money to a creditor" within the above Act.—ARMSTRONG *v.* HEMSTREET (1892), 22 O. R. 336; *overd.* DAVIDSON *v.* FRASE (1896), 23 A. R. 439.—CAN.

7450 ii. —— —— ——.]—Indorsing & giving to a creditor the unaccepted cheque of a third person in debtor's favour is not a payment of money to the creditor by debtor within the meaning of the Act.—DAVIDSON *v.* FRASER (1896), 23 A. R. 439; 28 S. C. R. 272.—CAN.

7450 iii. —— *Drawing, indorsing, discounting, & protesting bills.*]—K. contracted with P. for goods to be sold by P. to K. P. drew bills on K. which, before acceptance, were indorsed to & discounted by a bank, & the proceeds paid to P. P. became bkpt. The bills, before the bkpcy., were presented to the indorsees for acceptance, & protested for non-acceptance; but K., on receiving an indemnity from the bank, accepted them, having at the time notice of the bkpcy., & the amount was afterwards paid to the bank:—*Held:* the drawing, indorsing, discounting, & protesting the bills, did not amount to a payment of the debt, or a transfer of it to the indorsees, so as to prevent the assignment of it to the assignees of P.—LLOYD *v.* KIRKWOOD (1840), 2 Jebb & S. 167.—IR.

a. —— *Proceeds of cheque.*]—Deft. called upon K. who was insolvent

within the sect.—SMITH *v.* MOON (1829), Mood. & M. 458.

7455. —— —— —— In part payment.]—A delivery of goods, *bonâ fide* made in part payment of a previous debt, after a secret act of bkpcy. committed by debtor, is a payment protected by the above sect.—CANNAN *v.* WOOD (1837), 2 M. & W. 465; Murp. & H. 76; 6 L. J. Ex. 112; 1 Jur. 498; 150 E. R. 840.

Annotations:—**Distd.** Backhouse *v.* Jones (1839), 8 Scott, 148. **Refd.** Langton *v.* Waring (1865), 18 C. B. N. S. 315. **Mentd.** Martin *v.* Reid (1862), 11 C. B. N. S. 730.

7456. —— —— Set off of price of goods delivered against prior debt.]—After a secret act of bkpcy. by P., deft. accepted a bill of exchange for him for £98 at three months, which P. paid to a creditor standing by. Later, in the course of the same day, P. agreed to sell deft. four horses as security for £70 of the £98. The horses were subsequently delivered to deft., who paid the bill when it became due:—*Held:* the transaction was not a payment protected by the above sect.—CARTER *v.* BRETON (1830), 6 Bing. 617; L. & Welsb. 287; 4 Moo. & P. 424; 8 L. J. O. S. C. P. 224; 130 E. R. 1419.

Annotations:—**Consd.** Cannan *v.* Denew (1833), 3 L. J. C. P. 65; Cannan *v.* Wood (1837), Murp. & H. 76.

7457. —— —— Assignment of chattels as security for loan.]—R. having committed a secret act of bkpcy., assigned chattels to deft., as security for money lent him by deft., in trust, to permit R. to use them till Mar., 1833, & then to sell them in discharge of the debt, if unpaid. In Oct., 1832, within two months of the assignment, a commission was issued against R.:—*Held:* the assignment was not protected by the above sect.—CANNAN *v.* DENEW (1833), 10 Bing. 292; 3 Moo. & S. 761; 3 L. J. C. P. 65; 131 E. R. 917.

Annotation:—**Consd.** Wright *v.* Fearnley (1838), 5 Bing. N. C. 89.

7458. —— —— Taking of bank post bill for cash.]—The taking of a bank post bill, for which cash is given at the time, from a party who has committed an act of bkpcy. is equally within the protection of the above sect. as a purchase of goods for ready money, the party taking it having no notice of the act of bkpcy.—WILLIS *v.* BANK OF ENGLAND (1835), 4 Ad. & El. 21; 5 Nev. & M. K. B. 478; 1 Har. & W. 620; 5 L. J. K. B. 73; 111 E. R. 694.

Annotations:—**Expld.** Wright *v.* Fearnley (1838), 6 Scott, 813. In *Willis* v. *Bank of England* there was a regular exchange of property, which amounted to neither more nor less than a purchase & sale (VAUGHAN, J.). **Mentd.** Cornfoot *v.* Fowke (1840), 6 M. & W. 358; Powles *v.* Page (1846), 3 C. B. 16.

7459. —— —— Pledge of chattels in security of loan.]—Bkpt. having, within two months before the fiat, deposited chattels by way of pledge, in consideration of an advance of money:—*Held:* the transaction, though *bonâ fide*, & without notice of an act of bkpcy., was not protected by the above sect., as the protection given by that sect. was confined to the payment of a debt, & to transactions in which the parties stood in the relation of debtor & creditor, & as an advance on the deposit of goods was not such a case.—WRIGHT *v.* FEARNLEY (1838), 5 Bing. N. C. 89; 7 Dowl. 129; 6 Scott, 813; 8 L. J. C. P. 41; 2 Jur. 968; 132 E. R. 1038; *affd., sub nom.* FEARNLEY *v.* WRIGHT (1840), 6 Bing. N. C. 446, Ex. Ch.

Annotation:—**Expld.** Young *v.* Hope (1848), 2 Exch. 105. All that the ct. decided was that a pledge of goods was not a payment within s. 82 (PARKE, B.).

7460. "By or with bankrupt"—46 Geo. 3, c. 135, s. 1—Payment to trustee under commission afterwards superseded.]—A. being indebted to B. & Co., who became bkpts., deposited a promissory note with defts. as their assignees, & afterwards paid them the amount of the debt due from him to B. & Co., on which the note was given up. The commission against them was superseded, & another issued, under which defts. were reappointed assignees. Four months after A. had made the payment to them, he became bkpt. on a secret act of bkpcy. previously committed by him. In an action for money had & received, brought by his assignees against defts. in their own right, between the superseding the first commission, & issuing the second:—*Held:* they were not entitled to recover the payment made to the latter by A., being protected by the above sect. as the subsequent commission revested those rights in defts. which they believed to exist when the payment was made, & as such payment, if made to B. & Co., could not have been disturbed, if they had remained solvent.—DAVENPORT *v.* CARTER (1820), 2 Brod. & Bing. 317; 5 Moore, C. P. 16; 129 E. R. 989.

7461. —— 2 & 3 Vict. c. 29—Transactions with sheriff after knowledge of bankruptcy.]—A trader assigned his effects to a trustee, thereby committing an act of bkpcy. Afterwards a creditor, ignorant of the act of bkpcy., took in execution the trader's goods comprised in the assignment. The trustee paid off the execution, & took an assignment of the goods from the sheriff. A fiat in bkpcy. having afterwards issued against the trader:—*Held:* although the levy made by the execution creditor might have been protected by 6 Geo. 4, c. 16, s. 81, or 2 & 3 Vict. c. 29, the party who had become assignee of the sheriff with knowledge of the act of bkpcy. could not avail himself of that protection, & the assignees in the bkpcy. might bring trover against him for the goods.—FAWCETT *v.* FEARNE (1844), 6 Q. B. 20; 13 L. J. Q. B. 300; 3 L. T. O. S. 298; 8 Jur. 645; 115 E. R. 8.

Annotations:—**Consd.** Young *v.* Hope (1848), 2 Exch. 105; *Re* Pritchard, *Ex p.* Knowlys (1852), Fonbl. 238. **Folld.** *Re* James, *Ex p.* Harris (1874), L. R. 19 Eq. 253.

7462. —— 1849 Act, s. 133—Bankrupt not party to every part of transaction.]—By an agreement in writing between a guarantee society & H., after reciting that H. was about to enter the service of a gas co., the society agreed with H. to indemnify the co. to the extent of £250 against any loss that might occur through his dishonesty, & H. agreed with the society that if they should receive any notice of any irregularity, default, or claim intended to be made under the guarantee, it should be lawful for them by their officers, or any person authorised by them, to enter H.'s house, & take possession of his goods, &, in case they should be called upon to make any payment under the guarantee, to sell the goods for their own indemnification. The guarantee was given, & H. having afterwards been guilty of dishonest conduct, the co. called upon the society to pay the sum guaranteed. Thereupon the society & the co., by their authority, entered & seized H.'s goods. Meanwhile H. had committed an act of bkpcy., but of that, at the time of entry & seizure, neither the society nor the co. had notice. H. was subsequently

for payment of £59 due to him. K. then drew a cheque for £82 in favour of deft., who cashed the cheque, & paid K. the difference:—*Held:* the transaction was substantially a payment out of the proceeds of the cheque.—HUMPHREY *v.* MCMINN (1868), 8 N. S. W. S. C. R. 231.—**AUS.**

b. —— *Grant of Crown lands, 25 Vict. No. 8, s. 1.*]—S. selected Crown land & sold the same for valuable consideration in Nov., 1865, to deft., to whom he was indebted at the time of sale. S. became insolvent in Feb., 1866, & pltf. was appointed his assignee. Deft., in June, 1866, obtained from the Crown a grant to himself in fee of the said land, which grant was duly registered in July following:—*Held:* the transaction was not a "payment" within the above Act.—SEMPILL *v.* JARVIS (1867), 6 N. S. W. S. C. R. 68.—**AUS.**

Sect. 13.—*Protection of bonâ fide transactions—validity of payments to bankrupt and assignee: Sub-sect.* 1.]

adjudicated bkpt., & his assignees brought an action against the society & the co. for the entry & seizure:—*Held:* the transaction was with bkpt., although he had not been a party to every act by which it was carried out, & pltfs. were not entitled to recover.—KREHL *v.* GREAT CENTRAL GAS CO. (1870), L. R. 5 Exch. 289; 39 L. J. Ex. 197; 23 L. T. 72; 18 W. R. 1035.

Annotation:—**Consd.** *Re* Waugh, *Ex p.* Dickin (1876), 4 Ch. D. 524.

7463. —— 1869 Act, s. 94—Notice to sheriff of claim by landlord.]—A trader's goods were seized by the sheriff under a judgment obtained after debtor had committed an act of bkpcy. The landlord of the house, where the trade was carried on, gave notice to the sheriff that the goods were his property. Afterwards the trader was adjudicated bkpt. upon the act of bkpcy.:—*Held:* the notice to the sheriff was not a dealing with bkpt. under the above sect.—*Re* LAKE, *Ex p.* DORMAN (1872), 8 Ch. App. 51; 42 L. J. Bcy. 20; 27 L. T. 528; 21 W. R. 94, L. JJ.

Annotations:—**Mentd.** *Re* Cook, *Ex p.* Moore (1877), 36 L. T. 560; *Re* Bainbridge, *Ex p.* Fletcher (1878), 8 Ch. D. 218.

See, further, Sect. 10, *ante*.

7464. "To any of his creditors"—6 Geo. 4, c. 16, s. 82—Money paid into court—To abide event.]—If money has been paid into ct. to abide the event of the suit under 7 & 8 Geo. 4, c. 71, s. 2, & deft. wishes to take it out on perfecting special bail, under s. 3, he must do so before issue joined. Money so paid in is not a payment to a creditor within the protection of 6 Geo. 4, c. 16, s. 82.—FERRALL *v.* ALEXANDER (1831), 1 Dowl. 132.

Annotations:—**Distd.** Reynolds *v.* Wedd (1838), 4 Bing. N. C. 694. **Consd.** Murray *v.* Arnold (1862), 3 B. & S. 287; Cooke *v.* Bell (1863), 2 New Rep. 174; Culverhouse *v.* Wickens (1868), L. R. 3 C. P. 295.

7465. —— Money paid under order of court.]—S. being sued by deft., paid money into ct. in lieu of bail, on Sept. 12. Having omitted to put in bail or pay the additional sum required as security for costs, the ct. ordered the money to be paid to deft. on Sept. 23. On the 9th S. had committed an act of bkpcy., & on the 28th a fiat was issued against him:—*Held:* his assignees could not recover from deft. the money so paid him by order of the ct.

It is not disputed that all the property of bkpt. passes to his assignees by relation to the act of bkpcy., the only question is, whether this case falls within any of the exceptions to that rule; & I think that the money having been paid by order of a ct. competent to adjudicate on the subject, the payment does fall within the exceptions (VAUGHAN, J.).—REYNOLDS *v.* WEDD (1838), 4 Bing. N. C. 694; 6 Dowl. 728; 6 Scott, 699; 7 L. J. C. P. 244; 2 Jur. 495; 132 E. R. 956.

Annotations:—**Distd.** De Mesnil *v.* Dakin (1867), 8 B. & S. 650. **Refd.** Anon. (1843), 1 L. T. O. S. 318. **Mentd.** Dimmack *v.* Bowley (1857), 2 C. B. N. S. 542.

See, also, Sect. 4, sub-sect. 1, A., *ante*.

7466. "Contract, dealing, or transaction"—2 & 3 Vict. c. 29, s. 1—Payment.]—*Semble:* a mere payment by bkpt. to a creditor after the act of bkpcy. was not a "contract, dealing, or transaction" within the above sect., but the case of such a payment was governed by 6 Geo. 4, c. 16, s. 81.—TURQUAND *v.* VANDERPLANK (1842), 10 M. & W. 180; 12 L. J. Ex. 132; 152 E. R. 432.

Annotations:—**Mentd.** Marshall *v.* Lamb (1843), 5 Q. B. 115; Pennell *v.* Attenborough (1843), 7 Jur. 927.

7467. —— —— Execution.]—Where a trader commits an act of bkpcy. by procuring his goods to be taken into execution with intent to defeat or delay creditors, the execution, although levied *bonâ fide* by the judgment creditor, is not protected by the above sect.—HALL *v.* WALLACE (1841), 7 M. & W. 353; 10 L. J. Ex. 133; 5 Jur. 198; 151 E. R. 802.

Annotations:—**Expld.** Belcher *v.* Magnay (1843), 12 M. & W. 102. **Consd.** Newnham *v.* Stevenson & Wood (1850), 17 L. T. O. S. 5. **Distd.** Shears *v.* Goddard (1896), 12 T. L. R. 234, C. A. **Refd.** Colombine *v.* Penhall (1853), 1 Sm. & G. 228; Smith *v.* Cannan (1853), 2 E. & B. 35, Ex. Ch.; Shears *v.* Goddard (1895), 65 L. J. Q. B. 151. **Mentd.** Ellis *v.* Russell (1847), 11 Jur. 821.

See, also, Sect. 10, *ante*.

7468. —— —— Delivery of order for payment of sum due to bankrupt.]—Debtor gave a creditor an order for money drawn by a board of guardians on their treasurer, payable to himself, but not to bearer or order. He committed an act of bkpcy., of which the creditor had notice, before the treasurer of the union paid the creditor the amount of the order:—*Held:* the assignees could not recover the amount of the order, as this was a "transaction" protected by the above act & the "transaction," so far as bkpt was concerned, was completed when he handed the order to the creditor.—GREEN *v.* BRADFIELD (1844), 1 Car. & Kir. 449.

7469. —— —— Deposit of goods with liberty to owner to retake—Sale by owner before fiat.]—A trader took possession of goods, under an agreement with the owner that he should keep possession for a twelvemonth, on payment of a certain sum, but if the money was not paid on a certain day, the owner should be at liberty to retake them. The goods continued in the possession of the trader until the stipulated time for payment, when the money not having been paid, the owner sold them, after an act of bkpcy., committed by the trader, but before the fiat issued:—*Held:* this was a "dealing or transaction" protected by the above sect.—YOUNG *v.* HOPE (1848), 2 Exch. 105; 154 E. R. 424.

Annotations:—**Consd.** Graham *v.* Furber (1853), 14 C. B. 134; Krehl *v.* Great Central Gas Co. (1870), L. R. 5 Exch. 289; Rutter *v.* Everett, [1895] 2 Ch. 872. **Refd.** *Re* Pritchard, *Ex p.* Knowlys (1852), Fonbl. 238. **Mentd.** *Re* Brock, *Ex p.* Tanner (1853), 1 Bankr. & Ins. R. 156; *Re* Sketchley, *Ex p.* Boulton (1857), 1 De G. & J. 163, L. JJ.

7470. —— 1849 Act, s. 133—Taking goods out of order & disposition of bankrupt.]—The taking of goods by the true owner out of the "possession, order, or disposition" of bkpt., after a secret act

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7464 i. "*To any of his creditors*"—*Money paid into court.*]—Defts. paid money into ct. to abide the result of a new trial. Judgment was in favour of pltf. Defts. assigned for the benefit of creditors. On application for payment out:—*Held:* the money was paid in as against the happening of a contingency which eventuated before the assignment, & pltf. was entitled to payment out.—DOCTOR *v.* PEOPLE'S TRUST CO., 18 B. C. R. 111.—**CAN.**

7464 ii. ——.]—Deft. paid into ct. a certain sum of money. Pltf. recovered judgment for a larger amount. While the money was still in ct., deft.'s estate was sequestrated as insolvent:—*Held:* the money paid into ct. did not pass to the trustees of the insolvent estate, but was at the disposal of pltf.—DE ROUBAIX'S TRUSTEES *v.* BREDA'S CURATORS (1876), Buch. 196.—**S. AF.**

7464 iii. ——.]—Money awarded to two persons was lodged to their credit in ct. One was adjudicated bkpt. The ct. directed payment out, but in the petition the facts of the bkpcy. of one of petitioners, & that the other was a minor, was suppressed:—*Held:* the order must be rescinded, & the money paid to the assignees.—*Re* DUBLIN & DROGHEDA RY. CO., *Ex p.* KNOTT (1874), 8 I. L. T. 81.—**IR.**

7464 iv. —— —— *To abide result of appeal.*]—On June 28, A. obtained a civil bill decree against B., a trader. On June 30, B., on appealing, deposited with the under-sheriff the amount of the sum decreed. On July 13, the decree was affirmed. B., on June 29, had filed a declaration of insolvency. On July 12, a commission of bkpcy. issued against B., & on July 28, an assignee was appointed:—*Held:* the under-sheriff was liable to A. for the amount of the deposit, notwithstanding the bkpcy. of B.—MURPHY *v.* YOUNG (1844), 3 Craw. & D. 244.—**IR.**

of bkpcy., but before the date of the fiat, or the filing of the petition, is "a dealing or transaction" with bkpt., within the protection of the above sect.—GRAHAM *v.* FURBER (1853), 14 C. B. 134; 23 L. J. C. P. 10; 22 L. T. O. S. 119; 2 W. R. 39; 18 Jur. 61; 2 C. L. R. 10; 138 E. R. 56.

Annotations :—**Consd.** Krehl *v.* Great Central Gas Co. (1870), L. R. 5 Exch. 289; *Re* Seaman, *Ex p.* Furness Finance Co., [1896] 1 Q. B. 412. **Refd.** *Re* Jenvey (1854), 24 L. T. O. S. 192; Brewin *v.* Short (1855), 5 E. & B. 227. **Mentd.** *Re* O'Shea's Settlement, Courage *v.* O'Shea, [1895] 1 Ch. 325, C. A.

7471. —— —— **Intention to demand & get possession of goods.**]—The owner of goods in the possession of a trader, knowing that it was intended by the trader to execute an assignment of all his goods for the benefit of his creditors, went to take possession, but found the assignee under the assignment, which was an act of bkpcy., in possession, &, upon stating why he came, was told by the assignee that he was too late, as the assignee was in possession under the assignment. The trader afterwards was made bkpt.:—*Held :* this was not within the protection of the above sect., as nothing appeared before the notice of the assignment, beyond an intention to demand the goods, & as a mere intention to demand goods & get possession of them was not a "dealing or transaction" within the sect.—BREWIN *v.* SHORT (1855), 5 E. & B. 227; 24 L. J. Q. B. 297; 25 L. T. O. S. 159; 1 Jur. N. S. 798; 3 W. R. 514; 3 C. L. R. 1217; 119 E. R. 466.

Annotations :—**Consd.** Krehl *v.* Great Central Gas Consumers Co. (1870), 18 W. R. 1035; Rutter *v.* Everett, [1895] 2 Ch. 872. **Refd.** *Re* Sparke, *Ex p.* Cohen (1870), 40 L. J. Bcy. 14.

7472. —— —— **Irrevocable licence to seize goods.**]—Circumstances (*see* No. 7462, *ante*) in which:—*Held :* the word "transaction" ought not to be confined to the act of entering to seize the goods, but included the whole of the arrangement between the parties under which the goods were seized, & the contract by virtue of which the seizure was made, & shown it to be an irrevocable licence to take possession of the goods, was a "transaction" with bkpt., protected under the above sect.—KREHL *v.* GREAT CENTRAL GAS CO. (1870), L. R. 5 Exch. 289; 39 L. J. Ex. 197; 23 L. T. 72; 18 W. R. 1035.

Annotation :—**Consd.** *Re* Waugh, *Ex p.* Dickin (1876), 4 Ch. D. 524.

7473. —— **1869 Act, s. 94—Discharge by debtor of performance of contract.**]—Deft. entered into a contract to deliver goods to debtor, & before any breach by deft., & before notice of any act of bkpcy. by debtor, or the filing of the petition, debtor discharged deft. from its performance. Debtor's trustee subsequently claimed the right to enforce the agreement, & deft. pleaded debtor's exoneration:—*Held :* the exoneration was a "dealing for valuable consideration."—CHECKLAND *v.* MCNIEL (1875), 32 L. T. 367.

7474. —— —— **Seizure by employer under building contract.**]—A builder contracted with a building club to erect some houses for them on their own land. The contract contained a stipulation that, if the contractor should neglect or refuse to proceed with the work in a proper manner, or become bkpt. or insolvent, or otherwise incapable of completing the contract, the architect should have power, after giving two days' notice in writing to the contractor, to seize & retain all materials, plant, & implements, provided that the contractor should have drawn money on account of his contract. The contractor commenced the works & carried them on for some time receiving a considerable sum from the club. On May 30 he filed a liquidation petition. On June 2 the architect of the club gave notice to the contractor that, as he had neglected to proceed with the works, they should, on the expiration of two days, employ other means of completing the works, & that he must not remove any materials, implements, or plant from the works, & on the expiration of such notice the club took possession of the materials, implements, & plant:—*Held :* the club were entitled, as against the trustee, to retain what they had seized, the seizure being a protected transaction within the above sect.—*Re* WAUGH, *Ex p.* DICKIN (1876), 4 Ch. D. 524; 46 L. J. Bcy. 26; 35 L. T. 769; 25 W. R. 258.

Annotation :—**Distd.** *Re* Harrison, *Ex p.* Jay (1880), 14 Ch. D. 19, C. A.

See, also, BUILDING CONTRACTS, ARCHITECTS, & ENGINEERS.

7475. —— —— **Garnishee order.**]—A garnishee order attaching a debt due to bkpt., is not a "dealing" with bkpt. within the above sect.—*Re* CURTOYS, *Ex p.* PILLERS (1881), 17 Ch. D. 653; 50 L. J. Ch. 691; 44 L. T. 691; 29 W. R. 575, C. A.

Annotations :—**Consd.** *Re* Chinn, *Ex p.* Sulger (1881), 17 Ch. D. 839; Butler *v.* Wearing (1886), 17 Q. B. D. 182; *Re* O'Shea's Settlement, Courage *v.* O'Shea, [1895] 1 Ch. 325, C. A.; Hosack *v.* Robins (1918), 87 L. J. Ch. 545, C. A. **Refd.** *Re* Bannister, *Ex p.* Vale (1881), 45 L. T. 200, C. A.

7476. —— —— **Payment of money into bank.**]—Three days after filing his petition for liquidation, one of the overseers of a parish paid into the bank, to the credit of the treasurer of a board of guardians of the union, a sum of £55 in respect of a call for a contribution from the poor rates, which had been previously made upon the overseers by the board of guardians. The trustee claimed the money so paid as being money divisible amongst the creditors:—*Held :* the payment into the bank was a dealing with bkpt. within the above sect. & was protected.—*Re* DICKIN, *Ex p.* ATCHAM BOARD OF GUARDIANS (1882), 46 L. T. 238; 30 W. R. 644.

7471 i. "*Contract, dealing, or transaction*"—*Intention to demand & get possession of goods.*]—A. purchased whiskey from a trader, who became bkpt. The latter acquired his title by lodgment of delivery orders. A. tried to get possession before bkpcy.:—*Held :* A.'s title prevailed against the assignees.—*Re* HUGHES (1862), 14 Ir. Jur. 336.—**IR.**

7476 i. —— *Payment of money into bank.*]—F. obtained an overdraft in deft. bank, which was guaranteed by H. & C. to whom for security he gave a bill of sale. F. made default & instructed S., an auctioneer, to sell his goods. H. & C. wrote to S. directing him to hold the proceeds for them & also wrote to deft. asking that all moneys paid in after that date should be applied in reduction of the overdraft for which purpose they opened an account. S. paid the proceeds of sale into F.'s account. Within sixty days F. sequestrated. F.'s official assignee brought an action to recover the proceeds of the sale:—*Held :* the payment was not one by F., but was made by direction of H. & C. who were entitled to the proceeds up to the amount secured by the bill of sale.—LYONS *v.* BANK OF NEW SOUTH WALES (1882), 3 N. S. W. L. R. 385.—**AUS.**

g. —— *Taking possession under bill of sale*—1887 *Act.*]—*Semble :* taking possession under a bill of sale is a "dealing" within the above Act.—*Re* BELL & DAVIS, *Ex p.* OFFICIAL ASSIGNEE, COHEN (1892), 13 N. S. W. L. R. 73.—**AUS.**

k. —— *In respect of past debt*—1886 *Act, s.* 17.]—Bkpt. with intent to defeat or delay his creditors sold his property to one of his creditors in consideration of £153, of which £52 was a past debt. The purchaser was a party to the carrying out of bkpt.'s intention:—*Held :* the transaction was void within the above sect.—*Re* MOONEY, *Ex p.* OFFICIAL ASSIGNEE & HILL (1898), 19 N. S. W. B. 12.—**AUS.**

l. —— *Mortgage.*]—Prior to an act of bkpcy., B., a trader, executed a mtge. of a house & furniture to A., with liberty to A. to sell & dispose of the house, furniture, & effects in case of default in payment of the interest. B. made default & subsequently committed an act of bkpcy., of which A. had notice:—*Held :* this was a conveyance, contract, dealing, & transaction by & with bkpt., & was pro-

Sect. 13.—*Protection of bonâ fide transactions—validity of payments to bankrupt and assignee: Sub-sect.* 1.]

7477. —— —— Giving of post-dated cheque.]—The drawer of a post-dated cheque given for value is under no obligation to stop its payment before its date on receiving notice of an adjudication of bkpcy. made against the payee since the delivery of the cheque to him upon an act of bkpcy. committed by him before the delivery. If the cheque was originally delivered by the drawer to the payee in good faith & for value, & without notice of an act of bkpcy. previously committed by the payee, on which an adjudication is subsequently made, the transaction is protected, & the trustee cannot recover the amount of the cheque from the drawer. —*Re* PALMER, *Ex p.* RICHDALE (1882), 19 Ch. D. 409; 51 L. J. Ch. 462; 46 L. T. 116; 30 W. R. 262, C. A.

Annotations:—**Mentd.** Royal Bank of Scotland *v.* Tottenham, [1894] 2 Q. B. 715, C. A.; Bence *v.* Shearman, [1898] 2 Ch. 582, C. A.; Gordon *v.* London City & Midland Bank, Gordon *v.* Capital & Counties Bank, [1902] 1 K. B. 242, C. A.

7478. —— 1883 Act, s. 49—Charging order.]—A charging order is not a "contract, dealing, or transaction" within the above sect., & is not protected against a trustee of debtor having a title which relates back to a date anterior to the order, whether the creditor at the time when he obtained the order had or had not notice of an available act of bkpcy.—*Re* O'SHEA'S SETTLEMENT, COURAGE *v.* O'SHEA, [1895] 1 Ch. 325; 64 L. J. Ch. 263; 71 L. T. 827; 43 W. R. 232; 39 Sol. Jo. 168; 2 Mans. 4; 12 R. 70, C. A.

Annotations:—**Consd.** Wild *v.* Southwood, [1897] 1 Q. B. 317; Hosack *v.* Robins, [1918] 2 Ch. 339, C. A.

7479. —— —— ——.]—A charging order under Partnership Act, 1890 (c. 39), s. 23, upon a judgment debtor's interest in a partnership, being a proceeding *in invitum*, is not a "transaction" protected by 1883 Act, s. 49.—WILD *v.* SOUTHWOOD, [1897] 1 Q. B. 317; 66 L. J. Q. B. 166; 75 L. T. 388; 45 W. R. 224; 41 Sol. Jo. 67; 3 Mans. 303.

7480. —— —— Gaming or wagering contract.]—The words "contract, dealing, or transaction" in the above sect. mean a contract, dealing, or transaction which has contractual force & which involves a legal obligation, & do not include a contract by way of gaming or wagering, which is null & void under Gaming Act, 1845 (c. 109), s. 18.—WARD *v.* FRY (1901), 85 L. T. 394; 50 W. R. 72; 18 T. L. R. 2; 46 Sol. Jo. 11, C. A.

7481. —— 1914 Act, s. 45—Order to tax & pay costs in action.]—In Feb., 1914, judgment for dissolution of a partnership was given in an action in the Chancery Div., & a receiver of the partnership assets was appointed. On June 16 an order was made by consent in the action to tax the costs of pltf. & of deft., & the receiver was ordered to pay the costs when taxed to the solrs. of pltf. & of deft. out of the partnership assets. When the order was made all parties to it knew that a creditor's petition in bkpcy. was pending against each of the partners. Subsequently a receiving order was made on each petition, adjudication followed, the proceedings under the two petitions were consolidated, & an order was made by the judge in bkpcy. transferring the Ch. action to the Bkpcy. Ct. & staying the proceedings thereunder. In the meantime the costs had been taxed under the order of June 16, & the solrs. claimed that by virtue of that order they had an equitable charge for their costs on the partnership assets & were secured creditors:—*Held:* the order was a "dealing or transaction" within the above sect.—*Re* GERSHON & LEVY, *Ex p.* COOTE & RICHARDS, *Ex p.* WESTCOTT & SONS, [1915] 2 K. B. 527; 84 L. J. K. B. 1668; 59 Sol. Jo. 440; [1915] H. B. R. 146.

Annotation:—**Refd.** *Re* Pearce, *Ex p.* Official Receiver, The Trustee, [1919] 1 K. B. 354.

7482. "For valuable consideration"—1883 Act, s. 49—Consideration must move from bankrupt.]—In 1890 A. by deed assigned to a co. the money to become due to him under a contract with the War Office to secure the payment of £30. No notice of the deed was given to the War Office. In May, 1892, A. committed an act of bkpcy., & a receiving order was made against him in Aug., 1892. On June 24, 1892, A. by deed assigned the same money under the same contract to the co. to secure the payment of £74, which sum in fact included the previous £30. Notice of the deed was at once given to the War Office by the co., who were not aware of the act of bkpcy. In

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tected.—O'CONNOR *v.* HARRIS (1846), 9 I. L. R. 217.—IR.

m. —— —— 1884 *Act.*]—A mtgee. of shares held certificates but did not complete his title by registration of the transfer until after the mtgor. had committed an act of bkpcy., of which the mtgee. had no knowledge: —*Held:* the transaction was protected by the above Act.—*Re* FENTON, COURTNEY'S CASE (1886), 5 N. Z. L. R. 189.—N.Z.

n. —— *Direction to pay debt.*]—Insolvent sold his stock-in-trade in good faith, & directed the purchaser to pay as part purchase-money a debt due by the trader to his bankers, who held, as collateral security, a chattel mtge. The purchaser had an account with the same bankers, & gave them a cheque on this account for the amount of their claim, there being funds at his credit to meet the cheque: —*Held:* (1) this was a payment of money to a creditor & not a realisation of a security; (2) the bankers were not liable to account for the amount received.—GORDON *v.* UNION BANK OF CANADA (1899), 26 A. R. 155.—CAN.

o. —— ——.]—Insolvent being indebted to deft. instructed third parties to send to deft. any cheque coming to him. A cheque addressed to & payable to the order of insolvent was forwarded to deft. Insolvent became bkpt.:—*Held:* deft. was entitled to retain the sum owing.—CREIGHTON *v.* MERCHANTS BANK OF HALIFAX, R. E. D. 437.—CAN.

r. —— —— 2 *&* 3 *Vict. c.* 41.]—An order by debtor on a third party to pay debtor's creditor a sum certain out of a fund, which the third party was about to receive on account of debtor, with an undertaking by the third party that he would do what was directed, followed by actual receipt of the fund & by a partial payment by the third party to the creditor, operates, from the time of the fund being received by the third party, as payment by debtor to the creditor, & will not be affected under the above Act, by the bkpcy. of debtor within sixty days of the date of the order.—MACINTOSH *v.* BRIERLY (1846), 5 Bell Sc. App. 1.—SCOT.

s. —— —— *Book debts Act*, 1896.]—A wool-grower consigned wool to a firm of wool-brokers to be sold. Before the wool was sold the wool-grower bought sheep from A. to whom he gave an order directing the firm to pay A. a certain sum when his wool was sold & to deduct it from the proceeds of sale. The wool was sold, the wool-grower became insolvent, & the firm paid A. the sum as directed by the order:—*Held:* the order was an assignment to the extent of the debt & was not invalidated under the above Act.—SHACKELL *v.* HOWE, THORNTON & PALMER (1909), 8 C. L. R. 170.—AUS.

t. —— *Payment of guaranteed note*—1875 *Act.*]—Insolvent, at the request of his sureties, who had guaranteed a note, paid the holder within thirty days of his being placed in insolvency. When the sureties made this request neither they nor the holder of the note & mtge. knew or had probable cause for believing that the insolvent was unable to meet his engagements:—*Held:* the payment was not void within the above Act.—NELLES *v.* PAUL (1879), 4 A. R. 1.—CAN.

7482 i. "*For valuable consideration*"—*Given prior to act of bankruptcy.*]—B. & K., being partners, overpaid custom duties, & being indebted to defts., B. on the part of himself & K., went with one deft. to the collector to obtain the sum so overpaid. Payment was declined until authority was obtained from the Comrs. of Customs. B. then directed payment to defts. on collector being authorised. B. & K. committed acts of bkpcy. In pursuance of the direction the sum was paid to defts. B. & K.

Nov., 1893, the trustee rejected the claim of the co. to be secured creditors, & informed them that he should shortly receive from the War Office the money due under the contract. The co. took no step to assert their claim until Dec., 1895 :—*Held :* the notice to the War Office, coupled with the deed of June, 1892, was a dealing for valuable consideration, & a protected transaction within the above sect., & the co., having taken possession by their notice, could then set up both their deeds of assignment.

A claim for valuable consideration means a claim under which consideration moved from bkpt., *i.e.*, a claim not based on a mere gift by bkpt. (VAUGHAN WILLIAMS, J.).—*Re* SEAMAN, *Ex p.* FURNESS FINANCE CO., LTD., [1896] 1 Q. B. 412 ; 65 L. J. Q. B. 348 ; 74 L. T. 151 ; 44 W. R. 496 ; 40 Sol. Jo. 318 ; 3 Mans. 19.

7483. ——— Gaming or wagering contract.]—A. made bets upon a racecourse with deft., & lost £500 which he paid. A. had previously committed an act of bkpcy., upon which a receiving order was subsequently made against him. Deft. received payment of the £500 *bonâ fide* & without notice of the act of bkpcy. :—*Held :* the payment having been made without valuable consideration was not protected, & the trustee was entitled to recover the £500 from deft.—WARD *v.* FRY (1901), 85 L. T. 394 ; 50 W. R. 72 ; 18 T. L. R. 2 ; 46 Sol. Jo. 11, C. A.

7484. "Before date of receiving order"—2 & 3 Vict. c. 29—"Date & issuing of fiat"—Time of deliverance out of Bankrupt Office.]—A docket was struck, & a fiat bespoke & paid for at twelve o'clock. About two bkpt.'s goods were seized under a *fi. fa.* On the same day, but after the seizure, the fiat was called for, & obtained from the Bkpt. Office. It did not appear whether it had been at any previous time delivered out to petitioning creditor or any person on his behalf :—*Held :* (1) the time of delivering out a fiat in bkpcy. as an operative instrument was "the date & issuing" within the above Act, & *primâ facie* the time of deliverance out of the Bkpt. Office was that time ; (2) the execution was protected by the Act.—PEWTRESS *v.* ANNAN (1841), 9 Dowl. 828

Annotations :—**Mentd.** Freeman *v.* Whitaker (1850), 4 Exch. 834 ; Jones *v.* Jones (1865), L. R. 1 C. P. 140.

7485. ——— Transaction on same day as issuing of fiat.]—S., a woolstapler at A., was in the habit of making purchases of wool, which he directed to be consigned to deft., a wharfinger & shipping agent at B., who forwarded them to him at A., by carrier. In July, 1841, S. purchased wool in Scotland, which was paid for by E., his agent there, & by him forwarded to deft. at B. Part of the wool, consisting of ten bags, arrived at B. on Sept. 17, & a portion of it was, at ten o'clock on that morning, taken possession of by deft., the remainder being taken possession of by him between ten o'clock & four. On Sept. 21, E. received a letter from S., in which he informed him of his insolvency, & directed him to get the wool, & do the best he could to save himself, &, on some day between Sept. 26 & Oct. 1, E. gave directions to deft. to seize the wool. The remaining portion of the wool arrived at B. on Oct. 3, & was delivered into deft.'s warehouse on the 6th, 7th, & 8th of that month. An act of bkpcy. was committed by S. on Sept. 22, the fiat was dated & issued on the 27th, & was signed between twelve o'clock & two o'clock on that day, but it did not appear at what hour it was delivered out :—*Semble :* the above Act operated to protect a claim of general lien on goods of bkpt. coming into the hands of the party before the fiat, without notice of an act of bkpcy.—BOWMAN *v.* MALCOLM (1843), 11 M. & W. 833 ; 12 L. J. Ex. 397 ; 1 L. T. O. S. 386 ; 152 E. R. 1042.

7486. ——— ——— ——— Delivery of fiat by Lord Chancellor.]—A fiat in bkpcy., granted by the Lord Chancellor, was delivered by him to his secretary, to be transmitted by post to the comrs. in the country. The secretary put the fiat into the post office, in pursuance of the order given :—*Held :* the delivery of the fiat by the Lord Chancellor to the secretary was not the true "date & issuing of the fiat" within the above Act, so as to protect an execution levied after such delivery.—FREEMAN *v.* WHITAKER (1850), 4 Exch. 834 ; 19 L. J. Ex. 351 ; 154 E. R. 1454.

7487. ——— 1883 Act, s. 49—Possession retained by mortgagor up to receiving order.]—Where a mtge. is granted on a ship after the mtgor. has committed an act of bkpcy., in respect of which he is subsequently adjudicated a bkpt., the mtge. is protected by the above sect. if the mtgee. had no notice of the act of bkpcy. at the date of the mtge., notwithstanding the fact that the ship remains in the possession of the mtgor. up to the date of the receiving order.—THE RUBY (1900), 83 L. T. 438 ; 9 Asp. M. L. C. 146.

7488. ——— ——— Receiving order made on appeal from dismissal of petition—Receiving order antedated.]—Where on appeal from the dismissal of a bkpcy. petition a receiving order is made, & the order, in accordance with the usual practice of the ct., is antedated as of the date when the petition was wrongly dismissed, for the purposes of the above sect. the date of the receiving order is the date on which it was made, & not the date which it bears.—*Re* TEALE, *Ex p.* BLACKBURN, [1912] 2 K. B. 367 ; 81 L. J. K. B. 1243 ; 106 L. T. 893 ; 28 T. L. R. 415 ; 56 Sol. Jo. 553 ; 19 Mans. 327, D. C.

7489. "Person with whom transaction was made"—2 & 3 Vict. c. 29—Note delivered to son of bankrupt for creditor.]—Debtor indorsed a note in blank, & delivered it before the fiat to his son, who delivered it, after the fiat to pltf. No *mala fides* appeared :—*Held :* pltf. not having received the note before the fiat, could not recover as against debtor's assignee.—GREEN *v.* STEER (1841), 1 Q. B. 707 ; 1 Gal. & Dav. 499 ; 10 L. J. Q. B. 332 ; 113 E. R. 1302.

7490. Payment by "debtor" of "his debt"—1 Jac. 1, c. 15, s. 14—Money advanced to bankrupt on loan.]—A trader, after a secret act of bkpcy. consigned goods to a factor, who agreed to advance money thereon, & accepted & paid bills drawn on him by the trader. A commission afterwards issued against the trader on such prior act of bkpcy., after which the factor sold the goods & received money :—*Held :* he was answerable to the assignees for the value of the goods.

Here was no payment of any debt due to bkpt. ; the money advanced by defts. was a loan to bkpt.,

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were declared bkpts. In an action by the assignee of B. & K. :—*Held :* the beneficial interest in the money having been transferred by B. & K. to defts. for valuable consideration, prior to the acts of bkpcy., defts. were entitled to same.—BARNETT *v.* JEFFERSON (1825), Sm. & Bat. 159.—IR.

7482 ii. ——— ——— 1908 *Act*, s. 82.]—H. owned land subject to mtge. but promised in 1906 to transfer this land to A. subject to the mtge. in consideration of an indebtedness. In 1908, H. transferred the land to A. without his knowledge. H. then left the country owing a considerable amount to his creditors & was later adjudicated bkpt. :—*Held :* the transfer was protected by the above sect., since it was founded on valuable consideration & completed before date of adjudication. —*Re* HUME, *Ex p.* OFFICIAL ASSIGNEE (1909), 28 N. Z. L. R. 793.—N.Z.

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& defts. were in no wise his debtors (GROSE, J.).—COPLAND *v.* STEIN (1799), 8 Term Rep. 199; 101 E. R. 1344.

Annotations:—**Refd.** Cash *v.* Young (1824), 2 B. & C. 413. **Mentd.** Hovil *v.* Browning (1806), 3 Smith, K. B. 156; *Re* Slobodinsky, *Ex p.* Moore, [1903] 2 K. B. 517; *Re* Hart, *Ex p.* Green, [1912] 3 K. B. 6, C. A.

7491. —— —— **Bill of exchange deposited with trustee for creditor.**]—If a trader on receiving bills of exchange from one of his creditors abroad, to whom he is indebted beyond the amount of them, after becoming insolvent, but before committing an act of bkpcy., delivers the bills, with the consent of his other creditors to an agent of the person who has remitted them, for the use of the latter, if he should be ultimately entitled to them, that is a legal & valid transaction, & if a commission afterwards issues against the trader, his assignees cannot maintain an action against the trustee to recover the produce of the bills, as bkpt. had parted with the possession of them before the time of his bkpcy.—GRAFF *v.* GREFFULHE (1807), 1 Camp. 89.

7492. —— —— **Bill of exchange accepted for goods not yet delivered.**]—A., a merchant in London, ordered goods to be made by B., a manufacturer in the country. The goods were made to order, but before they were forwarded to A., B. committed an act of bkpcy., & afterwards shipped the goods, having previously, but after the act of bkpcy., drawn upon A. a bill of exchange for a larger sum than the price of the goods ordered, which bill A. accepted, not then knowing that B. had committed an act of bkpcy. The goods having afterwards come to the possession of A.:—*Held:* the assignees were entitled to recover them, because the property in them remained in bkpt., both at the time when the act of bkpcy. was committed, & when the bill was accepted by A., & this was not a payment protected by the above sect. because A. was not a debtor of B. at the time when the acceptance was given.—BISHOP *v.* CRAWSHAY (1824), 3 B. & C. 415; 5 Dow. & Ry. K. B. 279; 3 L. J. O. S. K. B. 65; 107 E. R. 787.

Annotation:—**Follid.** Carter *v.* Breton (1830), 6 Bing. 617.

7493. —— —— **Debt contracted after act of bankruptcy.**]—Goods *bonâ fide* sold to, & paid for by, a customer, in the interval between a secret act of bkpcy. by the trader, & the suing out of a commission:—*Held:* not recoverable in trover by the assignees, under the above sect.—CASH *v.* YOUNG (1824), 2 B. & C. 413; 3 Dow. & Ry. K. B. 652; 2 L. J. O. S. K. B. 72; 107 E. R. 438.

Annotations:—**Consd.** Bishop *v.* Crawshay (1824), 3 B. & C. 415. **Expld.** Kinder *v.* Butterworth (1826), 5 L. J. O. S. K. B. 23. **Consd.** Hill *v.* Farnell (1829), 9 B. & C. 45; Carter *v.* Breton (1830), 4 Moo. & P. 424. **Distd.** Cannan *v.* Denew (1833), 3 Moo. & S. 761. **Consd.** Willis *v.* Bank of England (1835), 4 Ad. & El. 21. **Expld.** Devas *v.* Venables (1837), 4 Scott, 123. **Consd.** Pearson *v.* Graham (1837), 6 Ad. & El. 899; Fearnley *v.* Wright (1840), 6 Bing. N. C. 446, Ex. Ch. **Refd.** Ward *v.* Clarke (1830), Mood. & M. 497.

7494. "**Really & bonâ fide a creditor**"—**19 Geo. 2, c. 32—Banker paying acceptances on account of bankrupt customer.**]—A banker, who pays the acceptance of a customer, who has made it payable at the banking-house, is not such a creditor in respect of a bill drawn, negotiated, or accepted by the customer, as is protected by s. 1, in receiving, without notice, the amount of his debt after the bkpcy. of his customer, as this is not within the words of the Act "a person who shall be really & *bonâ fide* a creditor of bkpt. for or in respect of any bill or bills of exchange really & *bonâ fide* drawn, negotiated, or accepted by such bkpt."—HOLROYD *v.* WHITEHEAD (1814), 5 Taunt. 444; 1 Marsh. 128; 2 Rose, 147; 128 E. R. 762.

Annotations:—**Mentd.** Windham *v.* Paterson (1815), 1 Stark. 144; Lazarus *v.* Cowie (1842), 3 Q. B. 459; Jewell *v.* Parr (1853), 13 C. B. 909.

7495. —— —— ——.]—If bkpt. draw a bill on his banker, who is ignorant of the bkpcy., & he accept the bill, the banker would be bound to pay it, & would be protected, as if he had actually paid the money (GIBBS, C.J.).—WALKER *v.* LAING (1817), 7 Taunt. 568; 1 Moore, C. P. 281; 129 E. R. 226.

7496. —— —— **Vendor repurchasing his goods from bankrupt purchaser.**]—A. sold goods to B. to be paid for by a bill at two months, & not being able to obtain it from B. & doubting his solvency, A. employed his broker to repurchase them in his own name, which was done, although at a great loss. B. afterwards became bkpt., without knowing that the goods had been repurchased by the broker on account of A. In an action of trover, brought by the assignees of B. against A. for the goods:—*Held:* that they were not entitled to recover, as the transaction was not fraudulent on the part of A.—HARRIS *v.* LUNELL (1819), 1 Brod. & Bing. 390; 4 Moore, C. P. 10; 129 E. R. 772.

Annotation:—**Refd.** Lackington *v.* Combes (1839), 8 Scott, 312.

7497. "**Really & bonâ fide made or entered into**"—**6 Geo. 4, c. 16, s. 82—Sale at unduly low price.**]—Bkpt. after a secret act of bkpcy. bought on credit & sold for ready money at unduly low prices:—*Held:* the purchasers were not protected by the above sect. unless the purchase was in the usual course of business, & if the purchaser knew the price to be greatly under the value of the commodity, it was not within the protection of the Act.—WARD *v.* CLARKE (1830), Mood. & M. 497.

Annotation:—**Refd.** Cannan *v.* Wood (1837), 2 M. & W. 465.

7498. —— —— —— **Duty to inquire.**]—Traders in embarrassed circumstances directed a shopman to remove goods to his lodgings & to sell them at 25 per cent. under prime cost. The shopman called on defts. & offered the goods for sale without disclosing the names of his employers, but stating that the owners were in want of money. Defts. called at the lodgings & made several large purchases, paying the shopman for each parcel in cash & deducting the discount. A fiat in bkpcy. issued, & the assignees brought trover to recover the goods. The jury found the bkpts. intended to defraud their creditors, & defts. had not made such inquiries as honest & prudent men would have done:—*Held:* the assignees were entitled to recover the goods sold both before & after the commission of the act of bkpcy.—DEVAS *v.* VENABLES (1837), 3 Bing. N. C. 400; 3 Hodg. 9; 4 Scott, 123; 132 E. R. 464.

Annotations:—**Apld.** Stansfeld *v.* Cubitt (1858), 2 De G. & J. 222, L. JJ. **Refd.** Uther *v.* Rich (1839), 10 Ad. & El. 784. **Mentd.** Oakley *v.* Boulton (1888), 4 T. L. R. 379.

See, also, Nos. 7558, 7574, *post.*

7497 i. *Bonâ fide transactions*—1898 *Act, s.* 57.]—The protection of the above sect. only extends to *bonâ fide* transactions, & does not apply where there is collusion.—*Re* THOREN, *Ex p.* OFFICIAL ASSIGNEE & GAY & CO. (1909), 9 S. R. N. S. W. 681.—AUS.

7497 ii. —— 1886 *Act, s.* 18 (*c*).]—Bkpt. with intent to defeat or delay his creditors sold his property to one of his creditors in consideration of £153, of which £52 was a past debt. The purchaser was a party to the carrying out of bkpt.'s intention:—*Held:* the payment of £101 was not *bonâ fide*, within the above sect.—*Re* MOONEY, *Ex p.* OFFICIAL ASSIGNEE & HILL (1898), 19 N. S. W. B. 12.—AUS.

a. —— *Before commission.*]—An assignment made *bonâ fide* by a person

7499. —— —— Payment made in pursuance of prior agreement.]—L. & C., silk merchants, deposited silk warrants with defts. who advanced money to them thereon. On Nov. 27 W. handed to defts. an order, which the jury found to be a fraudulent preference, from L. & C. directing defts. to make to the bearer a further advance of £500 on the silks. No money was advanced on the order until Dec. 6, when defts. gave W. £150, & it was agreed that they should retain the remaining £350 to meet certain acceptances of W.'s which they held, & which were due on Dec. 14. On Dec. 3 L. & C. committed an act of bkpcy., & on the 5th, a fiat issued against them :—*Held :* the payments made by defts. on Dec. 6 & 14 were not protected by the above sect.—GREEN *v.* WHITE (1836), 3 Bing. N. C. 59 ; 3 Scott, 387 ; 5 L. J. C. P. 326 ; 132 E. R. 331.

Annotation :—**Refd.** Fearnley *v.* Wright (1840), 1 Scott, N. R. 657.

7500. —— —— Payment made without intention of reclaiming same.]—A payment " really & *bonâ fide* made " within the above sect. is a payment made without any intention of its being reclaimed. —GIBSON *v.* MUSKETT (1842), 4 Man. & G. 160 ; 3 Scott, N. R. 427 ; 11 L. J. C. P. 225 ; 134 E. R. 66.

Annotation :—**Mentd.** Aldred *v.* Constable (1843), 4 Q. B. 674.

7501. —— 2 & 3 Vict. c. 29—Bills & cash delivered to execution creditor.]—A. & B., brothers, being partners in trade, & B. being largely indebted to the partnership, B. borrowed £500 from a loan co., which was secured by a bond of C., the uncle of A. & B., & two other persons, & by a policy of assurance on B.'s life. Of that sum B. paid £400 into the partnership funds. B. afterwards executed a warrant of attorney in favour of C. to indemnify him against the consequences of the bond. B. having made default in payment of the premiums on the policy of assurance, the loan co. called on C. for payment under the bond, whereupon C. entered up judgment on the warrant of attorney against B. & issued a *fi. fa.* thereon, which was levied on the partnership effects on Aug. 5, 1840. At that time A. & B. were in a state of hopeless insolvency. On Aug. 7 another *fi. fa.* at the suit of another creditor was issued against B. & levied on the partnership effects. On Aug. 8 A., in the name of the partnership, indorsed & delivered to C. on account of his claim against B. bills of exchange drawn by A. & B. for £81, which were paid at maturity, & on the 10th A. paid to C. on the same account, out of the money of the firm, a further sum of £80 in cash. On the 11th a docket was struck against A. & B., & on the 12th a fiat issued against them, grounded on an act of bkpcy. committed on Aug. 5, & on the 13th they were duly adjudged bkpts. :—*Held :* the assignees were entitled to recover from C. the amount of the payments so made to him on Aug. 8 & 10, & they were not protected by the above Act, not being payments " really & *bonâ fide* made " within that Act, even though C. were assumed to have received them without notice of the bkpcy.—TURQUAND *v.* VANDERPLANK (1842), 10 M. & W. 180 ; 12 L. J. Ex. 132 ; 152 E. R. 432.

Annotations :—**Folld.** Pennell *v.* Attenborough (1843), 7 Jur. 927. **Refd.** Marshall *v.* Lamb (1843), 5 Q. B. 115.

7502. —— 1849 Act, s. 133—Successive unregistered bills of sale.]—Debtor gave a bill of sale on his furniture, the consideration being stated as for goods sold, & money lent. At the request of debtor the bill of sale was not registered within the twenty-one days required by statute, but on the expiration of that time another bill of sale of the same furniture was executed in similar terms & was not registered. A third, a fourth, & a fifth bill of sale were in the same manner executed & not registered, & ultimately a sixth was executed on Aug. 5 & was registered within the prescribed time, but none of the other bills of sale were cancelled. Debtor was adjudicated bkpt. in the following Dec., the act of bkpcy. being committed in July :—*Held :* neither the bill of sale of Aug., nor its registration, constituted a dealing which was " really & *bonâ fide* entered into " within the above sect.—STANSFELD *v.* CUBITT (1858), 2 De G. & J. 222 ; 27 L. J. Ch. 266 ; 31 L. T. O. S. 3 ; 4 Jur. N. S. 395 ; 6 W. R. 320 ; 44 E. R. 973, L. JJ.

Annotations :—**Consd.** Ashton *v.* Blackshaw (1870), L. R. 9 Eq. 510 ; Ramsden *v.* Lupton (1873), L. R. 9 Q. B. 17, Ex. Ch. **Refd.** Hollinshead *v.* Egan, [1913] A. C. 564, H. L. **Mentd.** Badger *v.* Shaw (1860), 2 E. & E. 472 ; Richards *v.* James, Sharpe *v.* James (1867), 8 B. & S. 302 ; *Re* Stevens, *Ex p.* Stevens (1875), L. R. 20 Eq. 786 ; Crawcour *v.* Salter (1881), 18 Ch. D. 30, C. A. ; *Re* Hewer, *Ex p.* Kaken (1882), 21 Ch. D. 871 ; *Re* Ginger, *Ex p.* London & Universal Bank (1897), 76 L. T. 808, D. C.

7503. —— —— Agreement to assign chattels—Followed by actual possession—No assignment executed.]—B., as a security for money advanced, agreed to assign chattels to C. B. became unwell, & C. thereupon took possession of the chattels. B., upon recovering his health, confirmed the possession, but no assignment was ever executed. Subsequently B. became bkpt. :—*Held :* there had been a legal delivery of the chattels, & the assignees were not entitled to proceed with an action at law for their recovery.—PIERCY *v.* HUMPREYS, PIERCY *v.* MOWLE (1866), 15 L. T. 345.

7504. " In respect of goods really & bonâ fide sold "—19 Geo. 2, c. 32—Payment for carriage of goods.]—Money paid by a trader after a secret act of bkpcy. to a carrier for the carriage of goods may be recovered back in *assumpsit* by the assignees of bkpt.—BRADLEY *v.* CLARK (1793), 5 Term Rep. 197 ; 101 E. R. 111.

Annotations :—**Apld.** Pinkerton *v.* Marshall (1794), 2 Hy. Bl. 334. **Refd.** Hovil *v.* Browning (1806), 3 Smith, K. B. 156 ; Ward *v.* Fry (1901), 85 L. T. 394, C. A. **Mentd.** Cox *v.* Morgan (1801), 2 Bos. & P. 398.

7505. " Usual or customary course of trade & dealing "—19 Geo. 2, c. 32—Debt garnisheed by creditor.]—A creditor for goods sold & delivered to a trader, who had committed a secret act of bkpcy., not being cognizant thereof, attached money of the trader's in the hands of a third person, & recovered judgment in the Mayor's Ct. of London against the garnishee, who thereupon

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about to become bkpt. to a creditor thirty days before commission issued, is good, if made without the creditor's knowledge of any act of bkpcy., or that bkpcy. was in contemplation.—ARMOUR *v.* PHILLIPS (1847), 4 U. C. R. 152.—**CAN.**

b. —— ——.]—A sale made *bonâ fide* for valuable consideration at a time when bkpt. is solvent cannot be avoided, & the fact that the transfer was not made till shortly before the vendor's insolvency at a time when his liabilities exceeded his assets, does not work a cancellation of the transfer. —CILLIERS' TRUSTEES *v.* CILLIERS (1896), 13 S. C. 68 ; 6 C. T. R. 91.—**S. AF.**

c. —— *Holders in good faith.*]—Timber was purchased by A. who accepted bills for the price & in return received bills of lading. The sale was induced by fraudulent representation on the part of A. The timber was stored subject to A.'s orders. Thereafter A. in return for advances, granted delivery orders to the lenders to whom the bills of lading were handed. Having become bkpt. within sixty days of the granting of the delivery orders, the cargo was claimed by the grantees :—*Held :* the grantees having no knowledge of A.'s fraud in inducing the sale, were holders in good faith & for value.—LAIRD & SON *v.* BANK OF SCOTLAND (1910), 47 Sc. L. R. 794.—**SCOT.**

7505 i. " *Usual or ordinary course of business.*"]—If a farmer sells his only horses when as a farmer he needs them, & when the sale so made would imply a suspicion that the same was not in the ordinary course of dealing, the sale is not *bonâ fide*.—TUER *v.* HARRISON (1864), 14 C. P. 449.—**CAN.**

Sect. 13.—*Protection of bonâ fide transactions—validity of payments to bankrupt and assignee: Sub-sects.* 1 & 2, *A.* (*a*).]

paid him the amount of the debt so attached. Afterwards a commission issued:—*Held:* such payment was not protected by the above Act, not being a payment made by bkpt. in the usual & ordinary course of trade & dealing.—HOVIL *v.* BROWNING (1806), 7 East, 154; 3 Smith, K. B. 156; 103 E. R. 59.

Annotations:—**Refd.** Fowler *v.* Coster (1830), 10 B. & C. 427; Butler *v.* Hobson (1838), 5 Bing. N. C. 128.

7506. —— —— Payment under arrest.]—*Held:* a payment under arrest was protected by the above Act, as a payment in the ordinary course of trade.—TEALE *v.* YOUNGE (1825), M'Cle. & Yo. 497; 148 E. R. 509.

Annotation:—**Mentd.** De Tastet *v.* Le Tavernier (1836), 1 Keen, 161.

7507. "Money"—19 Geo. 2, c. 32—Bill of exchange indorsed by bankrupt.]—After an act of bkpcy. by deft., deft. gave & indorsed to pltf. two bills of exchange:—*Held:* there was no difference between an actual payment of money in satisfaction of a debt & indorsing bills of exchange, as regarded the protection in the above Act of creditors in receiving money for their debts after an act of bkpcy., without notice thereof.—HAWKINS *v.* PENFOLD (1754), 2 Ves. Sen. 550; 28 E. R. 351, L. C.

7508. —— —— Bill of exchange drawn by bankrupt.]—A. recovered a verdict for a sum of money against B., who committed an act of bkpcy. Afterwards, A. having had no notice of the bkpcy., gave time to B., & instead of entering up judgment & suing out execution, took a bill drawn by B. on C. at a distant period, for the amount of the sum recovered:—*Held:* this was not a payment protected by the above Act, & A. was liable to refund the money received for the bill to the assignees of B.—PINKERTON *v.* MARSHALL (1794), 2 Hy. Bl. 334; 126 E. R. 580.

7509. "By any person on his behalf"—6 Geo. 4, c. 16, s. 82—Payment by agent.]—Bkpt. made a purchase of timber by two agreements, one before & one after the act of bkpcy., &. after the act of bkpcy. received part of the timber without paying for it, but was not entitled to receive the remainder without giving security for the whole. After the act of bkpcy., deft. became security, & purchased from bkpt. the benefit of the contract, which purchase was recited in the instrument, by which deft. became security. Bkpt. afterwards agreed with deft., that he would pay the money due to the vendor for the timber purchased by the first agreement & in part received, & should be entitled to retain the timber so purchased. Bkpt. then delivered money & bills to deft., to be paid to the vendor for the timber first purchased. Deft. paid the cash to his own bankers, & indorsed bills to them, & afterwards paid the amount of the cash & of the bills to the vendor, by a single draft on those bankers. After that the commission issued:—*Held:* deft. was not liable to repay the cash to the assignees, nor to indemnify bkpt.'s estate against the bills, for deft. was the mere agent of the vendor, & neither the cash nor the proceeds of the bills could have been recovered back from him, the transaction on his part being a *bonâ fide* one, protected by the above sect.—SHAW *v.* BATLEY (1833), 4 B. & Ad. 801; 1 Nev. & M. K. B. 751; 110 E. R. 657.

Annotation:—**Consd.** Wright *v.* Fearnley (1838), 5 Bing. N. C. 89.

7510. "Goods belonging to any bankrupt"—6 Geo. 4, c. 16, s. 84—Goods deposited at wharf.]—Bkpt., before the act of bkpcy., deposited timber trees with defts., to be kept by them upon their wharf, & to be delivered upon payment of wharfage fees. On Feb. 7, 1848, a fiat in bkpcy. issued against bkpt., & he was duly adjudged a bkpt. On Feb. 9, the official assignee was appointed, & in Feb., 1849, the creditors' assignees were appointed. After the appointment of the official assignee, & before the appointment of the creditors' assignees, & without having obtained the consent or the former, bkpt. sold the timber, & ordered defts. to deliver it to the purchasers, & defts., who had no notice of the act of bkpcy., or of the fiat, or of the adjudication, immediately upon the receipt of the order delivered the timber to the purchasers. The adjudication was not notified in the *Gazette* until Feb. 13, 1849:—*Held:* by the words in the above sect., "goods belonging to any bkpt.," were to be understood goods which belonged to the bkpt. at the time they were deposited in the possession or custody of the person or body corporate delivering them, & which goods would have continued to be his property, if an act of bkpcy. had not occurred, & defts. were protected, as they had delivered the goods without notice of the act of bkpcy.—CANNAN *v.* SOUTH EASTERN RY. CO. (1852), 7 Exch. 843; 21 L. J. Ex. 257; 19 L. T. O. S. 204; 155 E. R. 1191.

Annotations:—**Distd.** Lee *v.* Robinson & Bayes (1856), 25 L. J. C. P. 249. **Consd.** Wood *v.* Dunn (1866), L. R. 2 Q. B. 73, Ex. Ch. **Mentd.** European & Australian Royal Mail Co. *v.* Royal Mail Steam Packet Co. (1861), 8 Jur. N. S. 136; *Re* Lawford & Lawrence, *Ex p.* Trustee, [1902] 2 K. B. 445.

7505 ii. ——.]—K. mortgaged to pltfs. cheese, purchased by him from S., to secure moneys advanced to him by pltfs., upon security of part of the cheese. This mtge. was not filed. S. thereafter became insolvent, & K. became aware of it on the following day:—*Held:* the mtge. to pltfs. was valid, having been taken "by way of additional security for a debt contracted in the course of business."—BANK OF MONTREAL *v.* MCWHIRTER (1867), 17 C. P. 506.—**CAN.**

d. —— *Sale of stock-in-trade.*]—A sale of the stock-in-trade of a business is included in the expression "transfer of goods in the ordinary course of business."—GREENBURGH *v.* LENZ, 12 B. C. R. 395.—**CAN.**

f. —— *Knowledge of insolvency*—1875 *Act.*]—A payment by insolvent in the ordinary course of business within thirty days before an assignment or the issue of a writ of attachment is not void under the above Act, unless the payee knows of insolvent's inability to meet his engagement in full, or has probable cause for believing same to exist.—SMITH *v.* HUTCHINSON (1878), 2 A. R. 405.—**CAN.**

g. —— —— *Irish* 1872 *Act, s.* 53.]—A payment made by an insolvent person on the verge of bkpcy. will be sustained if made in the ordinary course of business transactions between payer & payee, provided that the payee had no notice of the insolvent circumstances of the payer.—*Re* LAVENDER, *Ex p.* ADAMS (1894), 29 I. L. T. 106.—**IR.**

k. —— —— 1883 *Act.*]—A creditor within three months of the bkpcy. of his debtor sold stock for him, & placed the proceeds to his credit in the ordinary course of trade, & without notice of an act of bkpcy., & without knowledge of the fact that debtor at the time was insolvent:—*Held:* the transactions were protected by 1883 Act.—*Re* LINDSAY (1890), 9 N. Z. L. R. 192.—**N.Z.**

l. —— *Payments for antecedent debts*—1883 *Act.*]—The provision of the above Act, empowering the ct. to declare payments for antecedent debts made within three months before the bkpcy. void, was directory, & conferred a discretion upon the ct. Payments made within three months of the payer's bkpcy., in good faith, in the ordinary course of business for an antecedent debt were not void.—*Re* TURNBULL, *Ex p.* HAYNES (1884), 3 N. Z. L. R. 342.—**N.Z.**

m. —— *Onus of proof.*]—In an action by an assignee to set aside the transfer by insolvent:—*Held:* the burden of proof was on insolvent to show his good faith, & that the transaction complained of was in the usual course of dealing.—ANON. (1845), R. de L. 40.—**CAN.**

n. —— —— 1843 *Act.*]—When once contemplation of sequestration & intention to prefer have been proved, it lies upon the creditor who seeks the protection of above Act to establish beyond any doubt that the transaction took place in the usual & ordinary course of trade or business.—DU PLOOY'S TRUSTEE *v.* PLEWMAN (1890), 7 S. C. 332.—**S. AF.**

SUB-SECT. 2.—NOTICE OF "ACT OF BANKRUPTCY" —NOTICE OF INSOLVENCY.

A. Sufficiency of Notice.

(a) In General.

7511. In general.]—Notice of an act of bkpcy. within 2 & 3 Vict. c. 29 means knowledge thereof or wilfully abstaining from acquiring such knowledge.—BIRD *v.* BASS (1843), 6 Man. & G. 143; 6 Scott, N. R. 928; 1 L. T. O. S. 231; 134 E. R. 841.

Annotation :—**Refd.** Joseph *v.* Webb, Joseph *v.* Lyons, Joseph *v.* Pidcock, Joseph *v.* Jones (1883), Cab. & El. 262.

7512. Commission of bankruptcy.]—A commission issued is notice of the bkpcy.—COLLET *v.* De GOLS & WARD (1734), Cas. *temp.* Talb. 65; 25 E. R. 665, L. C.

Annotations :—**Consd.** Sowerby *v.* Brooks (1821), 4 B. & Ald. 523. **Refd.** *Ex p.* Herbert (1806), 13 Ves. 183, L. C.; *Ex p.* Knott (1806), 11 Ves. 609, L. C.; Cannan *v.* S. E. Ry. Co. (1852), 7 Exch. 843. **Mentd.** *Re* Slobodinsky, *Ex p.* Moore, [1903] 2 K. B. 517; *Re* Hart, *Ex p.* Green, [1912] 3 K. B. 6, C. A.

7513. Letter from debtor's solicitor—Stating inability to pay immediately—Proposing payment by instalments.]—A letter written by the solr. of a trader to the solr. of a judgment creditor, requiring the creditor to delay his execution which he would be entitled to sue out in a few days, giving as the reason of the application, lest he should so involve debtor as to render him unable immediately to satisfy his engagements, & proposing to pay the debt by instalments, as the only means of enabling the creditor to realise the whole amount of his demand :—*Held :* not such a sufficient notice of the insolvency of the trader, as to preclude the creditor under 49 Geo. 3, c. 121, from levying under his execution, as having been brought by such notice within the terms of the proviso in s. 2, by fixing him with previous knowledge of bkpt.'s insolvency.—ABRAHAM *v.* GEORGE (1822), 11 Price, 423; 147 E. R. 520.

Annotation :—**Refd.** Cutten *v.* Sanger (1828), 2 Y. & J. 459, Ex. Ch.

7514. Statement of debtor—That he had committed act of bankruptcy.]—A creditor having pressed his debtor to deposit bills of exchange as security for his debt, debtor deposited them, saying "It will be of no use to you, I have committed an act of bkpcy." :—*Held :* sufficient notice of an act of bkpcy.—ARTHUR *v.* WHITWORTH (1842), 6 Jur. 323.

7515. Whether specific act of bankruptcy must be stated.]—*Qu. :* whether notice of a prior act of bkpcy. under 2 & 3 Vict. c. 29 must be of some specific act of bkpcy.—HOCKING *v.* ACRAMAN (1843), 12 M. & W. 170; 13 L. J. Ex. 34; 2 L. T. O. S. 124; 152 E. R. 1157.

Annotations :—**Refd.** Udal *v.* Walton (1845), 14 M. & W. 254; Edwards *v.* Gabriel (1861), 6 H. & N. 701; Lucas *v.* Dicker (1880), 6 Q. B. D. 84, C. A.

7516. ——.]—*Qu. :* whether a general notice that a party has committed an act of bkpcy. is a notice of an act of bkpcy. within 2 & 3 Vict. c. 29.—CONWAY *v.* NALL (1845), 1 C. B. 643; 14 L. J. C. P. 165; 5 L. T. O. S. 127; 135 E. R. 693.

Annotations :—**Consd.** Green *v.* Laurie (1847), 17 L. J. Ex. 61. **Refd.** Udal *v.* Walton (1845), 14 M. & W. 254; Follett *v.* Hoppe (1847), 5 C. B. 226; Ponsford *v.* Walton (1868), L. R. 3 C. P. 167.

7517. —— **"He had committed several acts of bankruptcy."**]—A notice by bkpt. to an execution creditor, that "he had committed several acts of bkpcy." :—*Held :* a sufficient notice of a prior act of bkpcy., as the notice need not state particulars of any act of bkpcy.—UDAL *v.* WALTON (1845), 14 M. & W. 254; 14 L. J. Ex. 262; 9 Jur. 515; 153 E. R. 471.

Annotations :—**Apld.** Lucas *v.* Dicker (1880), 5 C. P. D. 150. **Refd.** Ponsford *v.* Watson (1868), 17 L. T. 511. **Mentd.** Groom *v.* Watson (1849), 19 L. J. C. P. 364; *Re* X. Y., *Ex p.* Haes (1901), 71 L. J. K. B. 102, C. A.

See, also, No. 7560, *post.*

7518. —— **Execution of creditors' deed.**]—Debtor's goods were seized by a judgment creditor under a *fi. fa.* Before the sale the solr. for other creditors sent the judgment creditor notice of an act of bkpcy. committed by debtor by the execution of a creditor's deed :—*Held :* the notice was sufficient.—HOPE *v.* MEEK (1855), 10 Exch. 829; 25 L. J. Ex. 11; 156 E. R. 676.

Annotations :—**Refd.** Topping *v.* Keysell (1864), 33 L. J. C. P. 225; Evans *v.* Hallam (1871), 24 L. T. 939; Lucas *v.* Dicker (1880), 5 C. P. D. 150. **Mentd.** Watson *v.* Humphrey (1855), 10 Exch. 781.

See, also, Sect. 10, sub-sect. 1, *ante.*

7519. —— **"Has this day committed an act of bankruptcy."**]—Notice was given to a sheriff, who had seized goods of J., & to the execution creditor in the following terms :—"Take notice that J. of R. in the county of D. has this day committed an act of bkpcy." & signed by the solrs. of J. :—*Held :* the notice was sufficient, without stating of what the act of bkpcy. consisted.—TURNER *v.* HARDCASTLE (1862), 11 C. B. N. S. 683; 31 L. J. C. P. 193; 5 L. T. 748; 142 E. R. 964.

Annotations :—**Mentd.** Johnson *v.* L. & Y. Ry. Co. (1878), 3 C. P. D. 499; The Winkfield, [1902] P. 42, C. A.; Royal Mail S.S. Co. *v.* Macintyre Co. (1911), 16 Com. Cas. 231; Eastern Construction Co. *v.* National Trust Co., [1914] A. C. 197, P. C.

7520. Notice stating date of filing of petition—Specifying court & petitioning creditor.]—A notice to an execution creditor, which states that a petition in bkpcy. against the execution debtor has been filed on a named date, specifying the ct., & giving the name of petitioner, is a sufficient notice of an act of bkpcy. to prevent the execution being a protected transaction, since the creditor ought to know that the petition would contain a statement that debtor had committed an act of bkpcy.—LUCAS *v.* DICKER (1880), 6 Q. B. D. 84; 50 L. J. Q. B. 190; 43 L. T. 429; 29 W. R. 115, C. A.

Annotations :—**Consd.** *Re* Sedgwick, *Ex p.* Hobbs (1892), 8 T. L. R. 623. **Refd.** *Re* O'Shea's Settlmt., Courage *v.* O'Shea, [1895] 1 Ch. 325, C. A.

7521. Verbal notice.]—A verbal notice of the presentation of a petition against the execution debtor is sufficient.—CURTIS *v.* WAINBROOK IRON CO. (1884), Cab. & El. 351.

Annotation :—**Refd.** Lole *v.* Betteridge, [1898] 1 Q. B. 256, C. A.

7522. To whom given—Clerk of creditor.]—L., who held the lease of a public-house, owed defts. £1,275, & deposited his lease in their hands as security. T., who had £650 in defts.' hands, purchased L.'s lease for £1,690, defts. agreeing to advance him enough to make up the purchase-money, on retaining the lease as a security. L., T., & defts.' clerk met to complete the transfer, when T. drew a draft on defts. in favour of L. for £1,690. Defts.' clerk received the draft, & on

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PART XX. SECT. 13, SUB-SECT. 2.—A. (a).

7511 i. *In general.*]—Notice of an act of bkpcy. must be specific & clear.—*Re* WILSON (1890), 24 I. L. T. Jo. 345.—IR.

7511 ii. ——.]—A trustee of a fund is not responsible to an assignee of a creditor for dealing with the latter without reference to the assignment unless either at the time of so dealing he actually knew of the assignee's title, or he had previously received a notice sufficiently distinct to give him an intelligent apprehension of the fact that the assignee had acquired an interest in the claim or fund.—CRAWFORD *v.* CANADA LIFE ASSURANCE CO. (1897), 24 A. R. 643.—CAN.

7515 i. *Whether specific act of bankruptcy must be stated.*]—Notice to the execution creditor in general terms without specifying any particular act of bkpcy., is sufficient to protect all creditors.—FRENCH *v.* KINGSMILL (1848), 5 U. C. R. 30.—CAN.

Sect. 13.—*Protection of bonâ fide transactions—validity of payments to bankrupt and assignee: Sub-sect.* 2, *A.* (*a*) & (*b*).]

L.'s executing the transfer of the lease, gave him a draft on defts. for £415. On the evening of that day, L. having previously committed acts of bkpcy., a creditor of his gave defts.' clerk notice not to pay the draft, as a docket would be struck against L. Another of defts.' clerks, in consequence, refused payment when the draft was presented the next day, having also received a similar notice from pltf., another creditor of L.'s. Defts., some days afterwards, paid the draft to a banker who presented it, but not till he had executed an indemnity:—*Held:* defts. had, before payment of the draft, sufficient notice of the bkpcy.—SPRATT *v.* HOBHOUSE (1827), 4 Bing. 173; 12 Moore, C. P. 395; 5 L. J. O. S. C. P. 147; 130 E. R. 734.

Annotation:—**Refd.** Robinson *v.* Carrington (1833), 1 Mont. & A. 1.

7523. —— **To principal—Notice to all his agents.**] Notice of an act of bkpcy. being committed by N. was given to the Bank of England in London, on Mar. 16, & Apr. 8. On Apr. 12 two bank post bills, indorsed in blank, were delivered by N. to S. that he might obtain cash for them from the branch bank, at Gloucester, & S., being acquainted with the agent there, obtained cash for the bills, from the branch bank, & by the direction of the agent, indorsed the bills to Governor & Co. of the Bank of England. The commission had not then issued, & neither S. nor the agent at the branch bank knew of the act of bkpcy.:—*Held:* (1) notice to a principal was notice to all his agents; (2) the Bank were not protected by 6 Geo. 4, c. 16, s. 82, such previous notice of the act of bkpcy. having been given to them in London.—WILLIS *v.* BANK OF ENGLAND (1835), 4 Ad. & El. 21; 5 Nev. & M. K. B. 478; 1 Har. & W. 620; 5 L. J. K. B. 73; 111 E. R. 694.

Annotations:—**Mentd.** Wright *v.* Fearnley (1838), 5 Bing. N. C. 89; Cornfoot *v.* Fowke (1840), 6 M. & W. 358; Powles *v.* Page (1846), 3 C. B. 16.

7524. —— **Solicitor of execution creditor.**]—Where an act of bkpcy. had been committed & the fact was communicated to the attorney of an execution creditor previously to the issuing of a *fi. fa.* sued out by such attorney:—*Held:* the execution was not valid as against the assignees, though the fiat had issued after the writ was lodged with the sheriff.—ROTHWELL *v.* TIMBRELL (1842), 1 Dowl. N. S. 778; 6 Jur. 691.

Annotation:—**Refd.** Pike *v.* Stephens (1848), 12 Q. B. 465.

See, also, No. 7548, *post.*

7525. —— —— **Or his clerk in charge of business.**]—Service of a notice must be on the attorney himself or a clerk so far entrusted with the management of his business, as to have the power of acting on such a communication in his absence; & an announcement of bkpcy., made at the attorney's office, to a person who had lodged the writ of execution with the sheriff, but had not personally the conduct of the suit in which execution issued, does not affect the client, the execution creditor.—PIKE *v.* STEPHENS (1848), 12 Q. B. 465; 17 L. J. Q. B. 282; 12 L. T. O. S. 145; 12 Jur. 746; 116 E. R. 941.

Annotations:—**Refd.** Pennell *v.* Stephens (1849), 18 L. J. C. P. 291; Brewin *v.* Briscoe (1859), 28 L. J. Q. B. 329.

7526. —— ——.]—Debtor committed an act of bkpcy. on the day following the seizure of his goods under a *fi. fa.* The execution creditor's solr., with notice of the act of bkpcy., obtained a bill of sale of the goods from the sheriff in favour of his principal, & the goods were sold after debtor's adjudication:—*Held:* notice to the solr. of the act of bkpcy. was notice to his principal.—BREWIN *v.* BRISCOE (1859), 2 E. & E. 116; 28 L. J. Q. B. 329; 5 Jur. N. S. 1206; 121 E. R. 45.

Annotations:—**Consd.** *Re* Ashton, *Ex p.* McGowan (1891), 64 L. T. 28, D. C. **Refd.** Brittain *v.* Brown & Millar (1871), 24 L. T. 504; *Re* Boocock, [1916] 1 K. B. 816, D. C.

7527. —— **Clerk of creditor's solicitor.**]—A statement was made by a clerk of deft.'s attorney, to a clerk of pltf.'s attorney, that deft. had committed an act of bkpcy. The clerk to whom it was given was not shown to be a managing clerk, or to have communicated the matter to his principal:—*Held:* the statement was not such a notice as would defeat an execution, under 2 & 3 Vict. c. 29, s. 1. *Qu.:* whether a notice to a managing clerk would suffice.—PENNELL *v.* STEPHENS (1849), 7 C. B. 987; 18 L. J. C. P. 291; 13 L. T. O. S. 257; 13 Jur. 766; 137 E. R. 391.

7528. —— **Managing clerk of purchaser's solicitor.**]—Where a solr., with the consent of his client, puts his managing clerk to conduct the management of a matter, which the solr. was retained to conduct, notice to the clerk of an act of bkpcy., acquired in the course of such business, is notice to the solr. & to his client.

A solr. was retained to purchase debtor's business. His managing clerk, who partially negotiated the purchase, had notice of an act of bkpcy. committed by debtor:—*Held:* not notice to the lay client.—*Re* ASHTON, *Ex p.* MCGOWAN (1891), 64 L. T. 28; 39 W. R. 320; 7 T. L. R. 207; 8 Morr. 72, D. C.

7529. —— **Sheriff's officer in possession.**]—Notice to a sheriff's officer in possession under a writ of *fi. fa.*, of an act of bkpcy. committed by the deft., is not notice to the execution creditor.—RAMSEY *v.* EATON (1842), 10 M. & W. 22; 2 Dowl. N. S. 219; 11 L. J. Ex. 333; 6 Jur. 489; 152 E. R. 365.

Annotation:—**Refd.** Whitmore *v.* Greene (1844), 13 M. & W. 104.

7530. *S. P. Re* MATANLÈ, *Ex p.* SCHULTE (1874), 9 Ch. App. 409; 30 L. T. 478; 22 W. R. 462, L. J.

Annotations:—**Refd.** *Re* Waugh, *Ex p.* Dickin (1876), 4 Ch. D. 524; Lucas *v.* Dicker (1880), 6 Q. B. D. 84, C. A.; *Re* Bannister, *Ex p.* Valé (1881), 18 Ch. D. 137, C. A.; *Re* Tollemache, *Ex p.* Revell (1884), 13 Q. B. D. 727, C. A.

7531. —— **Broker distraining for rent.**]—*Qu.:* whether notice of an act of bkpcy. to a broker distraining for rent is sufficient notice to the landlord.—LACKINGTON *v.* ELLIOTT (1844), 7 Man. & G. 538; 8 Scott, N. R. 275; 13 L. J. C. P. 153; 3 L. T. O. S. 180; 8 Jur. 695; 135 E. R. 216.

7532. —— **Agent of creditor—After termination of agency.**]—The notice of a bkpcy. petition mentioned in 1883 Act (c. 52), s. 46 (2), must be served on the sheriff or his recognised agent, such as the under-sheriff, for the purpose of receiving such notices; it is not sufficient to serve it upon an ordinary bailiff or man in possession.

On F., the serjeant-at-mace of the Mayor's Ct., London, proceeding to execute a warrant issued to enforce a judgment for more than £20 obtained in that ct., he found H., an officer of the sheriffs of London, in possession of goods of debtor under a writ issued by the Q. B. D., &, in accordance with the usual practice, he delivered the warrant to H. for execution. H. sold goods, & out of the proceeds paid the amount of the warrant to F.

7524 i. *To whom given—Solicitor of execution creditor.*]—It is sufficient if notice of a declaration of insolvency be given to the attorney of the execution creditor before execution is sued out.—FRENCH *v.* KINGSMILL (1848) 5 U. C. R. 30.—**CAN.**

The next day notice was served on H. of a bkpcy. petition having been presented against debtor, on which he was afterwards adjudged bkpt. No notice of the petition was served on F. :—*Held :* (1) even if an effectual notice could ever have been served on H., a notice served on him after he had handed over the money to F. & his agency for F. had thus been determined was ineffectual ; (2) the execution creditor was entitled to the proceeds of sale.—*Re* HOLLAND, *Ex p.* WARREN (1885), 15 Q. B. D. 48 ; 54 L. J. Q. B. 320 ; 53 L. T. 68 ; 33 W. R. 572 ; 1 T. L. R. 430 ; 2 Morr. 142, C. A.

Annotation :—**Follд.** Bellyse *v.* M'Ginn, [1891] 2 Q. B. 227, D. C.

7533. How given—Mere delivery at solicitor's office.]— A mere delivery at the attorney's chamber, as in the cases of notices, in a cause, is not sufficient. —PIKE *v.* STEPHENS (1848), 12 Q. B. 465 ; 17 L. J. Q. B. 282 ; 12 L. T. O. S. 145 ; 12 Jur. 746 ; 116 E. R. 941.

Annotations :—**Refd.** Pennell *v.* Stephens (1849), 18 L. J. C. P. 291. **Mentd.** Brewin *v.* Briscoe (1859), 28 L. J. Q. B. 329.

—— **By telegram.**]—*See* INJUNCTION ; TELEGRAPHS & TELEPHONES.

7534. When given — Before seizure.] — An execution is defeated by bkpcy., if notice of an act of bkpcy. be served on pltf.'s attorney at any time, however short, before seizure, though the notice is served in London, & the writ has been sent to the country.—PIKE *v.* STEPHENS (1848), 12 Q. B. 465 ; 17 L. J. Q. B. 282 ; 12 L. T. O. S. 145 ; 12 Jur. 746 ; 116 E. R. 941.

Annotations :—**Refd.** Brewin *v.* Briscoe (1859), 28 L. J. Q. B. 329 ; **Mentd.** Pennell *v.* Stephens, (1849), 18 L. J. C. P. 291.

7535. When notice effectual—Notice sent by letter.]—Notice of an act of bkpcy. was sent by letter to the attorney of the execution creditors :—*Held :* they were not affected with such notice by the mere delivery of the letter at their attorney's office, nor until the same had been read, there being nothing to show a wilful abstaining from reading the letter.—BIRD *v.* BASS (1843), 6 Man. & G. 143 ; 6 Scott, N. R. 928 ; 1 L. T. O. S. 231 ; 134 E. R. 841.

Annotation :—**Refd.** Joseph *v.* Webb, Joseph *v.* Lyons, Joseph *v.* Pidcock, Joseph *v.* Jones (1883), Cab. & El. 262.

7536. —— ——.]—A party, to whom notice of an act of bkpcy. is sent by post, is not to be deemed to have had notice until the day when, in the ordinary course of post, he would receive the letter containing it.—LOADER *v.* HISCOCK (1858), 1 F. & F. 132, N. P.

(b) Whether Knowledge is Notice.

7537. What knowledge—That debtor insolvent.] —If a man lends money to a tradesman knowing him to be insolvent, this is not fraudulent against the assignees under a commission of bkpcy., supposing no act of bkpcy. was committed at the time the money was advanced.—FOXCROFT *v.* DEVONSHIRE (1760), 2 Burr. 931 ; 1 Wm. Bl. 193 ; 97 E. R. 638.

Annotations :—**Distd.** Copland *v.* Stein (1799), 8 Term Rep. 199. **Refd.** Cash *v.* Young (1823), 3 Dow. & Ry. K. B. 652. **Mentd.** Houghton *v.* Matthews (1803), 3 Bos. & P. 485.

7538. —— **"Understand"—1 Jac. 1, c. 15, s. 14.**]—A banker is not justified in paying the drafts of a person, who has placed money in his hands, after he has notice of an act of bkpcy. committed by him.

As to the word "understand" which is used in the above sect., it is too much to say that it can become a question whether a party did or did not know the law ; if he understand the fact that is sufficient ; he must know the law & is bound by the consequences (BULLER, J.).—VERNON *v.* HANKEY (1787), 2 Term Rep. 113 ; 100 E. R. 62 ; *subsequent proceedings sub nom.* HANKEY *v.* VERNON (1791), 3 Bro. C. C. 313, L. C.

Annotations :—**Distd.** *Re* Lawford & Lawrence, *Ex p.* Trustee, [1902] 2 K. B. 445. **Refd.** Foster *v.* Allanson (1788), 2 Term Rep. 479. **Mentd.** Fowler *v.* Padget (1798), 7 Term Rep. 509 ; Balme *v.* Hutton (1831), 2 Cr. & J. 19 ; Garland *v.* Carlisle (1833), 2 Cr. & M. 31 Ex. Ch. ; Harrison *v.* Nettleship (1833), 2 My. & K. 423 ; Waters *v.* Waters (1848), 2 De G. & Sm. 591.

7539. —— **That debtor in prison at suit of several creditors.**]—A trader subsequent to an act of bkpcy., being arrested & detained in prison at the suit of several creditors, sent for all his creditors but one, & paid their debts in full, but no other circumstance occurred, from which it could be presumed that they knew of his bkpcy. or insolvency :—*Held :* such payments were not protected by 19 Geo. 2, c. 32.—SOUTHEY *v.* BUTLER (1802), 3 Bos. & P. 237 ; 127 E. R. 130.

Annotation :—**Consd.** Bayly *v.* Schofield (1813), 1 M. & S. 338.

7540. —— **That debtor had left with his tools.**]—B., being considerably indebted, left his house without leaving any money, & taking his tools & the greater part of his furniture, without saying why or where he was going, & leaving directions to that effect. J., a creditor of B., being informed of such departure of B., pursued him, & five days afterwards obtained from him a conveyance of lands for a consideration made up of £10 cash & his own debt, & an undertaking to satisfy certain other engagements of bkpt. B. was in the same month duly declared bkpt. :—*Held :* the deed had been executed after notice to the purchaser of a previous act of bkpcy., & must be given up to the creditors' assignee of bkpt., in order to be cancelled, on payment of the £10 to J.—HOBSON *v.* BROWN (1855), 1 Jur. N. S. 920.

7535 i. *When notice effectual—Circular notice—Transaction complete before receipt.*]—A., after issuing circulars intimating his insolvency, took delivery of goods previously purchased from parties who did not receive the circular till after delivery :—*Held :* vendor could recover his goods or the price thereof, intimation having been delayed to prevent stoppage *in transitu.* —SCHUURMANS & SONS *v.* TWEEDIE'S TRUSTEE (1828), 3 Fac. Coll. 1124.—SCOT.

PART XX. SECT. 13, SUB-SECT. 2.—A. (b).

7537 i. *What knowledge—That debtor insolvent—Refusal of bank to honour cheque without guarantee.*]—M., before sequestrating his property, gave W. bills to defray a debt. The bills were not met & W. asked M. for another bill. Instead of a bill M. drew a cheque which the bank refused to pay without a guarantee from W. This was given & the cheque was met :—*Held :* the payment was not within 25 Vict. No. 8, s. 1, W. having notice of M.'s insolvency at the time the cheque was paid.—SANDEMAN *v.* WATSON (1880), 1 N. S. W. L. R. 113.—AUS.

7537 ii. —— ——.]—Bkpt. in asking for a further advance from certain creditors laid a statement of his affairs before them, & it was arranged that he should call a meeting of his creditors, as on the statement he could not pay all his creditors in full :—*Held :* this constituted notice of an available Act of bkpcy.—*Re* LEMON, *Ex p.* OFFICIAL ASSIGNEE, COLONIAL, FINANCE, MORTGAGE, INVESTMENT, & GUARANTEE CORPN., LTD (1894), 15 N. S. W. B. 90. —AUS.

7537 iii. ——.]—A creditor, took an assignment of substantially the whole of debtor's property, knowing there were other creditors for whose satisfaction debtor's assets were not sufficient :—*Held :* the transaction was not protected by 1892 Act, s. 82.—COMMERCIAL UNION ASSURANCE CO. *v.* MACGIBBON & CO. (1905), 25 N. Z. L. R. 43.—N.Z.

a. —— *That debtor was about to suspend payment.*]—After receiving notice from debtor's agent that debtor was going to suspend payment, a creditor took, on the day previous to debtor's filing a petition in insolvency, possession of his goods by virtue of a letter of lien by debtor to secure past & future advances & overdrafts : —*Held :* the creditor was not a *bonâ fide* transferee for value as the act of taking possession was after knowledge of the act of insolvency.—MERCANTILE BANK OF INDIA, LTD. *v.* MADRAS OFFICIAL ASSIGNEE (1916), I. L. R. 39 Mad. 250.—IND.

Sect. 13.—*Protection of bonâ fide transactions—validity of payments to bankrupt and assignee: Sub-sect.* 2, *A.* (*b*), *& B.*]

7541. —— That debtor had left his home & place of business in difficulties—Contrary to his rules of employment.]—Evidence that deft. was aware that bkpt. had left his home & place of business in difficulties, & contrary to the rules of his employment as post-master, & had not returned :—*Held :* evidence of deft.'s knowledge of an act of bkpcy., by absenting with intent to delay & defeat creditors.—SMITH *v.* OSBORN (1858), 1 F. & F. 267.

7542. —— That debtor had left house—No knowledge of intention to abscond.]—A wool broker gave to a bank to secure an advance a letter of hypothecation on certain wools, promising to lodge warehouse warrants for them next day. The bank made repeated application for the warrants, but did not obtain them. After a few days, bkpt. having left his house, they by pressure obtained the keys of his warehouse, where the wool was stored, & took possession. In leaving his house, bkpt. was, as it turned out, absconding :—*Held :* on the facts, the bank had no notice of that.—*Re* SLEE, *Ex p.* NORTH WESTERN BANK (1872), L. R. 15 Eq. 69 ; 42 L. J. Bcy. 6 ; 27 L. T. 461 ; 21 W. R. 69.

Annotations :—**Mentd.** *Re* Steele, *Ex p.* Conning (1873), L. R. 16 Eq. 414 ; Reeves *v.* Barlow (1883), 11 Q. B. D. 610, D. C. ; *Re* Hall, *Ex p.* Close (1884), 14 Q. B. D. 386 ; *Re* Hamilton, Young, *Ex p.* Carter, [1905] 2 K. B. 772, C. A.

7543. —— That debtor had left England—In circumstances leading to inference of intent to defeat creditors.]—At a time when A., as attorney of B. & C., executed a bill of sale of property of B. to D., D. was aware of circumstances, from which it was reasonable to infer that B. had left England to defeat his creditors. D. swore that he believed B. had left England only to make a purchase & would speedily return, & that he did not suspect B. & C. of being insolvent :—*Held :* D. knew facts sufficient to inform him that B. had committed an act of bkpcy., & he could not escape the consequence by saying he had not drawn that inference from them.—*Re* DOUGLAS, *Ex p.* SNOWBALL (1872), 7 Ch. App. 534 ; 41 L. J. Bcy. 49 ; 26 L. T. 894 ; 20 W. R. 786, L. JJ.

Annotations :—**Consd.** *Re* Boocock, [1916] 1 K. B. 816, D. C. **Mentd.** Vane *v.* Vane (1873), 28 L. T. 320, C. A. ; Elliott *v.* Turquand (1881), 7 App. Cas. 79, P. C.

7544. —— That bankruptcy petitions against debtor had been presented.]—By consent a bkpcy. petition was dismissed, debtor paying an agreed sum in settlement. Petitioning creditor had knowledge of other petitions against debtor. A receiving order was made within three months on a subsequent petition :—*Held :* the notice of the petitions was notice of acts of bkpcy., & the amount must be repaid to the trustee.—*Re* SEDGWICK, *Ex p.* HOBBS (1892), 8 T. L. R. 623 ; 9 Morr. 217.

Annotation :—**Dbtd.** *Re* O'Shea's Settlmt., Courage *v.* O'Shea, [1895] 1 Ch. 325, C. A.

7545. —— ——.]—In Feb., 1914, judgment for dissolution of a partnership was given in an action in the Ch. Div., & a receiver of the partnership assets was appointed. On June 16 an order was made by consent in the action to tax the costs of pltf. & of deft., & the receiver was ordered to pay the costs when taxed to the solrs. of pltf. & of deft. out of the partnership assets. When the order was made all parties to it knew that a creditor's petition in bkpcy. was pending against each of the partners. Subsequently a receiving order was made on each petition, adjudication followed, the proceedings under the two petitions were consolidated, & an order was made by the judge in bkpcy. transferring the Ch. action to the Bkpcy. Ct. & staying the proceedings thereunder. In the meantime the costs had been taxed under the order of June 16, & the solrs. claimed that by virtue of that order they had an equitable charge for their costs on the partnership assets & were secured creditors :—*Held :* the solrs. were not secured creditors, for they knew of the bkpcy. petitions when the order was made, & the assumption was that they had notice of an available act of bkpcy. committed by the partners before that time.—*Re* GERSHON & LEVY, *Ex p.* COOTE & RICHARDS, *Ex p.* WESTCOTT & SONS, [1915] 2 K. B. 527 ; 84 L. J. K. B. 1668 ; 59 Sol. Jo. 440 ; [1915] H. B. R. 146.

Annotation :—**Mentd.** *Re* Pearce, *Ex p.* Official Receiver, The Trustee, [1919] 1 K. B. 354.

7546. —— That debtor's solicitor had instructions to issue notice suspending payment.]—Knowledge by a creditor that debtor's solr. has instructions to prepare a notice, that debtor intends to suspend payment of his debts, is not notice to such creditor that debtor has committed an act of bkpcy., & an assignment of a debt taken by such creditor from debtor, with such knowledge, is valid.—*Re* MORGAN, *Ex p.* TURNER (1895), 73 L. T. 448 ; 44 W. R. 96 ; 40 Sol. Jo. 36 ; 2 Mans. 508, D. C.

7547. Whose knowledge—One of two trustees.]—If execution be taken out in the name of two trustees as co-pltfs. & one knows of an act of bkpcy. committed by deft., his knowledge is *primâ facie* the knowledge of both, & the execution is not protected by 2 & 3 Vict. c. 29, s. 1, even though it be in fact sued out only by the party, of whose knowledge there is no evidence. *Qu. :* whether the knowledge of one co-pltf. would not affect the other, even if it were proved that he in fact was ignorant of the prior act of bkpcy.—EDWARDS *v.* COOPER (1847), 11 Q. B. 33 ; 10 L. T. O. S. 160 ; 116 E. R. 386.

7548. —— Solicitor of creditor.]—F., a debtor, caused a deed to be prepared by B., her attorney, whereby she assigned all her stock-in-trade & effects to M., in trust for her creditors. The deed was intended to protect her property from executions in case certain offers about to be submitted to her creditors were not accepted. The assignment was executed by F. & M. on Feb. 17, 1870, & formal possession of the property was given under it to the latter. A meeting of creditors was then held. The existence of the deed was never communicated to them, but proposals were made to

7543 i. —— *That debtor had left colony.*]—Debtor left the colony, leaving the manager of his bank, to which he was indebted, a power of attorney. Bills accepted by debtor before leaving were presented at the bank & dishonoured, & he was adjudicated bkpt. :—*Held :* (1) the bank had notice that his departure was an act of bkpcy. ; (2) money paid into his account after that date could be claimed by the official assignee, free from the bank's lien.—*Re* MOORE (1886), 4 N. Z. L. R. 309.—N.Z.

b. —— *Notice of bankruptcy through newspapers.*]—K. was adjudicated bkpt. in England but claimed to be entitled to land in W. A. Subsequent to his bkpcy. the land was conveyed to pltf. by deed executed in W. A. & signed under a power of attorney. At the time pltf. had no formal notice of the adjudication, but knew of its existence from publications in newspapers :—*Held :* pltf. had constructive notice of the bkpcy.—SMITH *v.* LIDDELOW (1900), 2 W. A. L. R. 69.—AUS.

c. —— *That insolvency gazetted.*]—Debtor, notice of whose insolvency had been gazetted, deposited in a bank money which his trustee claimed. The bank pleaded no knowledge of the insolvency, receipt of the money in the ordinary way of business, & payment out of the money *bonâ fide* :—*Held :* no defence.—BAYLIS'S TRUSTEES *v.* CAPE OF GOOD HOPE BANK (1886), 4 S. C. 439.—S.A.F.

them which they accepted, whereupon it became necessary to borrow money, & B. applied to K., who advanced £400 to F., on the security of a bill of sale over all her property. This instrument was drawn up by B. & executed at his office by F., in the presence of K. A reassignment of even date was made by M. to F., of his trust estate in her property. Debtor's goods were subsequently seized & removed to the premises of M. by B., then acting for K., under the bill of sale. On Mar. 22 F. was adjudicated a bkpt., having filed a declaration of insolvency. An action of trover having been brought by the trustee in bkpcy. against B. & M., for conversion of the goods :—*Held :* (1) assuming the assignment to M. of all the effects in trust for creditors was an act of bkpcy., K. had no notice of it, for even assuming he had employed B. as his attorney in the preparation of the bill of sale, yet the relations thereby established between them would not be such that the knowledge of B., of the assignment to M., would be constructive knowledge in K. ; (2) the reassignment by M. to F. was valid notwithstanding her bkpcy., & K., being a *bonâ fide* mtgee. for value without notice of a prior act of bkpcy., was protected by 1869 Act, s. 95, & had a valid title to the goods as against pltf.—BRITTAIN *v.* BROWN & MILLAR (1871), 24 L. T. 504.

See, also, No. 7524, *ante.*

B. Sufficiency of Act or Facts of which Creditor has Notice.

7549. Notice that commission would issue—Debtor in prison.]—If a trader become a bkpt. by lying in prison two months after an arrest, his assignees may maintain an action for money had & received against a person who, having notice that a commission would be issued against him, sells his goods & pays him the produce before the two months are expired.—KING *v.* LEITH (1787), 2 Term Rep. 141 ; 100 E. R. 77.

Annotations :—**Distd.** Cash *v.* Young (1823), 3 Dow. & Ry. K. B. 652. **Consd.** Edwards *v.* Gabriel (1861), 6 H. & N. 701. **Refd.** Smith *v.* Hodson (1791), 4 Term Rep. 211 ; Coles *v.* Robins (1812), 3 Camp. 183, N. P. **Mentd.** *Re* Johnson, *Ex p.* Rayner (1872), 7 Ch. App. 325, L. JJ.

7550. Notice that commission in force—Commission superseded—Notice of act of bankruptcy on which second fiat awarded.]—Deft. having in his possession a lease belonging to S., which had been deposited with him as a security for money advanced by him to S., & upon which he claimed a lien for costs as against S., & also as against the assignee appointed under a commission issued against S. in 1830, concurred with the assignee in the sale of the lease, & received from him, in satisfaction of his demand, the amount of the purchase-money, & also received, with the assent of the assignee, sums due for rent of the premises, etc. In Jan., 1832, after the sale the commission against S. was superseded, & in Mar. a second fiat issued against him :—*Held :* as the former commission was in force when the several payments were made, such payments must be taken to have been made after not only constructive, but actual, notice of the act of bkpcy. on which the second fiat was awarded, the former commission having been taken out by deft. himself as solr. to petitioning creditor, & deft. having been afterwards appointed & having acted as solr. to the first commission.—CLARK *v.* GILBERT (1835), 2 Bing. N. C. 343 ; 2 Scott, 520 ; 1 Hodg. 347 ; 5 L. J. C. P. 61 ; 132 E. R. 135.

Annotations :—**Mentd.** Chinery *v.* Viall (1860), 5 H. & N. 288 ; Cox *v.* Liddell (1895), 2 Mans. 212.

7551. Circumstances amounting to insolvency.]—The notice of insolvency, which renders contracts & transactions with bkpt. after an act of bkpcy. void, means notice of a general inability in bkpt. to discharge his engagements, not merely notice of such a circumstance as his being so much pressed for money as to be obliged to renew his bills.—ANON. (1803), 1 Camp. 491, n.

Annotation :—**Refd.** De Tastet *v.* Le Tavernier (1836), 1 Keen, 161.

7552. ——.]—Embarrassment is not to be confounded with insolvency, but where a man's means of present payment are so crippled, & his embarrassment is so great that he cannot proceed with & carry on his business in the usual course of trade, he is insolvent, without reference to the consideration whether the whole of his property when converted into money & realised would be sufficient to pay his debts, & notice of such a state of circumstances is notice of insolvency.—DE TASTET *v.* LE TAVERNIER, DE TASTET *v.* SMITH, SMITH *v.* DE TASTET (1836), 1 Keen, 161 ; 48 E. R. 268.

Annotations :—**Refd.** Bowser *v.* Colby (1841), 1 Hare, 109 ; *Re* Muggeridge's Trusts (1860), John. 624.

7553. Intention to strike docket.]—SPRATT *v.* HOBHOUSE, No. 7522, *ante.*

7554. Striking of docket.]—Notice of a docket having been struck is not notice of a prior act of bkpcy.—HOCKING *v.* ACRAMAN (1843), 12 M. & W. 170 ; 13 L. J. Ex. 34 ; 2 L. T. O. S. 124 ; 152 E. R. 1157.

Annotations :—**Dbtd.** Lucas *v.* Dicker (1880), 6 Q. B. D. 84, C. A. **Refd.** Udal *v.* Walton (1845), 14 M. & W. 254 ; Edwards *v.* Gabriel (1861), 6 H. & N. 701 ; Lucas *v.* Dicker (1880), 5 C. P. D. 150.

7555. Granting assignment for creditors.]—A notice that a party has executed a conveyance of all his property for the benefit of his creditors is a good notice of an act of bkpcy.—LACKINGTON *v.* ELLIOTT (1844), 7 Man. & G. 538 ; 8 Scott, N. R. 275 ; 13 L. J. C. P. 153 ; 3 L. T. O. S. 180 ; 8 Jur. 695 ; 135 E. R. 216.

7556. —— Petitioning creditor signing as trustee.]—Bkpt. assigned all his property to two trustees, one of whom was petitioning creditor, who was present at the execution of it by bkpt., & executed it himself, but not in the presence of any attorney or solr. :—*Held :* this was not such an assignment, as being communicated to a creditor

PART XX. SECT. 13, SUB-SECT. 2.—B.

7551 i. *Circumstances amounting to insolvency.*]—Transferee's knowledge of insolvent's condition may be implied, if knowledge is shown of circumstances from which ordinary men of business would determine that debtor was unable to meet his liabilities.—HART *v.* ALLEN (1902), 40 N. S. R. 352.—CAN.

7551 ii. ——.]—A. sold his stock-in-trade & book debts, the purchasers assuming certain of the liabilities & paying an amount in cash. The sale was carried out by R., a creditor of A. into whose hands the purchase money was paid. A. was indebted to deft. for goods purchased from him. R. paid deft. out of the purchase money in R.'s hands within thirty days of A. being declared insolvent. A.'s assignee in insolvency sued deft. to recover back the moneys so paid to him :—*Held :* (1) deft. had probable cause for believing A. to be insolvent when he received the money, which clearly belonged to A. ; (2) R. made such payment out of A.'s money & as his agent.—MILLER *v.* REID (1879), 4 A. R. 479.—CAN.

7551 iii. ——.]—D. gave P. bills. D., being unable to meet the bills, gave P. a lien over crops to secure the amount. D. sold the property, on which the crops were, to a third party who required that P.'s lien be discharged before completion. It was discharged out of the purchase money, P. being aware that his lien would be void if D. became bkpt. within four months from its date. He was also aware that the property sold was D.'s sole asset. D. became bkpt. :—*Held :* it was to be inferred from all the circumstances that at the time the lien was discharged all parties were aware that D.'s bkpcy. was imminent.—PILMER *v.* DONOVAN'S OFFICIAL ASSIGNEE (1895), 14 N. Z. L. R. 441.—N.Z.

Sect. 13.—*Protection of bonâ fide transactions—validity of payments to bankrupt and assignee: Sub-sect.* 2, *B. & C.*]

of bkpt., before the receipt by him of money from bkpt., would enable the assignees to recover such money, as money received after & with notice of an act of bkpcy.—BURBIDGE *v.* WATSON (1829), 4 C. & P. 170, N. P.

7557. —— Neither stamped nor registered.]—A deed of assignment under 1861 Act, sched. D., may be given in evidence as proof of an act of bkpcy., though neither stamped nor registered, & notice of the execution of the deed is notice of an act of bkpcy.

H. being in difficulties, executed a deed in the form given in 1861 Act, sched. D. The deed was never stamped or registered. Immediately after its execution an attorney, acting both for H. & the trustees named in the deed, wrote to W., an auctioneer, informing him of the execution of the deed, & authorising him to sell the goods of H. W. sold the goods &, after the expiration of twenty-eight days, paid the proceeds to H. H. subsequently absconded, & was made a bkpt. In an action by the assignee of H. under the bkpcy. against W. to recover the value of the goods, the deed was put in evidence, & its execution relied on as the act of bkpcy. :—*Held :* the deed, being given in evidence for a collateral purpose, & not to give effect to it as a valid instrument, was admissible, although not stamped or registered, & as the act of bkpcy. was complete on the execution of the deed, W. had notice of an act of bkpcy.—PONSFORD *v.* WALTON (1868), L. R. 3 C. P. 167 ; 37 L. J. C. P. 113 ; 17 L. T. 511 ; 16 W. R. 363.

Annotations :—**Folld.** *Re* Gouldwell, *Ex p.* Squire (1868), 4 Ch. App. 47, L. JJ. **Refd.** Selby *v.* Graves (1868), 19 L. T. 186. **Mentd.** *Re* Hughes, *Ex p.* Hughes (1893), 62 L. J. Q. B. 358, D. C. ; *Re* Gunsbourg, *Ex p.* Trustee, [1918–19] B. & C. R. 108.

7558. Intention to commit act of bankruptcy.]—A letter from bkpt. to a creditor, saying "that he had resolved not to open his bank on Monday," is not notice of an act of bkpcy., but only notice of an intention to commit an act of bkpcy.—*Re* RIDGE & NEWLAND, *Ex p.* HALLIFAX (1842), 2 Mont. D. & De G. 544, Ct. of R.

See, also, No. 7498, *ante*, & No. 7574, *post.*

7559. —— Creditor not bound to inquire whether committed or not.]—A creditor who receives notice of his debtor's intention to commit an act of bkpcy., is not bound to inquire whether the act has been committed, but is entitled to avail himself of his remedies just as if he had received no such notice. —*Re* WRIGHT, *Ex p.* ARNOLD (1876), 3 Ch. D. 70 ; 45 L. J. Bcy. 130 ; 35 L. T. 21 ; 24 W. R. 977, C. A.

Annotations :—**Distd.** *Re* Turner, *Ex p.* Attwater (1876), 35 L. T. 682, C. A. **Refd.** *Re* Gibson, *Ex p.* Bolland (1878), 26 W. R. 481. **Mentd.** *Re* O'Shea's Settlmt., Courage *v.* O'Shea, [1895] 1 Ch. 325, C. A.

7560. Signing declaration of insolvency—Without filing or gazetting.]—A notice to the following effect :—"J. has committed an act of bkpcy. He signed a declaration of insolvency yesterday, & will be declared bkpt. immediately. I have sent for a fiat," is not such a notice as will deprive an execution creditor of the protection of 2 & 3 Vict. c. 29 ; 6 Geo. 4, c. 16, s. 6, requiring the declaration of insolvency to be filed, & to be advertised in the London Gazette, before it is a complete act of bkpcy.—CONWAY *v.* NALL (1845), 1 C. B. 643 ; 14 L. J. C. P. 165 ; 5 L. T. O. S. 127 ; 135 E. R. 693.

Annotations :—**Distd.** Follett *v.* Hoppe (1847), 5 C. B. 226. **Apld.** Green *v.* Laurie (1847), 17 L. J. Ex. 61. **Refd.** Udal *v.* Walton (1845), 14 L. J. Ex. 262 ; Ponsford *v.* Walton (1868), L. R. 3 C. P. 167.

See, also, No. 7517, *ante.*

7561. Filing declaration of insolvency.]—A notice given by debtor, that he has filed a declaration of insolvency, pursuant to 5 & 6 Vict. c. 122, s. 22, where a fiat in bkpcy. issues within two months from the filing of such declaration, is sufficient to defeat the execution creditor.—GREEN *v.* LAURIE (1847), 1 Exch. 335 ; 17 L. J. Ex. 61 ; 10 L. T. O. S. 167 ; 11 Jur. 997 ; 11 J. P. Jo. 857 ; 154 E. R. 142.

Annotations :—**Folld.** Edwards *v.* Gabriel (1861), 6 H. & N. 701. **Refd.** Ponsford *v.* Walton (1868), L. R. 3 C. P. 167.

7562. —— Though not gazetted.]—Debtor filed a declaration of insolvency under 5 & 6 Vict. c. 122, s. 22, & on the same day was taken in execution under a *ca. sa.* After notice of the act of bkpcy. had been given by debtor to the execution creditor & the sheriff's officer, debtor paid a portion of his assets to the officer in order to procure his discharge. Debtor was declared a bkpt. :—*Held :* sufficient notice of the act of bkpcy., & his assignees were entitled to recover the amount so paid, although the declaration had not been advertised in the Gazette.—FOLLETT *v.* HOPPE (1847), 5 C. B. 226 ; 17 L. J. C. P. 76 ; 10 L. T. O. S. 205 ; 11 Jur. 974 ; 136 E. R. 863.

Annotations :—**Refd.** Green *v.* Laurie (1847), 1 Exch. 335 ; Bailey *v.* Johnson (1871), L. R. 6 Exch. 279.

7563. Filing petition for arrangement.]—Goods taken in execution by the sheriff were sold by him to the execution creditor, who had received notice that the execution debtor had filed his petition for arrangement with creditors. That petition was subsequently dismissed, & the execution debtor was adjudicated bkpt. on a creditor's petition.—*Held :* the notice of the filing of the petition for arrangement was notice of an act of bkpcy.—EDWARDS *v.* GABRIEL (1861), 7 H. & N. 520 ; 31 L. J. Ex. 113 ; 9 L. T. 201 ; 8 Jur. N. S. 592 ; 10 W. R. 95, Ex. Ch.

Annotations :—**Expld.** Birmingham Gas Co. *v.* Adams (1870), 19 W. R. 123. **Distd.** *Re* Boocock, [1916] 1 K. B. 816, D. C. **Refd.** Bothamley *v.* Heyward (1862), 8 Jur. N. S. 1156.

7564. ——.]—On Nov. 12 debtor filed a liquidation petition, & the creditors resolved to accept a composition. Debtor failed to pay it when due, & on May 28 he was adjudicated a bkpt. upon a petition filed on Apr. 29, the act of bkpcy. being the filing of the liquidation petition. On Mar. 29 he had executed a mtge. of leasehold property—in substitution for a mtge., given to the same creditor two years before the liquidation petition was filed, on a lease which afterwards turned out to be void :—*Held :* though, when the mtge. of Mar. 29 was executed, the mtgee. had notice of the filing of the liquidation petition, yet it was not notice of an act of bkpcy. then available for adjudication against debtor, & the mtge. was protected by 1869 Act, s. 95.—*Re* WALTON, *Ex p.* HOARE (1873), L. R. 16 Eq. 625 ; 43 L. J. Bcy. 38 ; 29 L. T. 140 ; 21 W. R. 909, D. C.

Annotations :—**Folld.** *Re* Kearley & Clayton's Contract (1878), 7 Ch. D. 615. **Distd.** *Re* Baum, *Ex p.* Cooper (1878), 10 Ch. D. 313, C. A.

d. *Disposition for attachment.*]—A creditor who produces a disposition for an attachment against the goods of his debtor thirty days after obtaining an obligation from him, is presumed to have known of his insolvency.—LA BANQUE D'HOCHELAGA ET BANQUE UNION (1886), 12 Q. L. R. 377 ; *affd.*, Cout. Dig. 845.—**CAN.**

7561 i. *Filing declaration of insolvency.*]—Notice of a declaration of insolvency having been filed, is notice of an act of bkpcy. from such time, provided a commission issues within two months, and that the execution creditor knew of the fact before suing out execution. —FRENCH *v.* KINGSMILL (1848), 5 U. C. R. 20.—**CAN.**

7565. Act not committed before transaction.]—A petition for liquidation was presented after the goods of debtor, a non-trader, were seized in execution, & the sale took place before the appointment of a trustee. No act of bkpcy. had been committed before the seizure: *Held:* (1) in 1869 Act, s. 95 "act of bkpcy." meant an act of bkpcy. which had been committed at the time of seizure; (2) the execution creditor was entitled to the proceeds.—*Re* NORTON, *Ex p.* TODHUNTER (1870), L. R. 10 Eq. 425; 39 L. J. Bcy. 17; 25 L. T. 313; 18 W. R. 890.

Annotations:—**Distd.** *Re* Hall, *Ex p.* Rocke (1871), 6 Ch. App. 796, n. **Folld.** *Re* Hall, *Ex p.* Rocke (1871), 6 Ch. App. 795, L. C. & L. JJ. **Consd.** Slater *v.* Pinder (1871), L. R. 6 Exch. 228. **Distd.** *Re* Adams, *Ex p.* Birmingham Gaslight & Coke Co. (1878), L. R. 11 Eq. 204. **Refd.** *Re* Skinner, *Ex p.* Keys (1870), 39 L. J. Bcy. 28; *Re* Johnson, *Ex p.* Rayner (1872), 41 L. J. Bcy. 26; Lucas *v.* Dicker (1880), 6 Q. B. D. 84, C. A. **Mentd.** *Re* Gwynn, *Ex p.* Veness (1870), 39 L. J. Bcy. 23.

7566. ——.]—*Held:* in 1869 Act, s. 95 "act of bkpcy." meant an act of bkpcy. committed prior to the time of seizure.—*Re* MATANLÈ, *Ex p.* SCHULTE (1874), 9 Ch. App. 409; 30 L. T. 478; 22 W. R. 462, L. J.

Annotations:—**Consd.** *Re* Bannister, *Ex p.* Vale (1881), 18 Ch. D. 137, C. A. **Folld.** *Re* Tollemache, *Ex p.* Revell (1884), 13 Q. B. D. 727, C. A. **Mentd.** *Re* Waugh, *Ex p.* Dickin (1876), 4 Ch. D. 524; Lucas *v.* Dicker (1880), 6 Q. B. D. 84, C. A.

7567. Facts that may or may not amount to acts of bankruptcy.]—Goods of debtor were seized under an execution. On the next day, his attorneys wrote to the attorneys of the execution creditors, that debtor had "made an assignment of what goods he had, & it was arranged that his daughter should raise the money, but this we find was never finally arrived at." The assignment was in fact to a trustee for the benefit of his creditors. The sheriff sold the goods under the execution, & on the next day debtor was adjudicated bkpt.:—*Held:* a notice stating circumstances which might or might not amount to an act of bkpcy. was insufficient, & the execution was protected, as the letter did not amount to a notice that debtor had committed an act of bkpcy.

To say something to a person which might possibly put him to further inquiry, or to tell him something which, if he were to inquire further, would show him that an act of bkpcy. existed, is not a sufficient notice (COCKBURN, C.J.).—EVANS *v.* HALLAM (1871), L. R. 6 Q. B. 713; 40 L. J. Q. B. 229; 24 L. T. 939; 19 W. R. 1158.

Annotation:—**Refd.** Lucas *v.* Dicker (1880), 6 Q. B. D. 84, C. A.

7568. Non-compliance with debtor's summons.]—The non-compliance with a debtor's summons is a completed act of bkpcy., available against debtor for adjudication on the expiration of the time limited by 1869 Act, s. 6 (6), & if notice of such non-compliance be given to another creditor before any petition for adjudication has been filed, it will prevent such creditor from availing himself of the protection of s. 94.—*Re* BUCHAN, *Ex p.* HANKIN (1875), 10 Ch. App. 267; 44 L. J. Bcy. 74; 32 L. T. 316; 23 W. R. 401, L. JJ.

Annotation:—**Consd.** Hood *v.* Newby (1882), 21 Ch. D. 605, C. A.

7569. ——.]—After pltf. had commenced an action against deft. for dissolution of partnership, pltf. took out a debtor's summons against deft. Deft. failed to comply with it, & pltf. filed a petition of bkpcy. against him based on the summons. Another creditor afterwards took out a debtor's summons against deft., &, on his non-compliance with it, filed a petition & obtained adjudication of bkpcy. against him. Before the adjudication & without notice of the act of bkpcy. on which it was based, pltf. entered into an agreement with deft. for compromise of the action, which the trustee sought to impeach as void against the creditors:—*Held:* the non-compliance with pltf.'s debtor's summons was an act of bkpcy. "available for adjudication" within 1869 Act, s. 94, & the agreement for compromise between pltf. & deft. was not a protected transaction under that sect.—HOOD *v.* NEWBY (1882), 21 Ch. D. 605; 52 L. J. Ch. 204; 47 L. T. 721; 31 W. R. 185, C. A.

7570. Act more than six months before adjudication.]—*Held:* 1869 Act, ss. 94, 95, protecting transactions with persons not having notice of an act of bkpcy. available for adjudication, referred to acts of bkpcy. committed within six months of the date of the petition, on which the adjudication was made.—*Re* BEDELL, *Ex p.* GILBEY (1878), 8 Ch. D. 248; 47 L. J. Bcy. 49; 38 L. T. 728; 26 W. R. 768, C. A.

Annotations:—**Folld.** *Re* Barnes, *Ex p.* Quilter (1882), 30 W. R. 739, C. A. **Refd.** *Re* Barnes, *Ex p.* Tilleard (1882), 30 W. R. 568; Hood *v.* Newby (1882), 21 Ch. D. 605, C. A.

7571. ——.]—Applts. claimed to retain money in respect of a transaction in relation to the property of bkpt., entered into by them at a time when they had notice of an act of bkpcy. committed by bkpt. to which the title of the trustee related back, but committed more than six months before the presentation of the petition on which he was subsequently adjudicated a bkpt., on the ground that they were protected by 1869 Act, s. 95, as having had no notice of an act of bkpcy. available for adjudication:—*Held:* they were not protected.—*Re* BARNES, *Ex p.* TILLEARD (1882), 30 W. R. 568.

7572. ——.]—Debtor committed an act of bkpcy. More than six months afterwards he was adjudicated a bkpt. upon a second act of bkpcy. Between the dates of the first & second acts money was paid to him by a depositary having notice at that time of the first act of bkpcy.:—*Held:* the payment was protected by 1869 Act, s. 94.—*Re* BARNES, *Ex p.* QUILTER (1882), 30 W. R. 739, C. A.

7573. Dismissal of bankruptcy petition.]—*Semble:* notice that a bkpcy. petition has been dismissed is not constructive notice that an act of bkpcy. has been committed by debtor (LINDLEY, L.J.).—*Re* O'SHEA'S SETTLEMENT, COURAGE *v.* O'SHEA, [1895] 1 Ch. 325; 64 L. J. Ch. 263; 71 L. T. 827; 43 W. R. 232, C. A.

Annotations:—**Mentd.** Wild *v.* Southwood, [1897] 1 Q. B. 317; Hosack *v.* Robins, [1918] 2 Ch. 389, C. A.

7574. Service of bankruptcy notice—Creditor not bound to inquire whether complied with or not.]—At 3 P.M. on July 16 resps. received information that a bkpcy. notice, which would expire at midnight on that day if not complied with, had been served on a man, who was their debtor. On July 23 debtor paid to resps. a sum of money. Resps. did not at any time before receiving the payment make any inquiry as to whether the bkpcy. notice had been complied with. The bkpcy. notice had not in fact been complied with, & debtor was subsequently adjudicated bkpt.:—*Held:* at the time of the payment resps. had no notice of an act of bkpcy., or of any facts which put them on inquiry as to whether an act of bkpcy. had been committed, & the payment was not void as against the trustee.—*Re* BOOCOCK, [1916] 1 K. B. 816; 85 L. J. K. B. 914; 114 L. T. 903; 32 T. L. R. 358; [1916] H. B. R. 47, D. C.

See, also, Nos. 7498, 7558, *ante.*

C. Proof of Notice.

7575. Whether necessary—Generally—Commission of bankruptcy issued.]—The issuing a com-

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mission of bkpcy. is not of itself sufficient notice to all the world of a prior act of bkpcy. having been committed, & if a payment be made of a debt to bkpt. after the issuing of such commission, but before the party paying has any actual knowledge of the bkpcy., such payment will be protected within 1 Jac. 1, c. 15, s. 14.—SOWERBY *v.* BROOKS (1821), 4 B. & Ald. 523; 106 E. R. 1028.

Annotation:—**Apld.** *Re* Barr's Trust (1858), 4 K. & J. 219.

7576. —— —— —— Though not acted or gazetted.]—A commission issued & not acted on nor gazetted is sufficient to defeat a transaction within two months of it, under the proviso of 6 Geo. 4, c. 16, s. 81.—PECKHAM *v.* LASHMOOR (1828), Mood. & M. 251, N. P.

7577. —— As regards execution creditor—Sheriff remaining in possession more than twenty-one days.]—If the sheriff remains in possession on behalf of a judgment creditor for twenty-one days the execution creditor will be deemed to have notice of the act of bkpcy. thereby committed.—FIGG *v.* MOORE BROTHERS, [1894] 2 Q. B. 690; 63 L. J. Q. B. 709; 71 L. T. 232; 10 T. L. R. 490; 1 Mans. 404; 10 R. 549.

Annotations:—**Apprvd.** Burns-Burns *v.* Brown, [1895] 1 Q. B. 324, C. A. **Mentd.** *Re* Pollock & Pendle, *Ex p.* Wilson & Mathieson (1902), 87 L. T. 238; *Re* Godding, *Ex p.* Trustee, [1914] 2 K. B. 70.

7578. —— —— ——.]—Where the sheriff remained in possession on behalf of a judgment creditor for more than twenty-one days & was then paid out, & later a receiving order was made against debtor, the execution creditors were ordered to repay the money to the trustee of debtor, as they must be held to have notice of the act of bkpcy. committed by the sheriff remaining in for more than twenty-one days.—BURNS-BURNS *v.* BROWN, [1895] 1 Q. B. 324; 64 L. J. Q. B. 248; 71 L. T. 825; 43 W. R. 195; 11 T. L. R. 114; 39 Sol. Jo. 152; 2 Mans. 23; 14 R. 119, C. A.

Annotation:—**Mentd.** *Re* Godding, *Ex p.* Trustee, [1914] 2 K. B. 70.

7579. —— As regards creditor taking possession of goods—Striking docket.]—Petitioner struck a docket against bkpt., which he afterwards abandoned & entered into an arrangement by which bkpt. assigned all his property to petitioner in trust for himself & the other creditors. After petitioner had taken possession of bkpt.'s property, & incurred some expense in the execution of the trusts, another creditor sued out a fiat against bkpt., under which the assignees seized bkpt.'s property in the hands of petitioner:—*Held*: petitioner had no lien on the property, as against the assignees, the docket struck being *primâ facie* evidence of his having notice of an act of bkpcy. prior to the trust assignment, & the assignment itself amounting to an act of bkpcy.—*Re* FIELD, *Ex p.* SWINBURNE (1838), 3 Deac. 396; Mont. & Ch. 119, Ct. of R.

7580. Onus of proof—Party seeking to upset transaction.]—The ct. refused to interpose, though in very suspicious circumstances, against creditors, who had received goods after a secret act of bkpcy., there being no actual proof of their having had notice of it.—FISHER *v.* TOUCHETT (1758), 1 Eden, 158; 28 E. R. 644.

7581. —— Party seeking to uphold transaction.]—A trader committed an act of bkpcy. His shopman, ignorant of the act of bkpcy., sold goods & received payment for them. The assignee brought an action of trover against the shopman:—*Held*: no evidence having been given of the ignorance of the purchaser, the transfer was not protected, the burden of proof being on deft.—PEARSON *v.* GRAHAM (1837), 6 Ad. & El. 899; 2 Nev. & P. K. B. 636; Will. Woll. & Dav. 691; 7 L. J. Q. B. 247; 112 E. R. 844.

Annotations:—**Apld.** *Re* Matanlè, *Ex p.* Schulte (1874), 9 Ch. App. 409, L. J. **Refd.** Bowman *v.* Malcolm (1843), 11 M. & W. 833. **Mentd.** Kynaston *v.* Crouch (1845), 9 Jur. 584.

7582. —— ——.]—*Held*: the onus was on the execution creditor, who claimed the protection of 1869 Act, s. 95, to prove that he had no notice of any prior act of bkpcy.—*Re* MATANLÈ, *Ex p.* SCHULTE (1874), 9 Ch. App. 409; 30 L. T. 478; 22 W. R. 462, L. J.

Annotations:—**Folld.** *Re* Bannister, *Ex p.* Vale (1881), 18 Ch. D. 137, C. A.; *Re* Tollemache, *Ex p.* Revell (1884), 13 Q. B. D. 727, C. A. **Refd.** *Re* Waugh, *Ex p.* Dickin (1876), 4 Ch. D. 524; Lucas *v.* Dicker (1880), 6 Q. B. D. 84, C. A.

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7580 i. *Onus of proof—Party seeking to upset transaction.*]—The *onus* is upon the person attacking the transaction to prove that deft. acted in bad faith.—*Re* DONOVAN (1910), 10 S. R. N. S. W. 532.—AUS.

7580 ii. —— ——.]—An assignee for the benefit of creditors, suing to set aside as void a mtge. by his assignor, when insolvent, to a creditor, must establish that the creditor knew at the time he took the mtge. that the mtgor. was insolvent.—LAMB *v.* YOUNG (1890), 19 O. R. 104.—CAN.

7581 i. —— *Party seeking to uphold transaction.*]—A. & D., on July 3, gave a bill of sale over goods to B. The grantors covenanted therein to insure the goods & hand policy to B. The policy was not handed over, & B. asked several times for it; he was informed that A. & D. were away on business but were expected back every day. B. then went to A.'s private house & ascertained that his wife had received a telegram from him; he told her that it was rumoured that A. & D. had "cleared." On July 21, B. registered the bill of sale, & seized. Bkpts. never returned. On July 27, bkpts.' estate was sequestrated, the act of bkpcy. being that they had departed out of the colony with intent to defeat or delay their creditors. In an action by the official assignee to recover the goods:—*Held*: B. had not only not discharged the *onus* cast upon him of showing that he had not notice of an act of bkpcy. at the time of the seizure, but that there was affirmative evidence that he had notice.—*Re* BELL & DAVIS, *Ex p.* OFFICIAL ASSIGNEE, COHEN (1892), 13 N. S. W. L. R. 73.—AUS.

7581 ii. —— ——.]—The statutory presumption of the invalidity of a transfer is rebutted by showing that it was entered into by the transferee in good faith & without knowing, or having reason to believe, that transferor was insolvent.—DANA *v.* MCLEAN, 21 C. L. T. Occ. N. 555; 2 O. L. R. 466.—CAN.

7581 iii. —— ——.]—A transfer of insolvent's property was made within sixty days before action was brought to set it aside:—*Held*: *onus* of proving want of knowledge of insolvency by virtue of 1897 Act thrown upon the party desiring to uphold the transfer.—ALLEN *v.* BANK OF OTTAWA (1908), 11 O. W. R. 148.—CAN.

7581 iv. —— ——.]—B. transferred shares in a co. without consideration to R., to enable him to qualify as a director. R., as owner, pledged the shares to his bank & undertook to execute a transfer of such shares on demand. R. became bkpt. At the time of his bkpcy. he was indebted to the bank, but this indebtedness was subsequently met; thereupon the bank handed the share certificates to the official assignee. Later F., as agent for B., gave notice to the co. & the bank that the shares were B.'s property:—*Held*: F. must prove affirmatively that B. had no notice of any acts of bkpcy. by R. at the time of claiming the shares for B. & in absence of proof the transaction was not protected.—BOWER *v.* ROSS' OFFICIAL ASSIGNEE (1894), 13 N. Z. L. R. 193.—N.Z.

7581 v. —— ——.]—About July 1, L. lent bkpt. £50. The transaction was effected by L. exchanging cheques with B. & handing the latter's cheques to bkpt. On July 15, L. indorsed bkpt.'s promissory note in favour of B., L. taking from bkpt. a document, in the form of a bought-&-sold note of eight horses purported to be sold by bkpt. to L., with a receipt "by p.n. & cash." Bkpt. filed on Aug. 15, 1901. After getting that security, L. demanded possession of the chattels, & bkpt. sent the harness as well as the horses to L. who retained possession thereof until he sold them:—*Held*: the *onus* of proving that the possession taken was not taken by virtue of the instrument was on L.—LEE *v.* PARKE'S OFFICIAL ASSIGNEE (1903), 22 N. Z. L. R. 747.—N.Z.

7583. —— ——.]—Where a person claims protection against the title of the trustees relating back to an act of bkpcy. committed prior to the transaction sought to be protected, the onus lies on the person supporting the transaction to prove that it was entered into without notice of the prior act of bkpcy.—*Re* JOY, *Ex p.* CARTWRIGHT (1881), 44 L. T. 883, C. A.

SECT. 14.—SEQUESTRATION OF ECCLESIASTICAL BENEFICE—OTHER ECCLESIASTICAL PROPERTY.

See, now, 1914 Act, s. 50.

7584. Profits of benefice.]—The profits of an ecclesiastical benefice do not pass to the assignees under an insolvency, though included in the schedule of insolvent.—ARBUCKLE *v.* COWTAN (1803), 3 Bos. & P. 321; 127 E. R. 177.

Annotations:—**Apld.** Bishop *v.* Hatch (1834), 1 Ad. & El. 171. **Refd.** Hawkins *v.* Gathercole (1854), 3 Eq. Rep. 348, L. JJ.; Parry *v.* Jones (1856), 1 C. B. N. S. 339; Hopkins *v.* Clarke (1864), 4 B. & S. 836. **Mentd.** Palmer *v.* Bate (1821), 2 Brod. & Bing. 673.

7585. ——.]—An *interim* order for protection under 5 & 6 Vict. c. 116 & Execution Act, 1844 (c. 96), does not prevent a creditor from issuing a *sequestrari facias* to seize the profits of a benefice, after insolvent's petition & before the final order.—PARRY *v.* JONES (1856), 1 C. B. N. S. 339; 26 L. J. C. P. 36; 28 L. T. O. S. 174; 21 J. P. 343; 2 Jur. N. S. 1190; 5 W. R. 121; 140 E. R. 140.

Annotations:—**Mentd.** Markin *v.* Aldrich (1862), 11 C. B. N. S. 599; R. *v.* Champneys (1871), L. R. 6 C. P. 384.

7586. —— **Necessity for sequestration order.**]—The assignees of an insolvent clergyman do not acquire any right to his benefice, or the income of it, by the assignment, nor until they have obtained a sequestration, as directed by 7 Geo. 4, c. 57, s. 28, after adjudication by Insolvent Debtors Ct., on such insolvent's petition.—BISHOP *v.* HATCH (1834), 1 Ad. & El. 171; 3 Nev. & M. K. B. 498; 3 L. J. K. B. 127; 110 E. R. 1172.

Annotations:—**Refd.** Parry *v.* Jones (1856), 1 C. B. N. S. 339. **Mentd.** Hawkins *v.* Gathercole (1855), 6 De G. M. & G. 1, L. JJ.

7587. —— —— **Right of trustee under order.**]—The right of the trustee of a bkpt. beneficed clergyman under a sequestration order is a right to collect & receive the rents & profits of the benefice. That is a right which he can very properly forgo, & agree to the relaxation or withdrawal of the sequestration in consideration of the payment of a sufficient sum.—(BIGHAM, J.).—*Re* BARRATT (1906), 22 T. L. R. 427, D. C.

7588. —— **Priority of sequestrations between—Creditor & trustee.**]—If a judgment creditor of a beneficed clergyman issue a sequestration, &, the clergyman becoming bkpt., his assignee under the bkpcy. issue a second sequestration, the former sequestration will remain valid & have priority, even though it were not published till after the filing of the petition in bkpcy.—HOPKINS *v.* CLARKE (1864), 5 B. & S. 753; 4 New Rep. 378; 33 L. J. Q. B. 334; 11 L. T. 204; 10 Jur. N. S. 1071; 12 W. R. 1029; 122 E. R. 1010, Ex. Ch.

7589. —— —— **Trustees under successive bankruptcies.**]—A beneficed clergyman was adjudicated a bkpt. under 1861 Act, & obtained his order of discharge. Subsequently, under 1869 Act, he was adjudicated bkpt. a second time. The assignee under the first bkpcy. afterwards issued a sequestration of the profits of his benefice, & the trustee in the second bkpcy. subsequently issued a similar sequestration:—*Held:* 1869 Act, s. 88, did not give the trustee's sequestration priority over the assignee's sequestration, the effect of the sect. being only to give priority to a sequestration issued by the trustee over one issued by an individual creditor in respect of a debt provable in the bkpcy.—*Re* MEREDITH, *Ex p.* CHICK (1879), 11 Ch. D. 731; 41 L. T. 246, C. A.

Annotation:—**Apld.** Lawrence *v.* Adams (1896), 75 L. T. 410.

7590. —— **Accrued after discharge.**]—On the application of the trustee of a beneficed clergyman the bishop of the diocese issued a sequestration, by virtue of which a portion was paid to debtor while performing the duties of the benefice under order of the bishop, & the residue, after paying thereout the costs & expenses of the sequestration, was handed over to his trustee. Debtor afterwards obtained an order of discharge, the whole of his property available for dividend, other than the money obtained by means of the sequestration, having been realised & distributed, but the sequestration was not relaxed by the bishop, the trustee having refused to take any steps to obtain the relaxation, on the ground that the sequestration ought not to be relaxed until the whole of the debts were satisfied. In an action by debtor against the trustee for an injunction to restrain him from receiving the residue of the income of the benefice, a declaration that debtor was entitled after his discharge to receive the income, & an order on the trustee to take steps to obtain the relaxation of the sequestration:—*Held:* the order of discharge did not entitle debtor to the income of his benefice.—LAWRENCE *v.* ADAMS (1896), 75 L. T. 410.

See, also, Part XVIII., Sect. 7, *ante.*

7591. Pew rents—Mortgage thereof void against trustee.]—L., a vicar, in consideration of an advance mortgaged the pew rents during his incumbency:—*Held:* the mtge. was void as against L.'s trustee.—*Re* LEVESON, *Ex p.* ARROWSMITH (1878), 8 Ch. D. 96; 47 L. J. Bcy. 46; 38 L. T. 547; 26 W. R. 600, C. A.

Annotations:—**Mentd.** Magdalen Hospital Governors *v.* Knotts (1878), 8 Ch. D. 709, C. A.; Vickers *v.* Selwyn (1903), 89 L. T. 747, D. C.; Wolfe *v.* Surrey County Council, Reeve *v.* Surrey County Council, [1905] 1 K. B. 439, D. C.

7592. Stipend as chaplain to workhouse.]—M., a clergyman, was adjudicated a bkpt. in the B. county ct. Bkpt., who was chaplain to the B. workhouse & workhouse infirmary, had the year before that of the order for administration executed an assignment of his stipend to secure repayment of a sum of money:—*Held:* during the continuance of the bkpcy. & of the office, the salary subject to the charge vested in the trustee as property of bkpt. within 1883 Act, s. 44, subject to the power of the ct. to make an order under s. 53 (2) appropriating the salary in the manner therein pointed out.—*Re* MIRAMS, [1891] 1 Q. B. 594; 60 L. J. Q. B. 397; 64 L. T. 117; 39 W. R. 464; 7 T. L. R. 309; 8 Morr. 59.

Annotations:—**Mentd.** Mogul S.S. Co. *v.* McGregor, Gow, [1892] A. C. 25, H. L.; Hyams *v.* Stuart King (1908), 77 L. J. K. B. 794, C. A.; Horwood *v.* Millar's Timber & Trading Co., [1916] 2 K. B. 44, D. C.

7593. Withdrawal of relation of sequestration—Power of trustee to agree to.]—*Re* BARRATT, No. 7587, *ante.*

See, generally, ECCLESIASTICAL LAW.

SECT. 15.—APPROPRIATION OF PORTION OF PAY OR SALARY, ETC.

See, now, 1914 Act, s. 51 (2), replacing 1883 Act, s. 53 (2).

7594. "In receipt of"—Part of salary deducted to repay advances.]—An actor was engaged by the manager of a theatre, under a written agreement for two years at a salary of £30 *per* week. Shortly

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after a receiving order had been made against the actor he made an agreement with the manager to advance money for the purchase of his debts, to repay which the manager deducted £20 a week from his salary :—*Held :* bkpt. was not " in receipt of " the salary of more than £10 *per* week within 1883 Act, s. 53.—*Re* SHINE, *Ex p.* SHINE, [1892] 1 Q. B. 522 ; 61 L. J. Q. B. 253 ; 66 L. T. 146 ; 40 W. R. 386 ; 8 T. L. R. 279 ; 36 Sol. Jo. 295 ; 9 Morr. 40, C. A.

Annotations :—**Mentd.** Holmes *v.* Millage (1893), 68 L. T. 205, C. A. ; *Re* Roberts, [1900] 1 Q. B. 122, C. A. ; Affleck *v.* Hammond, [1912] 3 K. B. 162, C. A. ; Hollinshead *v.* Hazleton, [1916] 1 A. C. 428, H. L. ; Hamilton *v.* Caldwell (1919), 88 L. J. P. C. 173, H. L.

7595. " Salary or income "—Actor.]—An actor was engaged by the manager of a theatre, under a written agreement for two years at a salary of £30 per week, but if without the consent of the manager he assigned or charged the amount payable, or did or suffered anything to deprive himself of the present enjoyment of it, the manager was at liberty to determine the agreement without notice. The actor having been adjudicated bkpt., an application was made that part of his earnings should be paid to the official receiver as his trustee in bkpcy. :—*Held :* the earnings were " salary or income "—*Re* SHINE, *Ex p.* SHINE, [1892] 1 Q. B. 522 ; 61 L. J. Q. B. 253 ; 66 L. T. 146 ; 40 W. R. 386 ; 8 T. L. R. 279 ; 36 Sol. Jo. 295 ; 9 Morr. 40, C. A.

Annotations :—**Consd.** Hollinshead *v.* Hazleton, [1916] 1 A. C. 428, H. L. **Refd.** Affleck *v.* Hammond, [1912] 3 K. B. 162, C. A. **Mentd.** Holmes *v.* Millage (1893), 68 L. T. 205, C. A. ; *Re* Roberts, [1900] 1 Q. B. 122, C. A. ; Hamilton *v.* Caldwell (1919), 88 L. J. P. C. 173, H. L.

7596. —— Commercial traveller.]—Where bkpt. was a commercial traveller at an annual salary of £100, paid weekly, the engagement being terminable at a week's notice :—*Held :* such bkpt. was in the receipt of a " salary," out of which the ct. had power to direct payment of a certain sum by monthly instalments to the trustee for the purpose of distribution amongst the creditors.—*Re* BRINDLE, *Ex p.* BRINDLE (1887), 56 L. T. 498 ; 35 W. R. 596 ; 4 Morr. 104, D. C.

Annotations :—**Apprvd.** *Re* Shine, *Ex p.* Shine, [1892] 1 Q. B. 522, C. A. **Refd.** *Re* Jones, *Ex p.* Lloyd, [1891] 2 Q. B. 231, D. C.

7597. —— Employee on piece work.]—Bkpt. was employed on " piece " work. For the convenience of his employers he was paid a fixed sum per week, & the difference was adjusted periodically :—*Held :* his earnings were not " salary or income."—*Re* HURRELL, *Ex p.* OFFICIAL RECEIVER (1895), 12 T. L. R. 133, D. C.

7598. —— Colonial judge's pension.]—Bkpt. was a retired colonial judge, who was entitled to a yearly pension for his past services, granted by the Secretary of State for the Colonies, & voted annually by the legislature of the colony :—*Held :* the pension was " income " subject to the power given to the ct. to determine how much should be set aside for the benefit of the bkpt.'s creditors.—*Re* HUGGINS, *Ex p.* HUGGINS (1882), 21 Ch. D. 85 ; 51 L. J. Ch. 935 ; 47 L. T. 559 ; 30 W. R. 878, C. A.

Annotations :—**Consd.** *Re* Hutton, *Ex p.* Benwell (1884), 14 Q. B. D. 301, C. A. **Distd.** Lucas *v.* Harris & Blair (1886), 3 T. L. R. 106, C. A. **Consd.** Hollinshead *v.* Hazleton, [1916] 1 A. C. 428, H. L. **Refd.** *Re* Mirams, [1891] 1 Q. B. 594 ; *Re* Pickard, *Ex p.* Official Receiver, [1912] 1 K. B. 397, D. C. **Mentd.** *Re* Saunders, *Ex p.* Saunders, [1895] 2 Q. B. 117, D. C. ; *Re* Elford, Elford *v.* Elford, [1910] 1 Ch. 814.

7599. —— Member of Parliament.]—The annual payment of £400 to members of Parliament under the resolution of the House of Commons of Aug. 10, 1911, is " salary or income," &, where bkpt. is a member of Parliament, the ct. may make an order appropriating a portion of his salary for the benefit of his creditors.—HOLLINSHEAD *v.* HAZLETON, [1916] 1 A. C. 428 ; 85 L. J. P. C. 60 ; 114 L. T. 292 ; 32 T. L. R. 177 ; 60 Sol. Jo. 139 ; [1916] H. B. R. 85, H. L.

7600. —— Professional man's prospective earnings.]—*Held :* the word " income " in 1869 Act, s. 90, applied only to an " income " *ejusdem generis* with a " salary," & did not enable the ct. to set aside for the benefit of the creditors of a professional man, who was an undischarged bkpt., any part of his prospective & contingent earnings in the exercise of his personal skill & knowledge.—*Re* HUTTON, *Ex p.* BENWELL (1884), 14 Q. B. D. 301 ; 54 L. J. Q. B. 53 ; 51 L. T. 677 ; 33 W. R. 242 ; *sub nom. Ex p.* HUTTON, 1 T. L. R. 148, C. A.

Annotations :—**Folld.** *Re* Jones, *Ex p.* Lloyd, [1891] 2 Q. B. 231, D. C. **Distd.** *Re* Shine, *Ex p.* Shine, [1892] 1 Q. B. 522, C. A. ; *Re* Rogers, *Ex p.* Collins (1893), 63 L. J. Q. B. 178. **Consd.** *Re* Roberts, [1900] 1 Q. B. 122, C. A. ; Affleck *v.* Hammond, [1912] 3 K. B. 162, C. A. **Refd.** *Re* Brindle, *Ex p.* Brindle (1887), 56 L. T. 498, D. C. ; Hollinshead *v.* Hazleton, [1916] 1 A. C. 428, H. L.

—— Personal earnings of bankrupt after adjudication & after-acquired property.]—*See* Sect. 7, subsects. 1, A. (*b*), & 3, *ante*.

—— Sequestration of ecclesiastical benefices.]—*See* Sect. 14, *ante*.

7601. —— Voluntary allowance.]—A voluntary allowance, to which bkpt. has no legal or equitable claim, is not " salary or income " & is not subject to an order of the Ct. of Bkpcy. directing payment of it, or any part, to the trustee, & it is immaterial whether bkpt. was in receipt of such allowance before the bkpcy., or whether it commenced subsequently.—*Re* WICKS, *Ex p.* WICKS (1881), 17 Ch. D. 70 ; 50 L. J. Ch. 620 ; 44 L. T. 836 ; 29 W. R. 525, C. A.

Annotations :—**Distd.** *Re* Huggins, *Ex p.* Huggins (1882), 21 Ch. D. 85, C. A. **Folld.** *Re* Webber, *Ex p.* Webber (1886), 18 Q. B. D. 111, D. C. **Distd.** Hollinshead *v.* Hazelton, [1916] 1 A. C. 428, H. L.

7602. —— —— " Compassionate allowance " from Indian Government.]—A voluntary " compassionate allowance " granted by the Secretary of State for India to an officer of the Indian army on compulsory retirement, to which the recipient has no claim or right, & which can be withdrawn at any time at the discretion of the Secretary of State, is not " income " & an order cannot be made for the payment of such allowance to the trustee of the recipient.—*Re* WEBBER, *Ex p.* WEBBER (1886), 18 Q. B. D. 111 ; 56 L. J. Q. B. 209 ; 55 L. T. 816 ; 35 W. R. 308 ; 3 T. L. R. 138 ; 3 Morr. 288, D. C.

Annotations :—**Distd.** *Re* Ward, *Ex p.* Ward, [1897] 1 Q. B. 266, C. A. **Mentd.** Hollinshead *v.* Hazleton (1915), 85 L. J. P. C. 60, H. L.

7603. —— Workman in colliery.]—Wages earned by a workman employed in a colliery are not " salary or income " & no order can be made under 1883 Act, s. 53, for payment of any part of such wages to the trustee of the person by whom the wages are earned.—*Re* JONES, *Ex p.* LLOYD,

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7601 i. " *Salary or income "—Sums which employer entitled to deduct but not in fact deducted.*]—Under an agreement between a commercial traveller & his employers, the latter were entitled to deduct a large yearly sum from his salary in discharge of his antecedent obligations to them, which sum they in fact did not deduct :—*Held :* an order under Irish 1857 Act, s. 51, could not be made against the sum which the employers voluntarily allowed bkpt., by waiving their strict rights.—*Re* STEVENSON (1897), 32 I. L. T. 15.—IR.

[1891] 2 Q. B. 231 ; 60 L. J. Q. B. 751 ; 64 L. T. 804 ; 40 W. R. 95 ; 7 T. L. R. 601 ; 8 Morr. 210, D. C.

7604. "Half pay"—"Gratuity or retired pay"—Retired officer liable to be recalled.]—A colonel in the regular army having voluntarily retired, received a "gratuity or retired pay" under Royal Warrant (Pay & Promotion), 1887, art. 1057. Under other articles of the same warrant he was liable to be recalled to serve in case of emergency. He was subsequently adjudicated a bkpt. :—*Held :* the ct. had jurisdiction to make such order as it thought just for the payment of part of such "gratuity or retired pay" to his trustee for the benefit of his creditors.—*Re* WARD, *Ex p.* WARD, [1897] 1 Q. B. 266 ; 66 L. J. Q. B. 310 ; 76 L. T. 37 ; 45 W. R. 329 ; 13 T. L. R. 166 ; 41 Sol. Jo. 228 ; 4 Mans. 23, C. A.

Annotation :—**Consd.** Hollinshead *v.* Hazleton, [1916] 1 A. C. 428, H. L.

7605. "Pension"—Charged on Navy estimates.]—*Held :* under 7 Geo. 4, c. 57, s. 19, it was competent to Insolvent Debtors Ct., with the consent of the Lords of the Admlty., to order payment to the assignee of a portion of a pension charged on the navy estimates, & granted to insolvent by the Crown, upon his being superseded in the office of advocate to the Ct. of Admlty., in consideration of ill health & length of time that he had been in the office.—*Re* BATTINE, *Ex p.* BATTINE (1833), 4 B. & Ad. 690 ; 110 E. R. 616 ; 1 Nev. & M. K. B. 579.

Annotations :—**Consd.** Spooner *v.* Payne (1849), 4 Exch. 138. **Refd.** R. *v.* Treasury Lords, *Ex p.* Hand (1836), 6 Nev. & M. K. B. 508. **Mentd.** Westmeath *v.* Westmeath (1834), 3 Knapp, 42.

7606. —— Granted by East India Co.]—The allowance given by East India Co. to an officer upon his retirement from service, does not, upon his bkpcy., pass to or vest in his assignees, inasmuch as from its nature the officer could not maintain an action against the co. to enforce the payment of the allowance, & the assignees could not have recourse to a remedy to which he, through whom they claim, was not entitled.—GIBSON *v.* EAST INDIA CO. (1839), 5 Bing. N. C. 262 ; 7 Scott, 74 ; 1 Arn. 493 ; 8 L. J. C. P. 193 ; 3 Jur. 56 ; 132 E. R. 1105.

Annotations :—**Consd.** *Ex p.* Napier (1852), 18 Q. B. 692. **Folld.** Innes *v.* East India Co. (1856), 17 C. B. 351. **Apld.** *Re* Keely, *Ex p.* Hawker (1872), 20 W. R. 322, L. JJ. **Distd.** Marchant *v.* Lee Conservancy Board (1873), L. R. 8 Exch. 290. **Consd.** *Re* Tufnell (1876), 3 Ch. D. 164 ; Grant *v.* Secretary of State for India (1877), 2 C. P. D. 445. **Distd.** Booth *v.* Trail (1883), 12 Q. B. D. 8. **Mentd.** Paine *v.* Strand Union (1846), 8 Q. B. 326 ; Secretary of State in Council of India *v.* Kamachee Boje Sahaba (1859), 7 Moo. Ind. App. 476, P. C. ; Salaman *v.* Secretary of State for India, [1906] 1 K. B. 613, C. A. ; Raphael S.S. *v.* Brandy (1911), 4 B. W. C. C. 307, H. L.

7607. —— Declared inalienable by Indian legislature.]—The ct. has jurisdiction to order payment to the trustee of a pension made inalienable by the Indian legislature. There is no rule of law that such an order should not be made.—*Re* SAUNDERS, *Ex p.* SAUNDERS, [1895] 2 Q. B. 424 ; 64 L. J. Q. B. 739 ; 73 L. T. 172 ; 59 J. P. 740 ; 44 W. R. 30 ; 11 T. L. R. 505 ; 39 Sol. Jo. 640 ; 2 Mans. 361 ; 14 R. 567, C. A.

Annotations :—**Consd.** Hollinshead *v.* Hazleton, [1916] 1 A. C. 428, H. L. **Mentd.** Knill *v.* Dumergue, [1911] 2 Ch. 199, C. A.

7608. "Compensation"—On abolition of wharfage rights.]—On the establishment of certain docks, an Act gave the proprietors of three ancient & free quays compensation on account of the exclusive trade they had enjoyed. One became bkpt. :—*Held :* the compensation passed to his assignees.—CHANDLER *v.* GARDINER (undated), cited in 17 Ves. at p. 338 ; 1 Rose, at p. 124 ; 34 E. R. 130, L. C.

Annotations :—**Refd.** Crutwell *v.* Lye (1810), 17 Ves. 335, L. C. ; Wright *v.* Fairfield (1831), 2 B. & Ad. 727.

7609. —— On abolition of office.]—An assistant comr. of bkpts., was awarded an annuity as a compensation on the abolition of the office. He subsequently became insolvent :—*Held :* the annuity passed over to the assignees.—SPOONER *v.* PAYNE (1852), 1 De G. M. & G. 383 ; 21 L. J. Ch. 791 ; 18 L. T. O. S. 321 ; 16 Jur. 367 ; 42 E. R. 599, L. C.

Annotations :—**Consd.** Lucas *v.* Harris (1886), 18 Q. B. D. 127, C. A. **Mentd.** Dent *v.* Dent (1867), L. R. 1 P. & D. 366.

7610. —— Lump sum "by way of additional allowance"—On retirement from civil service.]—An undischarged bkpt., who was in the Civil Service, on his retirement from the service was granted under Superannuation Act, 1909 (c. 10), a pension, & "by way of additional allowance," a lump sum in cash :—*Held :* the whole of the lump sum did not vest in the trustee for the benefit of creditors, but was "compensation granted by the Treasury" & must be dealt with in accordance with 1883 Act, s. 53.—*Re* LUPTON, *Ex p.* OFFICIAL RECEIVER, [1912] 1 K. B. 107 ; 81 L. J. K. B. 177 ; 105 L. T. 726 ; 28 T. L. R. 45 ; 56 Sol. Jo. 205 ; 19 Mans. 26, C. A.

7611. "Become due to bankrupt"—Voluntary allowance.]—*Held :* a yearly allowance which bkpt. received by way of gratuity from a relative could not be made applicable under 1861 Act, s. 139 or s. 159, towards payment of debts.—*Re* TOWNSHEND (LORD) (1862), 11 W. R. 194.

7612. Discretion of court.]—The ct. refused to make an order under 1883 Act, s. 53, where bkpt. was in receipt of a salary not exceeding £10 per week, & was paying £4 a week alimony under an order of the Divorce Div.—*Re* SHINE, *Ex p.* SHINE, [1892] 1 Q. B. 522 ; 61 L. J. Q. B. 253 ; 66

7608 i. *"Compensation"—Money appropriated by Act of Parliament as gratuity.*]—Money appropriated by Act of Parliament as a gratuity to bkpt. is not "compensation charged on the Consolidated Revenue" within 1898 Act, s. 61 (3), & does not belong to creditors.—*Re* PHILLIPS (1902), 2 S. R. N. S. W. 30.—**AUS.**

7612 i. *Discretion of court.*]—Insolvent holding a public appointment worth about £450 a year, filed his petition & sched., & consented to an order allocating £200 a year out of his salary towards payment of debts. An arrear of £156 having accrued in respect of the allocation order, a conditional order was obtained calling on insolvent to show cause why he should not pay that sum into ct. In reply, he claimed to have the amount allocated reduced :—*Held :* the question was the ability of insolvent to pay, & as persons with fixed incomes were entitled to no special favour, the motion must be refused.—*Re* MONS (1867), 1 I. L. T. Jo. 423.—**IR.**

7612 ii. ——.]—Bkpt., as "canvasser for traffic" of a railway co., of which he was an employee, was in receipt of a salary of £160 a year & £1 a week travelling expenses, & lived with his father rent free, but had a family of nine children to support. The petition had been presented by his wife in respect of arrears of alimony at the rate of 10*s.* a week, & the judge in bkpcy. made an order that he should pay £1 a fortnight out of his salary to the official assignees. On bkpt.'s evidence the effect would be to leave him only 11½*d.* a week for the actual support of each of his family :—*Held :* that order should stand, no sufficient reason being shown for interfering with the discretion exercised by the bkpcy. judge.—*Re* TOOMBE (BANKRUPT) (1910), 44 I. L. T. 117.—**IR.**

7612 iii. ——.]—In 1896 debtor was adjudged a bkpt. & paid two dividends, amounting to 1*s.* 4½*d.* in the pound ; in 1912 he made an affidavit in a remitting motion stating that his income was £220 a year, including £150 payable to him as clerk of petty sessions. The creditors applied for an order that the annual sum of £70, portion of the £150, should be paid by quarterly instalments to the assignees to be applied in payment of the debts of bkpt., & an order was made that bkpt. should pay £20 a year, without directing specifically that it should come out of his salary as petty sessions clerk :—*Held :* it was just & reasonable, having regard to the other income of bkpt., that the annual sum of £20 ought to be paid out of his salary as petty sessions clerk for the benefit of the creditors, & subject

Sect. 15.—*Appropriation of portion of pay or salary, etc.* *Sect.* 16: *Sub-sect.* 1.]

L. T. 146; 40 W. R. 386; 8 T. L. R. 279; 36 Sol. Jo. 295; 9 Morr. 40, C. A.

Annotations:—**Mentd.** Holmes *v.* Millage (1893), 68 L. T. 205, C. A.; *Re* Roberts, [1900] 1 Q. B. 122, C. A.; Affleck *v.* Hammond, [1912] 3 K. B. 162, C. A.; Hollinshead *v.* Hazleton, [1916] 1 A. C. 428, H. L.; Hamilton *v.* Caldwell (1919), 88 L. J. P. C. 173, H. L.

7613. ——.]—In making an order under 1883 Act, s. 53 the ct. has an absolute discretion, which will be exercised with regard to the facts of the case. Where bkpt. had no other means besides a pension of £330 a year, the ct., in its discretion, refused to order any part to be set aside.—*Re* SAUNDERS, *Ex p.* SAUNDERS, [1895] 2 Q. B. 424; 64 L. J. Q. B. 739; 73 L. T. 172; 59 J. P. 740; 44 W. R. 30; 11 T. L. R. 505; 39 Sol. Jo. 640; 2 Mans. 361; 14 R. 567, C. A.

Annotations:—**Consd.** Hollinshead *v.* Hazleton, [1916] 1 A. C. 428, H. L. **Mentd.** Knill *v.* Dumergue, [1911] 2 Ch. 199, C. A.

7614. ——.]—In making an order under 1883 Act, s. 53, for payment of part of bkpt.'s retired pay to his trustee the ct. took into consideration the position of bkpt. as a retired colonel, the fact that he was in bad health & had no means other than his retired pay of £420 a year to support himself, his wife & child, & ordered payment of £20 a year.—*Re* WARD, *Ex p.* WARD, [1897] 1 Q. B. 266; 66 L. J. Q. B. 310; 76 L. T. 37; 45 W. R. 329; 13 T. L. R. 166; 41 Sol. Jo. 228; 4 Mans. 23, C. A.

Annotation:—**Mentd.** Hollinshead *v.* Hazleton, [1916] 1 A. C. 428, H. L.

7615. —— **To sanction agreement between trustee & wife entitled to alimony.**]—Bkpt., a retired civil servant with a pension of £347 a year, had not complied with an order for payment of alimony. The ct. approved an agreement between the trustee & bkpt.'s wife, whereby in consideration of £50 *per annum* from the trustee the wife undertook not to enforce her rights under the order for alimony, & ordered £100 a year from the pension to be paid to the trustee, the remaining £50 to be applied for the benefit of the creditors.—*Re* YOUNG, *Ex p.* HAYDON (1898), 5 Mans. 85, C. A.

Effect of discharge on order appropriating pay or salary.]—*See* Sect. 7, sub-sect. 3, *ante*.

Power of court to commit for failure to comply with order for payment.]—*See* Part XXII., Sect. 1, sub-sect. 5, *post*.

SECT. 16.—CONTRACTS AND DISCLAIMER OF ONEROUS PROPERTY.

SUB-SECT. 1.—GENERAL EFFECT OF BANKRUPTCY ON CONTRACTS.

See, further, Sects. 7, 14 & 15, *ante*; AGENCY, Vol. I., pp. 691, 692; BUILDING CONTRACTS, ENGINEERS, & ARCHITECTS; CONTRACT; LANDLORD & TENANT; PARTNERSHIP; SALE OF GOODS; SALE OF LAND.

7616. Contract not discharged.]—Bkpcy. does not discharge a contract as a general proposition.—BROOKE *v.* HEWITT (1796), 3 Ves. 253; 30 E. R. 997, L. C.

Annotations:—**Consd.** Weatherall *v.* Geering (1806), 12 Ves. 504. **Folld.** Crosbie *v.* Tooke (1833), 1 My. & K. 431, L. C. **Mentd.** Buckland *v.* Papillon (1866), 15 L. T. 378, L. C.

7617. —— **General position of trustee.**]—Assignees in bkpcy. do not obtain the property of bkpt. by any contract between them & bkpt.; they take it by operation of law & enter into no covenant to indemnify bkpt. against the covenants in his leases. They may waive his leases, & so not become liable to the landlord at all: they may take to them subject only to such liability as attaches upon all assigns, that is a liability to be sued on such covenants as bind assigns during the time they retain that character; but where they cease to retain it their liability ceases, the privity of estate which alone makes them liable to be sued being determined (GRANT, M. R.)—WILKINS *v.* FRY (1816), 1 Mer. 244; 2 Rose, 371; 35 E. R. 665.

Annotations:—**Consd.** Levi *v.* Ayers (1878), 3 App. Cas. 842, P. C. **Mentd.** Fenn *v.* Craig (1838), 3 Y. & C. Ex. 216.

7618. —— **Right of contracting party to enforce performance.**]—A landlord agreed to grant a lease to A., his exors., administrators, & assigns. A. assigned his interest in the contract to B. &

to the consent in writing of the registrar of petty sessions clerks such sum should be paid to the official assignee.—*Re* M'AULIFFE (1913), 47 I. L. T. 146.—**IR.**

7612 iv. ——.]—Bkpt., whose estates had been sequestrated, continued to earn by service a salary:—*Held:* it was competent to pronounce an order ordaining him to pay to his trustee out of the income so earned, as & when received, what was held to be in excess of a suitable aliment for him, reserving right to the trustee, bkpt., & any other persons interested to apply further to the ct. in the event of any change of circumstances.—HAMILTON *v.* CALDWELL (1919), 88 L. J. P. C. 173; 56 Sc. L. R. 529; 2 S. L. T. 154, H. L.—**SCOT.**

a. *Enforcement of order.*]—Where an order had been made directing the payment of half bkpt.'s pension until 10s. in the pound had been paid to the creditors, & it appeared that the Govt. official, through whom the pension was paid, refused to pay over the money to any but bkpt., the ct. made a further order directing bkpt. either to execute such assurances as would enable the trustee to receive one-half of the pension or to pay one-half of it to the trustee himself, & in the meantime suspending his discharge.—*Re* MARTIN, 2 J. R. N. S. 43.—**N.Z.**

PART XX. SECT. 16, SUB-SECT. 1.

7616 i. *Contract not discharged—Agreement to account for goods sold—Price recovered after bankruptcy.*]—An agent took over a stock on consignment, under an agreement in writing, by which he was to account for goods sold as per price list supplied to him by the consignor, the profits over such price to belong to the agent:—*Held:* consignor was entitled to be paid in full, per price list, for goods sold by the agent before his insolvency, but the price of which was collected by his assignee subsequently.—SEHLBACH *v.* STEVENSON (1887), M. L. R. 3 Q. B. 391.—**CAN.**

7616 ii. —— *Contract to advance costs for percentage of sum recovered.*]—Contract to advance expenses of a law suit, on receiving a percentage on the sum recovered:—*Held:* not voided by the bkpcy. of the party, the advances being still secured.—RUCKER *v.* FISHER (1826), 4 Sh. (Ct. of Sess.) 438.—**SCOT.**

7616 iii. —— *Agreement to transfer property to third party.*]—Several persons having claims against a railway co. executed an agreement to deliver to G. the debentures of the co. held by them, on payment of the amounts shown opposite their respective names. The agreement was executed at G.'s request, but was not accepted nor acted upon by G., until after the insolvency & death of P., one of the signatories:—*Held:* an acceptance of the agreement by G. & a transfer of his rights thereunder to a third person, after the insolvency & death of P. could not bind P.'s estate.—SENÉCAL *v.* PAUZÉ (1889), 12 L. N. 330; 14 App. Cas. 637.—**CAN.**

7618 i. —— *Right of contracting party to enforce performance.*]—A vendor, who had merely a right to claim conveyance, sold his right to a farm. Thereafter he surrendered his estate as insolvent, without having obtained transfer *coram lege loci*:—*Held:* his trustee was bound to effect transfer in favour of the purchaser.—VAN AARDT *v.* HARTLEY'S TRUSTEE (1845), 2 Men. 135.—**S. AF.**

7618 ii. —— ——.]—A. sold land to B. Declarations of purchaser & seller were passed & the title deeds were handed over to B., who paid the purchase-money & entered into possession. A. then surrendered his estate without having passed transfers of the land to B.:—*Held:* B. was bound to deliver up the title deeds to A.'s trustee.—KELLAR'S TRUSTEE *v.* EDMEADES (1884), 3 S. C. 25.—**S. AF.**

7618 iii. *S. P.* OSMOND'S TRUSTEES *v.* HOFMEYER (1885), 4 S. C. 43.—**S. AF.**

7618 iv. *S. P.* NOTHNAGET'S TRUSTEES *v.* EKSTERN (1916), C. P. D. 386.—**S. AF.**

7618 v. —— ——.]—On Sept. 13, 1866, S. agreed to deliver, on account of K. at a railway station when wanted, six hundred boxes of cheese, at a certain rate per pound, & to keep same insured until wanted. The weight had not then been ascertained. Subsequently two warehouse receipts, dated respectively Sept. 21 & Oct. 9

then became bkpt. :—*Held :* the agreement for the lease was not annulled by the bkpcy. of the intended lessee, & B. on performing the conditions, had a right to enforce the agreement specifically, notwithstanding his assignor's bkpcy., & such right was not affected by a proviso, that in case of the bkpcy. of A. the landlord could re-enter & sell the benefit of the contract & the premises, & hold the proceeds, subject to his own claims, for the use of A.'s estate.—MORGAN *v.* RHODES (1834), 1 My. & K. 435 ; 1 Mont. & A. 214 ; 39 E. R. 746, L. C.

Annotation :—**Consd.** Buckland *v.* Papillon (1866), L. R. 1 Eq. 477.

7619. Assignees cannot take benefit of contract—Without taking burden.]—A. committed an act of bkpcy., & quitted England, having, previous to his act of bkpcy., become indebted, as indorser of a bill of exchange, to B. which was dishonoured & due notice thereof given. In A.'s absence, his wife made insurances, the broker being still a creditor for the premiums paid by him. B. having sued the drawer & obtained judgment, was induced by A.'s wife to take a bill in part payment indorsed by her for A. & to stay execution, upon depositing the policies, which being done, a loss happened. The bill not being paid, the broker accepted another for the amount, in his favour, upon the policies being delivered to him for A. with the consent of A.'s wife, & having received the money thereon, paid that bill, & deducted it in account with A.'s assignees, against whom a commission was issued after such payment :—*Held :* the assignees could not recover of B., for A.'s wife & the broker were their agents, & they could not take the benefit of the policies, effected by her, without taking the burden.—HOVIL *v.* PACK (1806), 7 East, 164 ; 3 Smith, K. B. 164 ; 103 E. R. 63.

7620. —— ——.]—By a marriage settlement, after reciting that the intended wife was possessed of £1,500 which the husband was to have for his own use as soon as the marriage should take effect, & that she had also a vested interest in the estate of testator, divisible on the death of a tenant for life, in consideration of the intended marriage, & of the sum of £1,500 then in the possession of the intended wife, & also of the vested interest, the husband covenanted that his heirs, exors., & administrators should, immediately after his decease, pay to the trustees of the settlement the sum of £4,000, to be held upon certain trusts for the wife & children of the marriage, but the deed contained a proviso that the heirs, exors., or administrators of the husband should pay all other debts, which the husband should owe at his death in preference to the £4,000, & that they should not be bound to pay the £4,000, unless the assets of the husband should be more than sufficient to pay all his other debts. The husband became a bkpt. before the death of the tenant for life, but he survived the tenant for life, & afterwards died before the wife's share was actually paid :—*Held :* the husband's assignees were not entitled to receive the wife's reversionary share under the will without performing the covenant.—CORSBIE *v.* FREE (1840), Cr. & Ph. 64 ; 5 Jur. 790 ; 41 E. R. 413, L. C.

7621. —— ——.]—In Dec., 1861, bkpt. contracted with W. to build a barge for him, to be paid for in bricks, the barge to be completed on June 5, 1862. Bkpt. hired a yard for a certain number of months, for the purpose of completing the contract, which period expired before the completion of the work, & W. then hired the yard. In June it was agreed by bkpt. in writing that the barge should be held by W. as a security for advances made by him. In July the bkpcy. took place. The advances made by W. exceeded the amount of work done & materials supplied by bkpt. :—*Held :* W. had a lien upon & was entitled to hold the barge, unless the assignees chose to complete the contract.—*Re* ATTWATER, *Ex p.* WATTS (1862), 1 New Rep. 170 ; 32 L. J. Bcy. 35 ; 7 L. T. 585 ; 9 Jur. N. S. 238, L. C.

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were given to K., one for three hundred & thirty, the other for two hundred & thirty boxes, signed by S. & specifying the weight of the cheese. S. became insolvent on Oct. 19 following, & K. became aware of it on the following day :—*Held :* even if the property did not pass before Sept. 21, the subsequent insolvency of S. did not affect K.'s right.—BANK OF MONTREAL *v.* MCWHIRTER (1867), 17 C. P. 506.—CAN.

7618 vi. —— —— *To what extent limited.*]—A sale of immovable property having been made by insolvent before his insolvency, & the trustee having called on the purchaser to complete the contract & pay instalments due to date of action :—*Held :* notwithstanding tender by the trustee in his action of transfer against payment of the price, deft. was not entitled to demand transfer on payment of the difference between the price & the amount of judgments obtained by the purchaser against insolvent before sequestration & capable of set-off *pro tanto* against the price, the *dominium* being in the insolvent estate against which the purchaser could only insist on damages for breach of contract to transfer.—NORDEN (SMITH'S TRUSTEE) *v.* NORDEN (1843), 2 Men. 128.—S. AF.

a. —— *Right of contracting party to retain rent falling due before bankruptcy—Until conveyance delivered.*]—The tenant under a lease exposed the reversion of the lease to sale, with the consent of the landlord, who acted as his agent.—The purchaser paid the price to the landlord, who failed to pay it over to the seller, or to deliver to the purchaser a valid discharge of the price, or a conveyance of the lease. The landlord was afterwards sequestrated & a judicial factor appointed on his estate. In an action at the instance of the judicial factor, against the purchaser, who had entered into possession for recovery of the arrears of his rent : —*Held :* the purchaser was entitled to retain the rents which fell due prior to the landlord's sequestration, until he got a valid discharge for the price, & a conveyance of the lease from the seller, but was bound to pay the rents which fell due subsequent to the sequestration.—MARTIN *v.* MARSHALL (1850), 12 Dunl. (Ct. of Sess.) 1172.—SCOT.

b. *Lease determined by insolvency —Unless previously assigned.*]—NIEUWOUDT *v.* SLAVIN & JOWELL (1896), 13 S. C. 58.—S. AF.

c. —— —— *Landlord liable to lessee's trustee for value of improvements.*]—PARKIN *v.* LIPPERT (1895), 12 S. C. 179.—S. AF.

d. —— *Notwithstanding previous mortgage.*]—P., S., & G. hired guano islands for a term, under a lease. P. & S. dissolved partnership, & S. pledged his interest in the lease to a bank. Upon the insolvency of S. :—*Held :* insolvent's share in the lease had ceased & determined, & the bank's right of pledge or mtge., ceased with the termination of insolvent's interest in the lease.—DE PASS *v.* COLONIAL GOVERNMENT (1886), 4 S. C. 383.—S. AF.

f. —— *Tenant's right to compensation for improvements.*]—Where a lease is prematurely brought to a close by the sequestration of the tenant, he has no claim for compensation for improvements on the subjects by which the landlord is *lucratus.*—WALKER *v.* M'KNIGHT (1886), 13 R. (Ct. of Sess.) 599.—SCOT.

7619 i. *Assignees cannot take benefit of contract—Without taking burden.*]—When goods are shipped for conveyance to a port, for an agreed freight, & bills of lading are signed, if the shippers become subsequently bkpt., their assignees cannot, before the sailing of the ship, insist upon redelivery of the goods, without paying the freight which would be due at the port of destination, & indemnifying the master against any claim respecting the bills of lading.—*Re* WEBSTER (1864), 17 Ir. Jur. 17.—IR.

7619 ii. —— ——.]—H. & Co. ha building contracts for erections at a hospital & asylum & applied to A. & Co., their timber merchants, for cash & materials to carry them on. A. & Co., in consideration of receiving orders on the treasurers of the asylum & hospital duly acknowledged by them, to receive the contract money, agreed to provide cash from time to time to complete the contracts. Under such arrangement they supplied cash till H. & Co. became insolvent. After the insolvency the official assignee finished the contracts & received on account of them £170 beyond what he laid out. A. & Co. sued the official assignee for the £170 as for money received to their use & obtained a verdict. A rule *nisi* to enter the verdict for deft. was discharged.—ANDERSON *v.* JACOMB, (OFFICIAL ASSIGNEE) (1863), 2 W. & W. 269.—AUS.

Sect. 16.—*Contracts and disclaimer of onerous property: Sub-sect.* 1.]

7622. Purchase by party becoming bankrupt—Preservation of vendor's lien.]—A vendor's lien in an estate for unpaid purchase-money, good against bkpt., is also good against his assignees.—GRANT *v.* MILLS (1813), 2 Ves. & B. 306; 35 E. R. 335.

Annotations:—**Folld.** *Re* Lightoller, *Ex p.* Peake (1816), 1 Madd. 346. **Consd.** Teed *v.* Carruthers (1842), 2 Y. & C. Ch. Cas. 31.

7623. —— —— **Payment by bill.**]—A vendor has a lien on the estate sold, for his purchase-money, though he has received bills from the vendee in payment of same, & though the vendee becomes bkpt.—*Re* LIGHTOLLER, *Ex p.* PEAKE (1816), 1 Madd. 346; 2 Rose, 455; 56 E. R. 128.

7624. —— —— **Payment by dishonoured bill.**]—Goods were sold under an invoice which expressed that they remained at rent. The purchaser subsequently accepted a bill drawn by the vendor for the price, which was negotiated by the vendor. Whilst the bill was running the purchaser sold a part which, by his direction, was delivered by the vendor to the sub-purchaser, whom the vendor charged with warehouse rent for the part, which he paid. Subsequently the purchaser became bkpt., & the bill was dishonoured:—*Held:* the assignee could not without paying the price maintain trover against the vendor for the residue of the goods, which had remained in his hands.—MILES *v.* GORTON (1834), 2 Cr. & M. 504; 4 Tyr. 295; 3 L. J. Ex. 155; 149 E. R. 860.

Annotations:—**Consd.** Griffiths *v.* Perry (1859), 1 E. & E. 680; *Re* Edwards, *Ex p.* Chalmers (1873), 8 Ch. App. 289, L. C. & L. JJ.; Grice *v.* Richardson (1877), 3 App. Cas. 319, P. C. **Refd.** Tanner *v.* Scovell (1845), 14 M. & W. 28. **Mentd.** *Re* McLaren, *Ex p.* Cooper (1879), 27 W. R. 518, C. A.

See, generally, Sect. 2, *ante.*

7625. —— —— ——.]—Testator devised freehold property to trustees, of whom bkpt. was one, upon trust to sell & divide the proceeds equally among his brothers & sisters, including bkpt. & his co-trustee. The *cestuis que trust,* in consideration of a specific sum stated in the deed to be paid to each of them, but which was in fact not paid, conveyed the estate to bkpt., who a few days afterwards gave each of the *cestuis que trust* two promissory notes for the payment of the money by instalments, but the notes were never paid:—*Held:* the *cestuis que trust* had a lien on the estate in the hands of bkpt.'s assignees, for the money still remaining unpaid.—*Re* DAVIS, *Ex p.* LATEY (1836), 2 Mont. & A. 609; 1 Deac. 557; 6 L. J. Bcy. 13, Ct. of R.

7626. —— —— ——.]—B. & Co. sold iron rails to a co. by a written contract, payment to be by buyers' acceptances of sellers' drafts against inspector's certificate of approval & wharfinger's certificate of each 500 tons being stacked ready for shipment. As the wharfinger's certificates were delivered, the co. accepted the drafts of B. & Co., which B. & Co. negotiated, but the rails remained in B. & Co.'s possession. Pltf. advanced money to the co. on the security of some of the wharfinger's certificates, which were handed over to him with a written memorandum. The co. became insolvent, & their acceptances were not paid. Pltf. filed a bill against B. & Co. & the receiver of the co., claiming a lien on the rails in the hands of B. & Co., in priority to their lien as vendors:—*Held:* the giving of the acceptances in pursuance of the contract was not an absolute payment, but conditional on the acceptances being met, & upon the insolvency of the acceptors the vendor's lien on the goods revived, the act of the vendor's having negotiated the bills making no difference.—GUNN *v.* BOLCKOW, VAUGHAN & CO. (1875), 10 Ch. App. 491; 44 L. J. Ch. 732; 32 L. T. 781; 23 W. R. 739, L. JJ.

Annotation:—**Mentd.** *Re* Defries, Eichholz *v.* Defries, [1909] 2 Ch. 423.

7627. —— —— **Sale on credit.**]—Pltf.'s servant delivered tobacco at bkpt.'s house on the same day that bkpt. had, at an earlier hour absconded to France. The servant had no order to demand the money:—*Held:* the sale was complete, & the property in the tobacco passed to bkpt.'s assignees.—HASWELL *v.* HUNT (1793–9), cited in 5 Term Rep. at p. 231; 101 E. R. 130, L. C.

Annotations:—**Consd.** Tooke *v.* Hollingworth (1793), 5 Term Rep. 215. **Refd.** Load *v.* Green (1846), 15 M. & W. 216.

7628. —— **Right to refuse delivery—Unless price tendered.**]—Under a contract for the sale of merchandise, goods were to be delivered in each of eleven months, payment to be by cash fourteen

7622 i. *Purchase by party becoming bankrupt—Preservation of vendor's lien.*]—Q. sold the furniture, etc., of hotel premises to L., who assigned his estate for the benefit of his creditors. Q. & L.'s assignees then entered into the following agreement: "Sold by L.'s assignees to Q. all the furniture, etc., Q. to give bills at three, six, nine, & twelve months. Property in goods bought to pass to Q. only upon payment of last bill." The greater portion of the goods so sold was delivered to Q., who neither gave the bills nor paid any portion of the price. Q. then surrendered his estate:—*Held:* the goods delivered to Q. belonged to L.'s assignees.—QUIRK'S TRUSTEES *v.* LIDDLE & CO.'S ASSIGNEES (1885), 3 S. C. 322.—S. AF.

7622 ii. —— ——.]—The vendor of certain sheep marked them, in order that, in case of the death of any of them, the risk might not fall on him, & kept them in his possession. The purchaser having become insolvent:—*Held:* whether the sale was on credit or for cash, the trustee was not entitled to recover the sheep or their value without paying the price.—TRUTER *v.* JOUBERT'S TRUSTEE 1899), 16 S. C. 375.—S. AF.

7622 iii. ——.]—Where goods are sold on credit & delivery thereof is made to the purchaser, the *dominium* in the goods vests absolutely in him, & the seller is not entitled, on the insolvency of the purchaser while the price is unpaid, to any preference in the insolvent estate over the proceeds derived from such goods.—SEQUESTRATOR COMMISSIONER *v.* VOS (1828), 1 Men. 286.—S. AF.

7622 iv. ——*Conditional sale.*]—An assignment for the benefit of creditors cannot operate to divest a vendor, under a conditional sale agreement, of the ownership of the goods comprised in such agreement prior to the fulfilment of the condition.—*Re* HODGES, DEERE (JOHN) PLOW CO. *v.* TRUSTS & GUARANTEES CO., LTD., [1917] 1 W. W. R. 317; 11 Alta. L. R. 198.—CAN.

7622 v. —— ——*Resale.*]—Goods were sold, & the price paid, but they were allowed to remain in the custody of the seller. They were resold. The subsequent purchaser intimated the second sale to the original seller, but not till after the first purchaser had become bkpt., & the seller had arrested in his own hands, in security of a general balance due by the first purchaser. The trustee in the sequestration made no claim to the goods:—*Held:* the seller's arrestment in his own hands was preferable to the second purchaser's intimation, the seller's right of retention in security of a general balance as against the trustee in the sequestration was not cut down by Mercantile Law Amendment (Scotland) Act, 1856 (c. 60).—WYPER *v.* HARVEY (1861), 23 Dunl. (Ct. of Sess.) 606.—SCOT.

7622 vi. —— —— ——.]—On the sale of a factory & machinery, it was stipulated that, until the purchase-money should be fully paid, the vendees were not to remove the machinery. The vendors afterwards executed a conveyance to the purchasers, who executed a mtge. which purported to be of the factory only, & did not mention the machinery. The purchasers resold, the vendee having notice of the covenant, & the vendee subsequently became insolvent:—*Held:* the covenant against removing the machinery remained in force, & the vendee's assignee was not at liberty to remove the machinery.—CRAWFORD *v.* FINDLAY (1871), 18 Gr. 51.—CAN.

7628 i. ——*Right to refuse delivery—Contract assigned by insolvent.*]—A., the purchaser of saw logs to be delivered at specified times, assigned the contract, & the vendor delivered one year's supply of the logs to the assignee. Afterwards A., becoming insolvent, absconded, & the vendor refused to complete the contract, asserting a right to stop the goods *in transitu,* or to retain them in consequence of A.'s

days after delivery. All the lots but the tenth were paid for, when a meeting was held of the purchaser's creditors, & he declared himself insolvent. On the next day, the vendors wrote that they refused to deliver any more goods, giving no reasons. The purchaser having been adjudicated bkpt. on the declaration of insolvency :—*Held :* although neither the non-payment of the tenth instalment nor the bkpcy. entitled the vendors to rescind the contract, yet after the declaration of insolvency they had a right to refuse to deliver any more goods, until the price of both the tenth & eleventh instalments had been tendered, & the letter refusing to deliver did not excuse the trustee from tendering.—*Re* EDWARDS, *Ex p.* CHALMERS (1873), 8 Ch. App. 289 ; 42 L. J. Bcy. 37 ; 28 L. T. 325 ; 21 W. R. 349, L. C. & L. JJ.

Annotations :—**Folld.** Morgan *v.* Bain (1874), L. R. 10 C. P. 15. **Consd.** *Re* Phœnix Bessemer Steel Co., *Ex p.* Carnforth Hæmatite Iron Co. (1876), 4 Ch. D. 108, C. A. **Refd.** Tolhurst *v.* Associated Portland Cement Manufacturers (1900), Ltd., [1902] 2 K. B. 660, C. A. **Mentd.** *Re* Nathan, *Ex p.* Stapleton (1879), 10 Ch. D. 586, C. A. ; Berry *v.* Halifax Commercial Banking Co., [1901] 1 Ch. 188.

7629. —— ——.]—Defts., on Feb. 5, sold to pltfs. 200 tons of iron, to be delivered 25 tons monthly at £5 per ton, net cash, or by four months' bill with 2*s.* 6*d.* per ton added. By the usage of trade no delivery was due under the contract till Apr. 1. On Mar. 12 pltfs. found themselves to be insolvent, & they gave notice of the fact to defts. On Mar. 16 they filed a petition in the bkpcy. ct. for liquidation by arrangement or composition. The usual course of business under previous contracts between the parties of a similar description was for defts. to deliver upon such contracts without further demand of delivery. No delivery was made by defts. or claimed by pltfs. in Apr. On Apr. 5, at the first meeting of the creditors, a resolution was passed to accept a composition of 5*s.* in the pound. Though the existence of the contract was mentioned at the meeting, no mention was made of it in the written statement of pltfs.' affairs. No step was taken in relation to the contract by either party until May 13, when the market for iron having risen, pltfs. claimed the delivery of iron in fulfilment of the contract, offering & being ready to pay cash for it. Defts. replied, stating that pltfs. having failed to perform their part of the contract there was an end to it. Pltfs. thereupon brought an action against defts. for non-delivery of the iron :—*Held :* there had been a rescission of the contract before May 13, the conduct of pltfs. having been such as to justify defts. in the belief that pltfs. intended to abandon the contract upon their insolvency, & there being evidence that defts. in such belief had likewise abandoned it.—MORGAN *v.* BAIN (1874), L. R. 10 C. P. 15 ; 44 L. J. C. P. 47 ; 31 L. T. 616 ; 23 W. R. 239.

Annotations :—**Refd.** *Re* Phœnix Bessemer Steel Co., *Ex p.* Carnforth Hæmatite Iron Co. (1876), 4 Ch. D. 108 ; *Re* Nathan, *Ex p.* Stapleton (1879), 10 Ch. D. 586, C. A. ; Tolhurst *v.* Associated Portland Cement Manufacturers (1900), Associated Portland Cement Manufacturers (1900), *v.* Tolhurst, [1902] 2 K. B. 660, C. A. **Mentd.** Berry *v.* Halifax Commercial Banking Co., [1901] 1 Ch. 188 ; Workman, Clark *v.* Lloyd Brazileño, [1908] 1 K. B. 968, C. A.

7630. —— ——.]—The C. Iron Co. in Oct., 1874, contracted to supply the P. Steel Co. with iron at a certain price, to be delivered in monthly instalments & to be paid for, as to some, by bills at four months, & as to the rest, by cash at a certain length of credit. The instalments were delivered till the month of Feb., 1875, inclusive, in which month the purchasing co. called a meeting of their principal creditors, & stated that they were carrying on the business at a loss & were short of working capital, & asked for an extension of credit in their existing contracts, which was refused them. The selling co. then refused to deliver any more iron except upon immediate cash payments, & in consequence of that refusal the purchasing co. gave notice to rescind the contract. The purchasing co. continued to carry on the business after the meeting, & endeavoured to raise fresh capital by issuing preference shares, but in June, 1875, they passed a resolution for winding up. The selling co. claimed to prove for damages for breach of the contract against the estate of the purchasing co. :—*Held :* there was no such declaration of insolvency at the meeting in Feb. as to justify the selling co. in refusing to deliver iron except for cash payments, & the purchasing co. had a right to rescind the contract, & the claim for damages should be dismissed.

In order to justify the vendors in such a case in exercising their right of refusal to deliver, there must be such proof or admission of the insolvency of the purchasers at the time as amounts to a declaration of intention not to pay for the goods.—*Re* PHŒNIX BESSEMER STEEL CO., *Ex p.* CARNFORTH HÆMATITE IRON CO. (1876), 4 Ch. D. 108 ; 46 L. J. Ch. 115 ; 35 L. T. 776 ; 25 W. R. 187 C. A.

Annotations :—**Consd.** Mersey Steel & Iron Co. *v.* Naylor (1882), 9 Q. B. D. 648, C. A. **Mentd.** Johnstone *v.* Milling (1886), 54 L. T. 629, C. A.

See, generally, COMPANIES ; SALE OF GOODS.

7631. —— **Endeavour to convert sale into hiring agreement.**]—A. & B. contracted for the purchase by B. of a billiard table, the price to be paid by instalments. The table was delivered, & part of the price paid. B. having failed to pay some of the instalments as they became due, was induced by A. to sign the following agreement for the hire of the table at a monthly rent : " This agreement is signed for A.'s satisfaction, & will become null & void on B. carrying out the original agreement." Upon the bkpcy. of B. the trustee sold the table & received the proceeds :—*Held :* the trustee was entitled to the proceeds of the sale, on the ground that the agreement for the purchase was not abrogated by the agreement for hire, & the table, being the property of bkpt., passed to the trustee. —*Re* LLOYD, *Ex p.* ORME (1878), 38 L. T. 328.

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insolvency. The assignee commenced an action at law in A.'s name against the vendor, in which he recovered judgment, & a bill by the vendor to restrain proceedings at law was dismissed with costs.—WAIT *v.* SCOTT 1857), 6 Gr. 154.—**CAN.**

g. —— *Right to require return of goods.*]—On Mar. 5 & 11 goods were delivered by merchants to a trader, who, on Mar. 14, presented a petition for arrangement & was granted protection on the same date. The merchants, alleging that the trader was aware for twelve months that he was in a state of insolvency, that he knew when the goods were delivered he was unable to pay for them, & that he concealed his financial position from the merchants, applied for an order for the return of the goods so supplied, or in the alternative for payment for same in full :—*Held :* the ct. had no jurisdiction to make such an order.—*Re* ARRANGING DEBTOR (1912), 46 I. L. T. 226.—**IR.**

k. —— ——.]—An application was made by the vendor of goods, which were sold to bkpt. on Sept. 29, & delivered on Oct. 3, for their return. The application was refused, as there was no evidence that bkpt. was insolvent when he entered into the transaction.—*Re* O'CONNOR (1873), 8 I. L. T. Jo. 64.—**IR.**

l. —— ——.]—The terms of a contract of sale of flax were contained in the following sale-note :—" We confirm sale to you of circa thirty tons Kashin Seretz flax at £30 10*s.* per ton. Payment by draft at three months." The goods were delivered on Aug. 4. On the previous day, Aug. 3, the buyers had found their position critical, & on the 5th they decided to stop payment. No invoice or bill of acceptance had then been sent, & in consequence of the suspension none were sent :—*Held :* the property passed by delivery to bkpts. & fell under their sequestration which subsequently took place.—CLARKE & CO. *v.* MILLER & SON'S TRUSTEE (1885), 22 Sc. L. R. 685.—**SCOT.**

Sect. 16.—*Contracts and disclaimer of onerous property: Sub-sects.* 1, 2 & 3.]

7632. —— Sub-contract—Bankruptcy of principal contractor.]—Contractors for the erection of steel tanks to be erected on the purchasers' premises, to be paid for after completion, employed pltf. as a sub-contractor to erect, & fix the tanks, he also to be paid a smaller price after completion. Pltf. had nearly finished the erection of one tank when the contractors became insolvent. The tanks when completed would not be fixtures. The pltf. agreed to complete the contracts:—*Held:* as no property in the tanks had passed, & as on completion pltf. could not be bound to hand over the tanks, except on having his purchase-money paid or secured by a first charge on the price to be paid to the contractors, the amount payable to the contractors was charged with the payment to the sub-contractor.—BELLAMY *v.* DAVEY, [1891] 3 Ch. 540; 60 L. J. Ch. 778; 65 L. T. 308; 40 W. R. 118; 7 T. L. R. 725.

Annotation:—**Distd.** Prichett Co. *v.* Currie, [1916] 2 Ch. 515, C. A.

SUB-SECT. 2.—WHAT CONTRACTS PASS TO TRUSTEE AND MAY BE ADOPTED.

7633. Undertaking by father to pay son annuity—Bankruptcy of son.]—Where a father on his son's marriage covenanted to pay his son £15 a year during the father's life, & the son became bkpt.:—*Held:* the creditors were not entitled to the benefit of the agreement.

An assignee under a Bkpt. stat. is not entitled to have the performance of an agreement made with bkpt. (*per* CUR.).—MOYSES *v.* LITTLE (1690), 2 Vern. 194; 23 E. R. 726.

Annotation:—**Consd.** Whitworth *v.* Davis (1813), 1 Ves. & B. 545.

7634. Contract by bankrupt to take others as partners—On payments by instalments.]—A sole trader agreed, in consideration of a sum payable by instalments, to take two persons into partnership with him for a period of eighteen years, & became bkpt. five months after the commencement of the partnership, when only one instalment was due:—*Held:* his assignees were entitled, at the respective periods, to receive the remaining instalments.—AKHURST *v.* JACKSON (1818), 1 Swan. 85; 1 Wils. Ch. 47; 36 E. R. 308.

Annotations:—**Refd.** Bury *v.* Allen (1845), 1 Coll. 589. **Mentd.** Burdon *v.* Barkus (1862), 4 De G. F. & J. 42, L. JJ. Atwood *v.* Maude (1868), 3 Ch. App. 369, L. C. & L. J.

7635. Contract to return bill drawn by bankrupt against goods—On return of goods to bankrupt—Performance by bankrupt.]—Bkpt., after an act of bkpcy., contracts with a factor, to whom he has delivered goods for sale, & who has accepted a bill upon the strength of the goods, to return the bill if he will return the goods, & does return the bill; the assignees may adopt this contract & recover against the factor, for non-delivery of the goods.—BUTLER *v.* CARVER (1818), 2 Stark. 433.

Annotation:—**Mentd.** Godmanchester Corpn. *v.* Phillips (1836), 4 Ad. & El. 550.

7636. Deposit in England of title deeds of Scottish estate—No lien recognised by law of Scotland.]—Bkpts. deposited with a creditor the title deeds of real estate in Scotland, accompanied by a written agreement to secure the payment of the general balance, both parties being resident in England, where the transaction itself took place. By the law of Scotland, no lien or equitable mtge. on real property was created by such a deposit:—*Held:* the contract being made in England, by contracting parties domiciled there, & England being also the domicil of the assignees under the bkpcy., the estate was charged with the equitable mtge., & the assignees were bound to pay to the creditor the amount of the proceeds of the sale of the estate.—*Re* COURTNEY, *Ex p.* POLLARD (1840), 4 Deac. 27; Mont. & Ch. 239, L. C.; *subsequent proceedings*, 1 Mont. D. & De G. 264, Ct. of R.

Annotations:—**Distd.** Waterhouse *v.* Stansfield (1851), 9 Hare, 234. **Expld.** Norton *v.* Florence Land & Public Works Co. (1877), 38 L. T. 377. **Distd.** *Re* Hart, *Ex p.* Fletcher (1878), 26 W. R. 843, C. A. **Consd.** Duder *v.* Amsterdamsch Trustees Kantoor, [1902] 2 Ch. 132; Bank of Africa *v.* Cohen, [1909] 2 Ch. 129, C. A. **Refd.** *Re* Richardson, *Ex p.* Richardson (1839), 3 Deac. 496, Ct. of R.; *Re* Hawthorne, Graham *v.* Massey (1883), 23 Ch. D. 743; British South Africa *v.* De Beers Consolidated Mines, [1910] 1 Ch. 354. **Mentd.** Morrison *v.* Morrison (1855), 2 Sm. & G. 564; British South Africa Co. *v.* De Beers Consolidated Mines, [1910] 2 Ch. 502, C. A.

7637. Agreement for tenancy—Word "assigns" omitted.]—The omission of the word "assigns" from an agreement for a tenancy for three years does not deprive the assignee of bkpt. of his right of election to take the premises.—*Re* BARKER (1863), 7 L. T. 724.

7638. Option to take lease—Word "assigns" omitted.]—A person entitled to leasehold premises for a long term of years agreed to underlet them to a tenant for three years, & whenever called upon to do so by the tenant, to grant to him a lease for three years, seven years, or the remainder of the term that he had it in his power to grant, such lease to contain all the usual covenants for protecting the interests of the grantor. The three years expired without the option being exercised, but the tenant continued in possession until he became bkpt., & his interest in the premises was sold by his assignee to a purchaser:—*Held:* bkpt. had such an interest in lands, as passed to his assignee, & such interest was not prevented from so passing by the absence of the word "assigns" in the agreement.—BUCKLAND *v.* PAPILLON (1866), 2 Ch. App. 67; 36 L. J. Ch. 81; 15 L. T. 378; 12 Jur. N. S. 992; 15 W. R. 92, L. C.

7632 i. —— *Sub-contract.*]—Goods having been sold on credit to be delivered on demand, the buyer, without having taken delivery, resold them to a party, who requested the seller to hold to his order. The seller made an entry in his books of the transfer, but returned no answer to the request. During the currency of the credit the first buyer became bkpt.:—*Held:* the silence of the seller imported acquiescence in the sub-sale, & he had thereby barred himself from retaining the goods.—FLEMING *v.* SMITH & CO. (1881), 18 Sc. L. R. 419.—SCOT.

m. *Sale by party becoming bankrupt—Property delivered but not transferred.*]—Where the estate of the vendor of immovable property has been sequestrated after payment of part of the purchase price & delivery of possession to the purchaser, but not before transfer *coram lege loci*, the *dominium* vests in insolvent's trustee for the benefit of his creditors.—HARRIS *v.* BUISSINNE'S TRUSTEES (1840), 2 Men. 105, 113.—S. AF.

n. —— ——.]—A shareholder in a joint-stock co., after having sold his shares & received the purchase price & delivered the scrip, duly ceded, surrendered his estate before the purchaser had taken transfer of the shares to himself in the books of the co.:—*Held:* the shares were not assets vested in the trustee of the seller's insolvent estate.—MCGREGOR'S TRUSTEES *v.* SILBERBAUER (1891), 9 S. C. 36.—S. AF.

o. —— *Judgment to pass transfer but property not transferred.*]—A judgment of a competent ct. for specific performance, *i.e.*, to pass transfer in favour of pltf., as purchaser, does not, on sequestration of deft.'s estate supervening before transfer is passed, vest the ownership in the thing sold in pltf., nor give him any right to compel the trustee of the sequestrated estate to pass transfer.—LEVITON & SON *v.* DE KLERK'S TRUSTEE (1914), C. P. D. 685.—S. AF.

PART XX. SECT. 16, SUB-SECT. 2.

7637 i. *Agreement for tenancy—Accommodation of bankrupt.*]—Assignees are not entitled to the specific execution of a contract for a lease, entered into with a view to the personal accommodation of bkpt.—FLOOD *v.* FINLAY (1811), 2 Ball & B. 9.—IR.

Annotations :—**Folld.** Mason *v.* Schuppisser (1899), 81 L. T. 147. **Apprvd.** Tolhurst *v.* Associated Portland Cement Manufacturers (1900), Ltd., [1903] A. C. 414, H. L. **Mentd.** County Hotel & Wine Co. *v.* L. & N. W. Ry. Co., [1918] 2 K. B. 251.

7639. Contract for purchase of goods on credit—On payment of price.]—When the purchaser of goods sold on credit becomes bkpt. before the vendor has parted with the possession of the goods, the trustee in the bkpcy. has a right to elect to complete the contract by paying the agreed price in cash within a reasonable time.—*Re* NATHAN, *Ex p.* STAPLETON (1879), 10 Ch. D. 586 ; 40 L. T. 14 ; 27 W. R. 327, C. A.

Annotations :—**Consd.** Pitts *v.* La Fontaine (1880), 6 App. Cas. 482, P. C. **Mentd.** *Re* Mackenzie, *Ex p.* Hertfordshire, [1899] 2 Q. B. 566, C. A. ; Tolhurst *v.* Associated Portland Cement Manufacturers (1900), Ltd., [1902] 2 K. B. 660, C. A.

7640. Contract cancelled by purchaser—After commission against vendor—Before second commission against vendor.]—Pltf. contracted to buy land from the assignees of bkpt., & paid a deposit to deft., an auctioneer. The commission was afterwards superseded, whereupon pltf. abandoned his purchase & claimed the return of the deposit. Under a second commission the same assignees were chosen :—*Held :* pltf. having given notice that he abandoned his purchase pending the first commission, the contract was at an end.—BARTLETT *v.* TUCHIN (1815), 6 Taunt. 259 ; 1 Marsh. 583 ; 128 E. R. 1034.

Annotation :—**Mentd.** Smallcombe *v.* Olivier (1844), 13 M. & W. 77.

7641. Lease abandoned by bankrupt before bankruptcy—Agreement for development of mining property by bankrupt & others jointly.]—L., M., & resp. were jointly interested in a mining property. L. wrote to resp. that he was unable to contribute anything to the expenses of developing the property & that M. & resp. could do what they liked with it. He subsequently became bkpt. Resp. developed the property by his own exertions, & at his own expense, & sold it for a considerable sum. The official assignee under L.'s bkpcy. claimed a share of the purchase-money :—*Held :* there was evidence of acts amounting to an agreement by L. to abandon his interest & to license M. & resp. to continue the adventure at their own risk, & his estate had no claim on the purchase-money.—PALMER *v.* MOORE, [1900] A. C. 293 ; 69 L. J. P. C. 64 ; 82 L. T. 166, P. C.

Annotation :—**Mentd.** Masters *v.* Fraser (1901), 66 J. P. 100.

7642. Contract of personal nature—Undertaking by bankrupt to provide stabling, carmen, & drivers for horses.]—A declaration set out an agreement between pltf. & P., that pltf. should, for eleven years from Mar. 1, 1869, supply P. with fifty horses suitable for his business of general agent & railway carrier, providing food, etc., & P. providing stabling, pltf. to have the care of the horses & P. to provide carmen & drivers. The declaration then alleged that P. became bkpt., that defts. were his assignees in bkpcy., that they had "accepted & adopted the contract as part of the estate & effects of P. as such bkpt.," & charged a breach of the agreement by refusing to take & pay for the horses :—*Held :* the contract was of too personal a character to pass to the assignees, even assuming an adoption by assignees of bkpt.'s contract possible.—JACKSON *v.* SWARBRICK, [1870] W. N. 133.

7643. —— Personal services.]—Unexecuted contracts for personal services do not vest in the trustee.

If at the date of the bkpcy. a sum of money is due in respect of services rendered under the contract, the trustee & not bkpt. will take the money. But as to future services bkpt. can sue for his remuneration under the contract, subject only to the right of the trustee to intervene & claim the funds of the litigation (COZENS-HARDY, L.J.).—BAILEY *v.* THURSTON & CO., LTD., [1903] 1 K. B. 137 ; 72 L. J. K. B. 36 ; 88 L. T. 43 ; 51 W. R. 162 ; 19 T. L. R. 75 ; 47 Sol. Jo. 91 ; 10 Mans. 1, C. A.

Annotations :—**Apprvd.** Hamilton *v.* Caldwell (1919), 88 L. J. P. C. 173, H. L. **Refd.** Affleck *v.* Hammond, [1912] 3 K. B. 162, C. A.

See, also, Sect. 7, sub-sect. 1, A. (*b*), *ante.*

7644. —— Undertaking by bankrupt to publish book.]—A publisher contracted to publish a book on the terms that he should receive half the profits. On his bkpcy. :—*Held :* the contract did not constitute a partnership, & the right to publish was personal to bkpt. & did not pass to his trustee.—LUCAS *v.* MONCRIEFF (1905), 21 T. L. R. 683.

7645. —— Contract by bankrupt to procure subscriptions for shares.]—A contract to procure subscriptions for shares in a limited co. is not a contract for personal service which is terminated by death or bkpcy., but passes to the trustee of deceased debtor, whose estate is being administered according to the law of bkpcy.—*Re* WORTHINGTON, *Ex p.* PATHÉ FRÈRES, [1914] 2 K. B. 299 ; 83 L. J. K. B. 885 ; 110 L. T. 599 ; 21 Mans. 119, C. A.

—— Rights of action in regard to.]—*See* Part XXI., *post.*

SUB-SECT. 3.—WHAT AMOUNTS TO ADOPTION.

7646. Lease—General rule—Must be act evidencing unequivocal intention to take lease.]—The assignees of bkpt. are not liable as assignees of the term, unless they have done some act which unequivocably indicates to the lessor that they have elected to take the benefit of the lease.—GOODWIN *v.* NOBLE (1857), 8 E. & B. 587 ; 27 L. J. Q. B. 204 ; 4 Jur. N. S. 208 ; 120 E. R. 219.

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p. *Contract that railway stock should be bankrupt's property—If he could give it marketable value.*]—Part of insolvent's assets was railway stock, obtained by him on a contract that he was to retain one-half, if he could give the stock a marketable value, but that if he could not do so within a certain time, extending beyond the period of the insolvency proceedings, the transaction was to be void, & he was to retransfer :—*Held :* a valid executory contract, which passed as such on insolvency to the assignee.—MCGEE *v.* CAMPBELL (1882), 2 O. R. 130.—CAN.

r. *"Actionable claim."*]—Property under a contract, which an assignor can pass to an assignee, is an "actionable claim" within Transfer of Property Act, s. 130, & would, under Indian Insolvent Act, s. 7, vest in the official assignee on the insolvency of the assignor.—JAFFER MEHAR ALI *v.* BUDGE-BUDGE JUTE MILLS CO. (1906), I. L. R. 34 Calc. 289.—IND.

PART XX. SECT. 16, SUB-SECT. 3.

7646 i. *Lease—General rule—Must be act evidencing unequivocal intention to take lease.*]—20 & 21 Vict. c. 60, s. 268, does not vest bkpt.'s lease in his assignees so as to make them liable to its covenants & conditions before election, even though in possession.—*Re* ELLIS (1864), 17 Ir. Jur. 19.—IR.

7646 ii. —— —— ——.]—Leasehold property does not vest in trustees in arrangement, until they have elected to take the premises.—*Re* SOMERVILLE (1878), 1 L. R. Ir. 293.—IR.

7646 iii. —— —— ——.]—A tenant from year to year of premises became an insolvent in 1871, but no trade assignee was appointed, & it did not appear that the official assignees had elected to take the tenancy :—*Held :* the tenancy from year to year did not pass to the official assignees by the mere act of filing the petition, but remained in insolvent subject to the right of the assignees to elect to take the tenancy, &, in the absence of evidence of any such election by the assignees, insolvent was entitled to recover possession of the premises.—HANWAY *v.* TAYLOR (1873), I. R. 8 C. L. 254.—IR.

7646 iv. —— —— ——.]—When a tenant of land owing arrears of rent takes the benefit of 11 & 12 Vict., c. 21, the official assignee must elect, & express his election to take the land *cum onere*, otherwise he acquires no interest in it.—CHINNA SUBBARAYA MUDALI *v.* KANDASVAMI REDDI (1876), I. L. R. 1 Mad. 59.—IND.

7646 v. —— —— ——.]—A., who

Sect. 16.—*Contracts and disclaimer of onerous property: Sub-sect.* 3.]

Annotations:—**Distd.** Williams *v.* Taylor (1869), 21 L. T. 612. **Refd.** *Re* Skeen, *Ex p.* Sykes (1858), 32 L. T. O. S. 19; Bradshaw *v.* James (1869), 17 W. R. 1010; White *v.* Hunt (1870), 23 L. T. 559; Titterton *v.* Cooper (1882), 46 L. T. 870, C. A.

7647. —— —— ——.]—By lease, dated Mar. 8, 1866, pltf. demised a house & premises to R. for seven years, at £600 a year, payable quarterly on June 8, Sept. 8, Dec. 8, & Mar. 8. On Mar. 25, 1869, R. filed a petition for adjudication of bkpcy., which was subsequently annulled on Apr. 15, on which day R. was adjudicated a bkpt. on a creditors' petition, under which, on May 7, defts. were appointed assignees, & at a meeting of creditors on the same morning it was resolved, pursuant to 1861 Act, s. 110, that no further proceedings should be taken under the bkpcy., which resolutions was confirmed at an adjourned meeting on May 21, & it was then resolved that bkpt.'s estate should be wound up & administered by the assignees in like manner as if same had remained in bkpcy. On Mar. 27, 1869, pltf. distrained for the quarter's rent due on Mar 8, & at the request of the solrs. to petitioning creditors & the official assignee, pltf. remained in possession, without selling, till May 12, when defts.' solrs. paid the rent & the costs of the distress to pltf. Defts., as assignees of bkpt.'s estate, remained in possession "for the purpose of realising the stock, fixtures, & furniture, & not otherwise," & on June 8, another quarter's rent became due, & was paid to pltf. on the same day by the same solrs. on behalf of defts. On June 12, pltf.'s solr. wrote to defts.' solrs. as follows: "I take it that as the assignees have not declined the lease of the premises, but are still in possession, they have elected to take the lease." No answer was sent to that letter. Defts. remained in possession for the purposes before mentioned, & no other, & on June 23 they sold by auction on the premises the tenant's fixtures belonging to the estate. The removal of the fixtures was completed by June 30, & attempts were made to deliver the keys of the premises to bkpt., but defts. were unable to ascertain his address. On July 21 they tendered the keys to his solrs., who declined to accept them, & on July 30, having learnt where bkpt. was, they forwarded the keys to him at Belfast by registered post letter, & informed him that they declined to accept the lease. On Aug. 1 defts'. solrs. wrote to pltf.'s solr. that defts. had disclaimed any interest in the premises, & had delivered the keys to bkpt. On Sept. 8 pltf. took possession upon the understanding that his doing so should not affect his right, if any, against defts. to the quarter's rent due that day. The lease had been deposited by bkpt., prior to the bkpcy., with a creditor, as security for a debt, & remained in the creditor's possession till after Sept. 8, when it was delivered by him to pltf. In an action by pltf. to recover from defts. the quarter's rent to Sept. 8:—*Held:* (KELLY, C. B., *diss.*) the question of election being one of intention, the acts of defts. were acts evidencing such an unequivocal intention on their part, to elect to take to the lease of the premises for at any rate the six months to Sept. 8, as to fix them with liability for the quarter's rent to that day, & (CHANNELL, B.) to render it unnecessary to decide whether an action for use & occupation could be maintained against them.—WILLIAMS *v.* TAYLOR (1869), 21 L. T. 612.

Annotation:—**Refd.** *Re* Thomas (1876), Diprose's Friendly Society Cases, p. 64.

7648. —— —— ——.]—An assignee in bkpcy. may, notwithstanding the vesting in him of bkpt.'s general estate, refuse a lease which he regards as a *damnosa hæreditas*, & he is not taken to have accepted it, unless he does some act which unequivocally testifies his acceptance.—WHITE *v.* HUNT (1870), L. R. 6 Exch. 32; 40 L. J. Ex. 23; 23 L. T. 559.

Annotations:—**Mentd.** Debenham *v.* Digby (1873), 28 L. T. 170; *Re* Beachey, Heaton *v.* Beachey, [1904] 1 Ch. 67, C. A.

7649. —— **Putting up property for sale.**]—Assignees are not concluded by putting up the premises to sell, for they may make an experiment to see if the lease be beneficial; but, where they put up the premises to auction, & found a purchaser, & received a deposit, but the contract of sale afterwards went off, without the assignees showing any reason why they did not enforce the sale:—*Held:* they were liable to the payment of rent, as assignees of all the estate, & interest, etc., of bkpt., in the premises.—HASTINGS *v.* WILSON (1816), Holt, N. P. 290.

Annotations:—**Refd.** Titterton *v.* Cooper (1882), 9 Q. B. D. 473, C. A. **Mentd.** Mackley *v.* Pattenden (1861), 1 B. & S. 178.

7650. —— **Releasing under-tenant.**]—A release of an under-tenant, by the assignees of bkpt., does not amount to an acceptance by them of the original lease.—HILL *v.* DOBIE (1818), 2 Moore, C. P. 342; 8 Taunt. 325; 129 E. R. 408.

7651. —— **Attempt to let premises—Lease accepted from provisional assignee.**]—The assignee of insolvent debtor accepted a lease of premises occupied by insolvent, from the provisional assignee, & retained it five months, & endeavoured to let the premises, but failed in so doing:—*Held:* this did not amount to an absolute acceptance of the lease by him, & the jury having found, that he had not retained it an unreasonable time, the ct. should refuse to disturb their verdict.—LINDSAY *v.* LIMBERT (1827), 12 Moore, C. P. 209; 5 L. J. O. S. C. P. 52.

Annotation:—**Refd.** Doe d. Palmer *v.* Andrewes (1827), 2 C. & P. 593.

7652. —— **Paying rent—Submitting to distress—Occupying tap to preserve licence—Asking for time.**]—Where the assignees of bkpt., after the bkpcy., placed a messenger in possession of an hotel, paid rent, submitted to distress, occupied by a third party a tap in connection with the premises, the profits of which were carried to the credit of bkpt.'s estate, the tap being kept open for the purpose of preserving the licence, asked for time for the payment of subsequently accruing rent, & being threatened with an action of ejectment by

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held premises in Bombay from pltf. as a monthly tenant, was adjudicated insolvent on Apr. 9, & the usual vesting order was made vesting all his estate & effects in deft. as official assignee. On Aug. 30, the sheriff, who had taken possession of the premises in execution of a decree passed against A., handed over possession of them to the agent of deft., who remained in possession until Sept. 30, when he gave them up to pltf., who brought a suit against deft. for the rent due from Apr. 1 to Sept. 30:—*Held:* by entering into possession on Aug. 30, 1896, deft. had elected to accept the lease, & was liable.—ABDUL RAZAK *v.* KERNAN (1898), I. L. R. 22 Bom. 617.—**IND.**

7649 i. —— *Putting up property for sale.*]—Lessees made a voluntary assignment in insolvency on May 17, 1869. The assignee sold the stock-in-trade of insolvents, who were dry goods merchants, & the purchaser took possession of the premises from him on May 27, the assignee also occupying a room there for the management of the estate:—*Held:* if any election to accept the lease were necessary on the assignee's part, it was shown by his conduct.—MAGEE *v.* RANKIN (1869), 29 U. C. R. 257.—**CAN.**

t. —— *Assignment to trustee.*]—The assignment of a leasehold interest to the assignee of an insolvent, is evidence of acceptance until the contrary be proved.—JACK *v.* GANNON (1847), Bl. D. & Osb. 157.—**IR.**

the lessor, their attorney told him they would resist the action :—*Held :* the assignees were not liable as assignees of the term, as such acts did not amount to an unequivocal indication to the lessor of their election to take the lease.—GOODWIN *v.* NOBLE (1857), 8 E. & B. 587 ; 27 L. J. Q. B. 204 ; 4 Jur. N. S. 208 ; 120 E. R. 219.

Annotations :—**Distd.** Williams *v.* Taylor (1869), 21 L. T. 612. **Refd.** *Re* Skeen, *Ex p.* Sykes (1858), 32 L. T. O. S. 19 ; Bradshaw *v.* James (1869), 17 W. R. 1010 ; White *v.* Hunt (1870), 23 L. T. 559 ; Titterton *v.* Cooper (1882), 46 L. T. 870, C. A. **Mentd.** *Re* Caston, *Ex p.* De Buisson (1864), 10 L. T. 792.

7653. —— Assigning lease—Effect of delay.]—A party, who had deposited a lease for years with pltf. as security for a debt & given him a memorandum by way of equitable mtge., became bkpt. in 1847, but was allowed to remain in possession & receive the rents until his death in 1858. In 1859 the Ct. of Bkpcy., on application of pltf., made an order for the sale of the lease, or, in the event of sale being deemed not advisable, that it should be assigned to pltf. The sum bid for the property being insufficient to satisfy pltf.'s claim, it was assigned to him in 1860 by the official assignee, & a creditors' assignee appointed in lieu of the original creditors' assignee, who had refused to concur in the sale. In ejectment by pltf. against the personal representative of bkpt. :—*Held :* (1) the assigning the lease to pltf. was an acceptance of it by the assignees ; (2) it was a question for the jury whether they had accepted it within a reasonable time.

The question as to whether the assignees of bkpt. had elected to take this lease depends on whether, prior to their doing what they did, they had or had not declined to interfere, in such circumstances as to divest themselves of authority to act as they have done. That must depend on whether the lapse of time between the bkpcy. & the conveyance to pltf. was so unreasonably long that, taken in conjunction with the surrounding circumstances of the case, the jury would be warranted in coming to the conclusion that the assignees had declined to accept the lease (COCKBURN, C.J.).—MACKLEY *v.* PATTENDEN (1861), 1 B. & S. 178 ; 30 L. J. Q. B. 225 ; 4 L. T. 285 ; 25 J. P. 517 ; 7 Jur. N. S. 1056 ; 9 W. R. 601 ; 121 E. R. 681.

7654. —— Entry by trustee for purpose of realising estate.]—Debtor by a valid deed under 1861 Act, s. 192, conveyed all his estate to a trustee to be administered for the benefit of his creditors as in bkpcy. Debtor was the lessee of certain premises, consisting of a jeweller's shop & house, for a term of years. The trustee entered upon the demised premises, & remained upon them from Mar. 21 to June 24 for the purpose merely of realising the trust-estate. Upon Apr. 26 the trustee gave the landlord notice that he elected not to take the lease :—*Held :* the trustee had done nothing amounting to an adoption of the lease.—MALLETT *v.* LEVIN (1867), 16 L. T. 531 ; 15 W. R. 929.

7655. —— —— Paying rent, etc.]—WILLIAMS *v.* TAYLOR, No. 7647, *ante*.

7656. —— Refusal to allow landlord to enter.]—R., who held two farms of pltf., as tenant from year to year, became bkpt. R.'s assignees took possession of the farms, & disputes having arisen between them & the landlord, the assignees refused to allow the landlord to enter on the farms, & sold the feed of parts of the farms :—*Held :* the assignees by their conduct had elected to take the farms.—BRADSHAW *v.* JAMES (1869), 20 L. T. 781 ; 17 W. R. 1010.

7657. —— Negotiations with mortgagee for assignment—Lease deposited with mortgagee as security.]—Pltf. demised to M. a wharf for twenty-one years, the lease containing covenants for rent & repairs by the lessee. M. deposited the lease with S. as security for a debt, & filed a petition for liquidation on Dec. 8, 1880, & deft. was appointed trustee on Jan. 3, 1881. Deft. never took possession of the wharf, but he negotiated with S. for the assignment of the lease to him ; the negotiations proved abortive. Pltf. served deft. with a notice requiring him to disclaim, but deft. failed to do so. Pltf. then brought an action to recover two quarter's rent, due respectively on Dec. 25, 1880, & on Mar. 25, 1881, & damages for breach of the covenant to repair :—*Held :* deft. had, by his conduct, elected to accept the lease.—TITTERTON *v.* COOPER (1882), 9 Q. B. D. 473 ; 51 L. J. Q. B. 472 ; 46 L. T. 870 ; 30 W. R. 866, C. A.

Annotations :—**Refd.** *Re* Zappert, *Ex p.* Trustee (1884), 1 Morr. 72 ; Rendall *v.* Andreae (1892), 61 L. J. Q. B. 630. **Mentd.** Alloway *v.* Steere (1882), 10 Q. B. D. 22 ; Hopkinson *v.* Lovering (1883), 11 Q. B. D. 92 ; Stein *v.* Pope, [1902] 1 K. B. 595, C. A.

7658. —— Severing fixtures.]—*Re* ROBERTS, *Ex p.* BROOK, No. 7667, *post*.

7659. Contract of sale by bankrupt—Bringing action for price.]—Where an action of *indebitatus assumpsit* is brought by assignees of bkpt. against a purchaser of goods, it affirms the sale & also the payment to bkpt. of any part of the price (LORD MANSFIELD, C.J.).—FOXCROFT *v.* DEVONSHIRE (1760), 2 Burr. 931 ; 1 Wm. Bl. 193 ; 97 E. R. 638.

Annotations :—**Consd.** Copland *v.* Stein (1799), 8 Term Rep. 199. **Mentd.** Houghton *v.* Matthews (1803), 3 Bos. & P. 485 ; Cash *v.* Young (1823), 3 Dow. & Ry. K. B. 652.

7660. —— Demand for purchase price—Goods purchased after notice of act of bankruptcy to create set-off.]—Defts. bought goods at the shop of A., after notice that A. had committed an act of bkpcy., & claimed to set off against the price a debt due to them from A. A fiat having afterwards issued against A., his assignees sent in an invoice, & demanded payment for the goods so bought by defts. :—*Held :* the assignees did not thereby so affirm the sale as to disentitle them to maintain trover for the goods, upon a subsequent demand & refusal.—VALPY *v.* SANDERS (1848), 5 C. B. 886 ; 17 L. J. C. P. 249 ; 11 L. T. O. S. 201 ; 12 Jur. 483 ; 136 E. R. 1128.

Annotation :—**Refd.** Rice *v.* Reed, [1900] 1 Q. B. 54, C. A.

7661. Continuing contract—Failure to disclaim—Work continued for two years.]—Trustees, being required to decide whether they would disclaim contracts to repair railway waggons for a term, did not disclaim, but continued to perform the contracts for two years, and then discontinued to do so :—*Held :* the trustees did not, by not disclaiming, adopt the contract, either personally or on behalf of the estate.—*Re* SNEEZUM, *Ex p.* DAVIS (1876), 3 Ch. D. 463 ; 45 L. J. Bcy. 137 ; 35 L. T. 389 ; 25 W. R. 49, C. A.

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w. *Sale of interest in partnership—Acquiescence of trustee.*]—A., one of the members of a partnership of five persons who owned a pastoral property, had mortgaged his interest in the partnership to B., another member of the partnership. In 1893, A. was adjudged bkpt. & an official assignee of his estate appointed. In 1894 A.'s interest in the partnership was sold under the mtge & was acquired by B., who held it & dealt with it as owner. In 1904 A. obtained releases from all his creditors, including B. The partnership was subsequently reconstituted on the basis of B. being the owner of two of the five shares. No claim was ever made by the official assignee in respect of A.'s share. In 1911 pltf. purchased from the official assignee A.'s interest in the partnership.

In a suit by pltf. against B. claiming to have the purchase of A.'s interest in the partnership set aside as having been at a gross undervalue :—*Held :* the official assignee had not only not elected to impeach the sale, but had actually affirmed it.—CAMPBELL *v.* CAMPBELL (1916), 21 C. L. R. 308.—AUS.

Sect. 16.—*Contracts and disclaimer of onerous property: Sub-sects.* 3, 4 & 5, *A. & B.*]

Annotations :—**Consd.** *Re* Westbourne Grove Drapery Co. (1877), 5 Ch. C. 248 ; *Re* Soloman, *Ex p.* Dressler (1878), 48 L. J. Bcy. 20, C. A. ; Wilson *v.* Wallani (1880), 5 Ex. D. 155. **Distd.** Alloway *v.* Steere (1882), 10 Q. B. D. 22 ; Titterton *v.* Cooper (1882), 9 Q. B. D. 473, C. A. **Refd.** Hopkinson *v.* Lovering (1883), 11 Q. B. D. 92. **Mentd.** L. C. C. *v.* Aylesbury Dairy Co., [1898] 1 Q. B. 106.

See, now, 1914 Act, s. 54 (4).

7662. Shares—Execution of deed of transfer—Acceptance of trust—General action.]—In the case of a transferee taking shares as assignee in bkpcy., he has the option of accepting or rejecting same. Acceptance of the shares, in the absence of any special act done in relation thereto, is not constituted by the execution of the deed of transfer, the acceptance of the trusts, & general action under them.—LEVI *v.* AYERS (1878), 3 App. Cas. 842 ; 47 L. J. P. C. 83 ; 38 L. T. 725 ; 27 W. R. 79, P. C.

SUB-SECT. 4.—EFFECT OF ADOPTION.

7663. Covenant against assignment of lease—Whether binding on bankrupt to whom lease re-assigned.]—If a lessee covenants not to assign & becomes bkpt., & his assignees take to the lease, his covenant is discharged by 49 Geo. 3, c. 121, s. 19, although a breach of it had become impossible, by reason that he no longer had the subject-matter respecting which the covenant was made, & if he comes in again as assignee of his assignees, he shall not be charged with the covenant, & it is no breach, if he assigns.—DOE D. CHEERE *v.* SMITH (1814), 5 Taunt. 795 ; 1 Marsh. 359 ; 128 E. R. 905.

Annotation :—**Refd.** Williams *v.* Earle (1868), L. R. 3 Q. B. 739.

7664. Covenant to pay rent in lease—Liability of bankrupt discharged.]—Assignees of bkpt., by accepting a lease, discharge bkpt. from any claim for rent.—ONSLOW *v.* CORRIE (1817), 2 Madd. 330 ; 56 E. R. 357.

Annotations :—**Refd.** Rowley *v.* Adams (1839), 4 My. & Cr. 534. **Mentd.** Hopkinson *v.* Lovering (1883), 11 Q. B. D. 92.

7665. —— ——.]—An assignment under a commission of bkpcy. being by act of law, & under the Acts of Bkpcy., is a good plea in discharge of bkpt. lessee in an action of debt for rent.—WADHAM *v.* MARLOW (1784), 4 Doug. K. B. 54 ; 8 East, 315, n. ; 99 E. R. 764 ; *sub nom.* WOODHAM *v.* MARLOW, 1 Hy. Bl. 437, n.

Annotations :—**Consd.** Mills *v.* Auriol (1790), 1 Hy. Bl. 433. **Expld.** Boot *v.* Wilson (1807), 8 East, 311. *Wadham* v. *Marlow* only decided that the acton of debt on the reddendum would not lie against the lessee for rent accruing after his bkpcy., when he had ceased to occupy the premises, & the assignee was in possession under the comrs.' assignment (LORD ELLENBOROUGH, C.J.). **Consd.** Onslow *v.* Corrie (1817), 2 Madd. 330. **Expld.** Copeland *v.* Stephens (1818), 1 B. & Ald. 593. LORD MANSFIELD in *Wadham* v. *Marlow* goes on the ground that the privity of estate was gone (BAYLEY, J.). **Mentd.** Auriol *v.* Mills (1790), 4 Term Rep. 94 ; Slipper *v.* Tottenham & Hampstead Junction Ry. Co. (1867), L. R. 4 Eq. 112 ; Baily *v.* De Crespigny (1869), 38 L. J. Q. B. 98 ; Allcock *v.* Moorhouse (1882), 47 L. T. 404, C. A.

See, also, cases in Sub-sect. 5, E., *post.*

SUB-SECT. 5.—DISCLAIMER.

A. In General.

See 1914 Act, s. 54.

7666. Right to disclaim—Lease.]—Assignees of bkpt. may waive his leases, & so not become liable to the lessor at all.—WILKINS *v.* FRY (1816), 1 Mer. 244 ; 2 Rose, 371 ; 35 E. R. 665.

Annotations :—**Consd.** Levi *v.* Ayers (1878), 3 App. Cas. 842, P. C. ; *Re* Müller, *Ex p.* Buxton (1880), 15 Ch. D. 289, C. A. **Mentd.** Fenn *v.* Craig (1838), 3 Y. & C. Ex. 216.

7667. —— —— **After severing fixtures.**]—*Qu. :* whether after severing the fixtures the trustee has any right to disclaim the lease.—*Re* ROBERTS, *Ex p.* BROOK (1878), 10 Ch. D. 100 ; 48 L. J. Bcy. 22 ; 39 L. T. 458 ; 43 J. P. 53, 286 ; 27 W. R. 255, C. A.

Annotations :—**Consd.** Lowrey *v.* Barker (1880), 5 Ex. D. 170, C. A. ; *Re* Latham, *Ex p.* Glegg (1881), 19 Ch. D. 7, C. A. **Mentd.** East & West India Dock Co. *v.* Hill (1882), 22 Ch. D. 14, C. A. ; *Re* Glasdir Copper Works, English Electro-Metallurgical Co. *v.* Glasdir Copper Works, [1904] 1 Ch. 819 ; Leschallas *v.* Woolf, [1908] 1 Ch. 641.

7668. Within what time—To whom time limit applies—Official receiver.]—The official receiver, on becoming trustee immediately on adjudication until a trustee is appointed, may disclaim onerous property without being subject to the limitation of time imposed on an appointed trustee.—*Re* COHEN, *Ex p.* TRUSTEE, [1905] 2 K. B. 704 ; 74 L. J. K. B. 864 ; 93 L. T. 659 ; 54 W. R. 83 ; 21 T. L. R. 725 ; 49 Sol. Jo. 712 ; 12 Mans. 358, C. A.

7669. —— **Reasonable time.**]—A petition for an order of sale by equitable mtgees. of a lease was allowed to stand over from Mar. 11 to Mar. 23, in order that the assignees might have time to elect, & when it came on again the assignees asked for further time :—*Held :* the assignees had had reasonable time.—*Re* COLLINS & PRIOR, *Ex p.* FLETCHER (1832), 1 Deac. & Ch. 318, 356, Ct. of R.

7670. —— ——.]—In an action by pltfs., as assignees of bkpt., against deft. for non-performance of a contract to deliver shares :—*Held :* defts. were bound to elect within a reasonable time.—LAWRENCE *v.* KNOWLES (1839), 5 Bing. N. C. 399 ;

PART XX. SECT. 16, SUB-SECT. 4.

a. *Trustee cannot repudiate contract after adoption.*]—TAYLOR'S ASSIGNEES *v.* KILLILEAGH FLAX SPINNING CO. (1869), I. R. 4 C. L. 120.—**IR.**

b. *Trustee acting as mortgagee in possession.*]—A mtgee. of lands, held under leases for lives renewable for ever, became bkpt. Ejectment for non-payment of rent having been brought by the head landlord, & the premises redeemed by the assignees, the assignees entered into possession by their agent. An annuitant, claiming under a settlement prior to the mtge., filed a bill :—*Held :* the assignees were chargeable as mtgees. in possession, & were bound to appropriate the rents which they had received out of the lands, or which they might without wilful default have received, in discharging the redemption money, before their own mtge.—SLOANE *v.* MAHON (1837), 1 Dr. & Wal. 189.—**IR.**

c. *Covenant by lessor to pay for improvements—Ejectment by lessor's trustee—Liability of trustee on covenant.*]—A. mortgaged land to B., & thereafter leased the same land to C. By the lease C. was entitled to be paid for all buildings erected by him upon the land during the currency of the lease. After A. had surrendered his estate his trustee sued C. under terms of the lease for ejectment :—*Held :* the lessee was entitled to compensation for the improvements made by him, to the extent by which the value of the land had thereby been enhanced.—DREYER'S TRUSTEE *v.* LUTLEY (1884), 3 S. C. 59.—**S. AF.**

PART XX. SECT. 16, SUB-SECT. 5.—A.

7668 i. *Within what time—Under* 1875 *Act, s.* 71.]—Under the above sect. an assignee can only terminate a lease of premises held by insolvent at the end of the current year, but he may get rid of his liability by assigning over the lease.—MCLAUGHLIN *v.* MCLEOD (1880), 19 N. B. R. 539.—**CAN.**

7669 i. —— *Reasonable time—Effect of failure to do so.*]—The owner of an absolute interest in reversion, expectant on the determination of prior life estates, in lands held under a fee-farm grant, was adjudicated bkpt. in 1878, & a certificate of vesting of his real & personal estate & effects in the official assignee & creditors' assignee was duly registered. Bkpt. obtained his certificate of conformity in 1880, & died in 1892, having devised his residuary real & personal estate, which included the lands, to his daughters, who, in 1904 entered into possession of the lands, &, in 1906, conveyed them for valuable consideration to the vendor, who, in turn, entered into possession & sold the lands. The official assignee claimed the residue of so much of the purchase-money as was attributable to the lands :—*Held :* the official assignee, not having elected to take the interest of bkpt. within a reasonable time, was not entitled.—*Re* BURKE'S ESTATE (1916), 50 I. L. T. 227.—**IR.**

2 Arn. 43 ; 7 Scott, 381 ; 8 L. J. C. P. 210 ; 132 E. R. 1152.

Annotations :—**Refd.** Mackley *v.* Pattenden (1861), 1 B. & S. 178. **Mentd.** De Medina *v.* Norman (1842), 9 M. & W. 820 ; Morgan *v.* Bain (1874), 44 L. J. C. P. 47.

7671. —— When time begins to run.]—The time for disclaimer by a trustee appointed under 1883 Act, s. 21 runs from the date of the certificate of his appointment, & not from the date of the adjudication.—*Re* COHEN, *Ex p.* TRUSTEE, [1905] 2 K. B. 704 ; 74 L. J. K. B. 864 ; 93 L. T. 659 ; 54 W. R. 83 ; 21 T. L. R. 725 ; 49 Sol. Jo. 712 ; 12 Mans. 358, C. A.

7672. —— Extension of time—Power of court to grant.]—Although the three months given to a trustee by 1883 Act, s. 55 (1), within which to disclaim onerous property, may have expired, the ct. has power under s. 105 (4), to grant the trustee an extension of time.—*Re* PRICE, *Ex p.* FOREMAN (1884), 13 Q. B. D. 466 ; 33 W. R. 139.

7673. —— —— What must be shown.]—When a trustee applies for an extension of time within which to disclaim, he must show good cause.—*Re* PRICE, *Ex p.* FOREMAN (1884), 13 Q. B. D. 466 ; 33 W. R. 139.

7674. —— —— When granted.]—On Mar. 31, 1890, the chief official receiver in bkpcy. resigned his office, & by an order of the same date all estates which were then vested in the chief official receiver as trustee by virtue of his office, were transferred to & vested in his successor. On June 19, 1890, it was ascertained by the official receiver that certain leasehold premises occupied by bkpt., against whom a receiving order had been made in 1884, had not been disclaimed, & on June 27, 1890, formal notice of disclaimer was given to the lessor. The lessor refused to accept the notice, & application was made to the ct. for leave to disclaim the property, it being shown that since the bkpcy. the rent of the premises had been paid by bkpt.'s wife out of her separate estate, & that no application had been made to the trustee by the lessor under 1883 Act, s. 55 (4), requiring him to decide whether he would disclaim or not :—*Held :* (1) the official receiver, as trustee, was affected by the acts & omissions of his predecessor, & on his appointment the lease vested in him, & he was not in a position to disclaim it without the leave of the ct. extending the time for doing so ; (2) there being no proof that the landlord had sustained any damage whatever from the omission, leave to disclaim should be given.—*Re* BAKER, *Ex p.* OFFICIAL RECEIVER, *Re* BAKER, *Ex p.* AXFORD (1891), 8 Morr. 116 ; 7 T. L. R. 355, C. A.

7675. —— —— —— On terms.]—A trustee applied for two months extension of time, & it was shown that a mtgee. would be prejudiced & the estate would in the event of disclaimer be insufficient to meet his demands. The ct. refused the application, unless on a personal undertaking by the trustee to indemnify the mtgee. during such extension.—*Re* PRICE, *Ex p.* FOREMAN (1884), 13 Q. B. D. 466 ; 33 W. R. 139.

7676. Sufficiency of disclaimer—Delay in taking decisive steps.]—In an action by pltfs. as assignees of bkpt. against deft., for non-performance of a contract to deliver shares, to be performed on July 1, 1835, the issue was, whether pltfs. had abandoned it :—*Held :* as they had taken no decisive steps till Jan., 1838, the jury might properly infer they had abandoned the contract.—LAWRENCE *v.* KNOWLES (1839), 5 Bing. N. C. 399 ; 2 Arn. 43 ; 7 Scott, 381 ; 8 L. J. C. P. 210 ; 132 E. R. 1152.

Annotations :—**Refd.** Mackley *v.* Pattenden (1861), 1 B. & S. 178. **Mentd.** De Medina *v.* Norman (1842) 9 M. & W. 820 ; Morgan *v.* Bain (1874), 44 L. J. C. P. 47.

7677. —— —— What is reasonable time.]—In Nov., 1847, R., being owner of one hundred & fifty-seven shares of £100 each, in an incorporated co., became bkpt. Only £25 per share had been paid. At the time of the bkpcy., bkpt. delivered the certificates of the shares to the official assignee. At that time the shares were of no value. In June, 1849, notice was given to the official assignee of a call of £1 per share, which he was requested to pay. Nothing further was done by the co. or the assignees until Feb., 1853, when the shares having become valuable, the assignees claimed to be registered in the co.'s books as the owners of them, & offered to pay whatever was due for calls. In answer to their application, they received a letter from the secretary of the co., stating that there were no shares standing in the registry-book in the name of bkpt. :—*Held :* assuming it was necessary that the assignees should, within a reasonable time, do some act to signify their acceptance of the shares, the question of reasonable time was one for the jury, but a reasonable time would not begin to run until some one interested in the matter took some step in respect of it.

Though undoubtedly a considerable period of time elapsed before anything was done, on the other hand, it is open to observation, that when the assignees were called upon to do something, there was a temporary want of value in the shares, & an admitted fluctuation, & it might be right & proper for the assignees to wait, & see what turn affairs might take (COLERIDGE, J.).—GRAHAM *v.* VAN DIEMEN'S LAND CO. (1855), 11 Exch. 101 ; 24 L. J. Ex. 213 ; 25 L. T. O. S. 248 ; 1 Jur. N. S. 806 ; 3 C. L. R. 887, Ex. Ch. ; *subsequent proceedings*, (1856), 1 H. & N. 541, Ex. Ch.

Annotation :—**Refd.** Mackley *v.* Pattenden (1861), 1 B. & S. 178.

7678. —— Letter stating intention to disclaim.]—A letter by a trustee, saying that he intends to disclaim, does not amount to a disclaimer.—*Re* JONES, *Ex p.* LOVERING (1874), 9 Ch. App. 586 ; 43 L. J. Bcy. 94 ; 30 L. T. 621 ; 38 J. P. 726, L. JJ.

Annotations :—**Mentd.** *Re* Stokoe, *Ex p.* Moore (1876), 2 Ch. D. 802, C. A. ; *Re* Richardson, *Ex p.* Harris (1880), 16 Ch. D. 613 ; *Re* Finley, *Ex p.* Clothworkers' Co. (1888), 21 Q. B. D. 475, C. A.

7679. —— Writing signed by trustee's solicitor.]—A disclaimer in writing signed by the trustee's solr. is not a valid disclaimer " by writing under the hand " of the trustee within 1869 Act, s. 23.—WILSON *v.* WALLANI (1880), 5 Ex. D. 155 ; 49 L. J. Q. B. 437 ; 42 L. T. 375 ; 44 J. P. 475 ; 28 W. R. 597.

Annotations :—**Apprvd.** Titterton *v.* Cooper (1882), 9 Q. B. D. 473, C. A. **Refd.** Hopkinson *v.* Lovering (1883), 11 Q. B. D. 92.

B. What Property or Contracts may be disclaimed.

7680. In general.]—Freehold property of bkpt. burdened with onerous covenants & charged by way of equitable mtge. may properly be disclaimed without leave.—*Re* MERCER & MOORE (1880), 14 Ch. D. 287 ; 49 L. J. Ch. 201 ; 42 L. T. 311 ; *sub nom. Re* BEARDSWORTH & MOORE'S CONTRACT, 28 W. R. 485.

Annotation :—**Mentd.** Hill *v.* East & West India Dock Co. (1884), 48 J. P. 788, H. L.

7675 i. —— *Extension of time—When granted—On terms.*]—Leave was given to the assignees for an extension of time to disclaim a lease, upon the terms of their paying the rent up to the extended date in case they disclaimed.—*Re* BOYLE (1873), 8 I. L. T. Jo. 88.—IR.

d. *When unnecessary.*]— Where assignees have elected under 1857 Act s. 271, not to accept bkpt.'s interest in a lease, a disclaimer under 1872 Act, s. 97, is unnecessary.—*Re* CONNOR (1874), 8 I. L. T. 71.—IR.

Sect. 16.—*Contracts and disclaimer of onerous property: Sub-sect.* 5, *B. & C.*]

7681. "Property"—Not limited to property divisible amongst creditors.]—The right of disclaimer conferred on the trustee by 1883 Act, s. 55 is not limited to property of bkpt. divisible amongst his creditors, but extends to any property from which no benefit can accrue to bkpt.'s estate.—*Re* MAUGHAN, *Ex p.* MONKHOUSE (1885), 14 Q. B. D. 956; 54 L. J. Q. B. 128; 33 W. R. 308; 2 Morr. 25.

Annotations:—**Mentd.** Furness *v.* Bond, [1888] W. N. 78; Foster *v.* Reeves (1892), 61 L. J. Q. B. 763, C. A.

7682. "Of bankrupt"—Estate of deceased insolvent administered in bankruptcy.]—In an administration in bkpcy. of the estate of deceased insolvent, the trustee can disclaim onerous property.—*Re* MELLISON, *Ex p.* DAY, [1906] 2 K. B. 68; 75 L. J. K. B. 595; 94 L. T. 679; 54 W. R. 444; 50 Sol. Jo. 378; 13 Mans. 201, D. C.

7683. Demise not in writing.]—6 Geo. 4, c. 16, s. 75, applies to the case of a demise not in writing.—BRIGGS *v.* SOWRY (1841), 8 M. & W. 729; 11 L. J. Ex. 193; 151 E. R. 1234.

Annotations:—**Mentd.** Phillips *v.* Shervill (1845), 6 Q. B. 944; *Re* Mackenzie, *Ex p.* Hertfordshire, [1899] 2 Q. B. 566, C. A.

7684. "Land burdened with onerous covenants"—Agreement for lease.]—Debtor held his business premises for a term of years under an agreement for a lease, & entered into a binding contract for the sale & assignment of his business & his business premises to a co., but became bkpt. before the completion of the contract:—*Held:* debtor's interest in the agreement for a lease was in the nature of land burdened with onerous covenants, which his trustee in bkpcy. could disclaim.—*Re* MAUGHAN, *Ex p.* MONKHOUSE (1885), 14 Q. B. D. 956; 54 L. J. Q. B. 128; 33 W. R. 308; 2 Morr. 25.

Annotations:—**Mentd.** Furness *v.* Bond (1888), 4 T. L. R. 457; Foster *v.* Reeves (1892), 61 L. J. Q. B. 763, C. A.

7685. —— Lease determined by forfeiture—Or effluxion of time—Between appointment of trustee & disclaimer.]—The trustee may disclaim a lease, even though it has been determined by effluxion of time or by forfeiture, between his appointment & the execution of the disclaimer.—*Re* MORRISH, *Ex p.* HART DYKE (1882), 22 Ch. D. 410; 52 L. J. Ch. 570; 48 L. T. 303; 31 W. R. 278, C. A.

Annotations:—**Refd.** Lybbe *v.* Hart (1885), 29 Ch. D. 8, C. A. **Mentd.** Ware *v.* Booth (1894), 10 T. L. R. 446; Serjeant *v.* Nash, Field, [1903] 2 K. B. 304, C. A.

7686. —— —— —— Before appointment of trustee.]—*Semble:* the trustee may disclaim a lease, which has been determined before his appointment.—*Re* MORRISH, *Ex p.* HART DYKE (1882), 22 Ch. D. 410; 52 L. J. Ch. 570; 48 L. T. 303; 31 W. R. 278, C. A.

Annotations:—**Refd.** Lybbe *v.* Hart (1885), 29 Ch. D. 8, C. A. **Mentd.** Ware *v.* Booth (1894), 10 T. L. R. 446; Serjeant *v.* Nash, Field, [1903] 2 K. B. 304, C. A.

7687. —— —— At option of lessor—Option not exercised before disclaimer.]—Bkpt. was the holder of a lease, which provided that if the lessee became bkpt. the lease should "cease, determine, & be void." The trustee disclaimed the lease:—*Held:* the proper construction of the proviso was that the lease only became void at the option of the lessor, & as he had not exercised the option, he was entitled to prove for the damage sustained by the disclaimer.—*Re* TICKLE, *Ex p.* LEATHER SELLERS' CO. (1886), 3 Morr. 126.

7688. —— Equity of redemption of lease—Assigned for entire residue of term.]—Where the lessee of premises subject to onerous covenants had, before his bkpcy., assigned the premises by way of mtge. for the entire residue of the term:—*Held:* the trustee, not being liable upon the covenants of the lease, either by privity of contract or by privity of estate, the equity of redemption which vested in him was not property burdened with onerous covenants within 1883 Act, s. 55, so as to make it necessary for the trustee to apply to the ct. for leave to disclaim the lease.—*Re* GEE, *Ex p.* OFFICIAL RECEIVER (1889), 24 Q. B. D. 65; 59 L. J. Q. B. 16.

7689. —— Lease acquired after adjudication.]—*Qu.:* whether a trustee can disclaim after-acquired leaseholds.—*Re* CLAYTON & BARCLAY'S CONTRACT, [1895] 2 Ch. 212; 64 L. J. Ch. 615; 72 L. T. 764; 59 J. P. 489; 43 W. R. 549; 39 Sol. Jo. 503; 2 Mans. 345; 13 R. 556; *sub nom.* CLAYTON *v.* BARCLAY, 11 T. L. R. 415.

Annotations:—**Mentd.** London & County Contracts *v.* Tallack (1903), 19 T. L. R. 156; Official Receiver *v.* Cooke, [1906] 2 Ch. 661; *Re* Kent County Gas Light & Coke Co., [1909] 2 Ch. 195.

7690. "Unprofitable contracts"—Works in mine.]—Assignees may be justified in declining to continue works in a mine, which do not appear likely to prove immediately beneficial to the estate, & even in relinquishing bkpt.'s interest therein as a *damnosa hæreditas*.—*Re* GUNDRY, *Ex p.* BADCOCK (1829), Mont. & M. 231.

7691. —— Contract for sale of lease—Lease itself must be disclaimed.]—A trustee proposed to disclaim a contract for the sale of a lease made by bkpt. before his bkpcy., without disclaiming the lease itself:—*Held:* the trustee could not separate the subject-matter of the contract from the contract itself, & the disclaimer was a nullity.—*Re* KERKHAM, *Ex p.* TRUSTEE & MARTELLI (1886), 80 L. T. Jo. 322.

Annotations:—**Folld.** *Re* Bastable, *Ex p.* Silverstone (1901), 84 L. T. 328; Pearce *v.* Bastable's Trustee in Bkpcy., [1901] 2 Ch. 122.

7692. —— —— ——.]—On the bkpcy. of a vendor of leasehold property, the trustee cannot disclaim the contract without disclaiming the lease.—PEARCE *v.* BASTABLE'S TRUSTEE IN BANKRUPTCY, [1901] 2 Ch. 122; 70 L. J. Ch. 446; 84 L. T. 525; 17 T. L. R. 366; 8 Mans. 287.

7693. —— —— ——.]—The trustee cannot, under 1883 Act, s. 55, disclaim a contract entered into by bkpt. for the sale of a lease, unless he also disclaims the lease itself.

The provisions of s. 55 were intended to enable the trustee to get rid of an onerous property or contract, & do not enable him to disclaim a contract, merely because it would be more beneficial to the estate that the contract should not be carried out.—*Re* BASTABLE, *Ex p.* TRUSTEE, [1901] 2 K. B. 518; 70 L. J. K. B. 784; 84 L. T. 825; 49 W. R. 561; 17 T. L. R. 560; 45 Sol. Jo. 576; 8 Mans. 239, C. A.

PART XX. SECT. 16, SUB-SECT. 5.—B.

7684 i. *Agreement for lease.*]—*Held:* an agreement for a lease, being binding on the tenant, was also binding on the official assignee of his estate, subject to his right to disclaim.—*Re* ALEXANDER, *Ex p.* GRAINGER (1893), 11 N. Z. L. R. 682.—N.Z.

f. *Lease included in assignment.*]—Deft. having seized the goods of B. for rent under an assignment to pltf.:—*Held:* an official assignee was not bound to accept a leasehold estate included in the assignment.—GREENWELL *v.* MCKAY (1909), 7 E. L. R. 85.—CAN.

7688 i. *Equity of redemption.*]—*Held:* the official assignee had no power under 1883 Amendment Act, 1884, s 15, to disclaim an equity of redemption of freehold land.—*Re* RICKMAN, *Ex p.* BANK OF NEW ZEALAND (1890), 8 N. Z. L. R. 381.—N.Z.

k. *Two leases of same property—Right to disclaim one.*]—Where there are two leases of the same property the trustees, in case of insolvency, may hold to the one & reject the other.—*Re* JOHNSTON'S INSOLVENCY, *Ex p.* HALY (1818), 1 Nfld. L. R. 125.—NFLD.

C. Leave to disclaim.

7694. When necessary—Contract to purchase unexpired portion of lease—Monthly tenancy.]—Bkpt. was tenant of leasehold premises under an agreement for a monthly tenancy. By an agreement of even date bkpt. contracted to purchase the unexpired residue of the lease. The contract remained unperformed at the time of his bkpcy :—*Held :* the trustee had an interest in the premises, within 1869 Act, s. 23 & 1871 Rules, r. 28, & was entitled to apply for & obtain leave to disclaim.—*Re* ROBERTS (1874), 30 L. T. 266.

7695. —— Lease of chattels.]—A trustee may disclaim a lease of chattels without leave of the ct.—SHEFFIELD WAGGON CO. *v.* STRATTON (1878), 48 L. J. Q. B. 35 ; 40 L. T. 86 ; 43 J. P. 317 ; 27 W. R. 120, C. A.

7696. Duty to obtain leave—Effect of failure to obtain leave.]—*Held :* the effect of 1871 Rules, r. 28 was to make it the duty of the trustee as between himself & the Ct. of Bkpcy. to obtain the leave of the ct. before disclaiming a tenancy, but it did not render the disclaimer inoperative as between the landlord & the trustee, where no such leave had been obtained.—REED *v.* HARVEY (1880), 5 Q. B. D. 184 ; 49 L. J. Q. B. 295 ; 42 L. T. 511 ; 44 J. P. 474 ; 28 W. R. 423, D. C.

Annotations :—**Refd.** *Re* Turner, *Ex p.* Ladbury (1881), 17 Ch. D. 532, C. A. **Mentd.** *Re* Hann, *Ex p.* Foreman (1887), 18 Q. B. D. 393.

7697. Circumstances in which application should not be made.]—It is the duty of a trustee to decide whether he will disclaim or not. He has no right to bring the matter before the ct. by applying for leave merely for the sake of protecting himself.—*Re* PARKER & PARKER, *Ex p.* TURQUAND (1884), 51 L. T. 667 ; 33 W. R. 752 ; 1 Morr. 275.

Annotations :—**Refd.** *Re* Oborne, *Ex p.* Marillier (1896), 3 Mans. 238. **Mentd.** *Re* Cock, *Ex p.* Shilson (1887), 20 Q. B. D. 343 ; *Re* Finley, *Ex p.* Clothworkers' Co. (1888), 21 Q. B. D. 475, C. A. ; *Re* Baker, *Ex p.* Lupton, [1901] 2 K. B. 628, C. A.

7698. Notice of motion for leave—Service out of jurisdiction.]—Notice of motion by the trustee for leave to disclaim may be served out of the jurisdiction upon persons whose interests may be affected.—*Re* RATHBONE, *Ex p.* PATERSON (1887), 56 L. J. Q. B. 504 ; 57 L. T. 420 ; 35 W. R. 735 ; 4 Morr. 270.

Annotation :—**Mentd.** *Re* Alderson, *Ex p.* Kirby (1891), 8 Morr. 95.

7699. —— How served—Property in country in enemy occupation—Property in enemy country.]—A trustee was desirous of disclaiming leasehold properties in places in Belgium in the occupation of alien enemies, & in Berlin in the enemy's country :—*Held :* notices of intention to disclaim might be served by sending them by ordinary post to the last known addresses of the respective landlords & giving them twenty-eight days' notice, within which to require the matter to be brought before the ct.—*Re* CURZON BROTHERS, *Ex p.* THE TRUSTEE (1915), 84 L. J. K. B. 1000 ; 31 T. L. R. 374 ; 59 Sol. Jo. 430 ; [1915] H. B. R. 77.

7700. Form of application—Several distinct properties—One landlord or chief respondent—Other parties interested.]—A trustee when applying to the ct. under 1883 Act, s. 55 (3), for leave to disclaim property may include in one application several distinct premises, so long as there is one landlord or chief resp. who is affected by the whole application, although there may be other resps. who are only affected by part of it.—*Re* WHITAKER (1888), 21 Q. B. D. 261 ; 57 L. J. Q. B. 527 ; 59 L. T. 255 ; 36 W. R. 736 ; 4 T. L. R. 577 ; 5 Morr. 178.

7701. Discretion of court.]—In cases where the property acquired by the trustee under 1869 Act, consists of leasehold interests, the ct. will exercise its discretion in allowing the trustee to disclaim such interest.—*Re* WILSON (1871), L. R. 13 Eq. 186 ; 20 W. R. 363.

Annotations :—**Refd.** *Re* Clarke, *Ex p.* East & West India Dock Co. (1881), 17 Ch. D. 759, C. A.

7702. —— What should be considered.]—In determining whether leave should be given to a trustee to disclaim a leasehold interest of bkpt., the ct. ought to have regard only to the question whether the disclaimer will be for the benefit of the persons interested in the administration of bkpt.'s estate, & ought not to have regard to any collateral consideration, such as the injury which the disclaimer might occasion to third parties.—*Re* CLARKE, *Ex p.* EAST & WEST INDIA DOCK CO. (1881), 17 Ch. D. 759 ; 50 L. J. Ch. 789 ; 45 L. T. 6 ; 30 W. R. 22, C. A.

Annotations :—**Refd.** East & West India Dock Co. *v.* Hill (1882), 22 Ch. D. 14, C. A. ; Harding *v.* Preece (1882), 9 Q. B. D. 281, D. C. **Mentd.** *Re* Tipping, *Ex p.* Edmonds (1883), 48 L. T. 77.

7703. —— —— Tenancy created by attornment clause in mortgage deed.]—Notwithstanding the insertion of an attornment clause in a mtge. deed, the real relation between the parties is that, not of landlord & tenant, but of mtgee. & mtgor., & this fact, as well as the nature of the rent reserved by the clause, must be taken into account in considering whether, on giving leave to the trustee of the mtgor. to disclaim the tenancy created by the attornment clause, any terms should be imposed for the benefit of the mtgee.—*Re* KNIGHT, *Ex p.* ISHERWOOD (1882), 22 Ch. D. 384 ; 52 L. J. Ch. 370 ; 48 L. T. 398 ; 31 W. R. 442, C. A.

Annotations :—**Mentd.** *Re* Bushell, *Ex p.* Izard (1883), 23 Ch. D. 115, C. A. ; *Re* Witton, *Ex p.* Arnal (1883), 24 Ch. D. 26, C. A. ; *Re* Salkeld, *Ex p.* Good (1884), 13 Q. B. D. 731, C. A.

7704. When granted—Bankruptcy of lessee—Landlord's rights against sub-lessee not prejudiced.]—A. demised a house to L. & Co. for ten years at a yearly rental of £70. A few days afterwards L. & Co. demised the house to M. for a term equal to the term of their own lease, less seven days, in consideration of a premium of £100 & a yearly rent of £56. L. & Co., having filed a petition for liquidation, the ct. gave the trustee leave to disclaim, on the ground that the disclaimer would not affect the right of A., the original lessor, to distrain upon M. for the rent of £70, & to re-enter on breach of the covenants, reserved by & contained in the original lease.—*Re* LEVY, *Ex p.* WALTON (1881), 17 Ch. D. 746 ; 50 L. J. Ch. 657 ; 45 L. T. 1 ; 30 W. R. 395, C. A.

Annotations :—**Consd.** *Re* Clarke, *Ex p.* East & West India Dock Co. (1881), 17 Ch. D. 759, C. A. ; East & West India Dock Co. *v.* Hill (1882), 22 Ch. D. 14, C. A. ; Harding *v.* Preece (1882), 9 Q. B. D. 281 ; Hill *v.* East & West India Dock Co. (1884), 9 App. Cas. 448, H. L. **Apld.** Wood *v.* Hayes (1885), 1 T. L. R. 207. **Refd.** *Re* Latham, *Ex p.* Glegg (1881), 19 Ch. D. 7, C. A. ; *Re* Marrish, *Ex p.* Hart Dyke (1882), 22 Ch. D. 410, C. A. ; *Re* Cock, *Ex p.* Shilson (1887), 20 Q. B. D. 343. **Mentd.** Heritable Reversionary Co. *v.* Millar, [1892] A. C. 598, H. L. (Sc.) ; De Vesci *v.* O'Connell, [1908] A. C. 298, H. L. (I.) ; O'Grady *v.* Wilmot, [1916] 2 A. C. 231, H. L. ; R. *v.* Halliday, [1917] A. C. 260, H. L. ; Tozer *v.* Viola, [1918] 1 Ch. 75.

7705. On what terms granted—Power of court to impose conditions.]—In giving leave to the trustee to disclaim a leasehold interest of bkpt., the ct.

PART XX. SECT. 16, SUB-SECT. 5.—C.

7694 i. *When necessary.*]—A lease cannot be disclaimed without leave of the ct.—*Re* CHUNG SHUN KOO, *Ex p.* HONG KONG LAND INVESTMENT & AGENCY CO., LTD. (1906), 2 Hong Kong 18.—HONG KONG.

l. *Date of disclaimer.*]—A disclaimer dates from the time of the sanction by the ct. & cannot have retrospective operation.—*Re* CHUNG SHUN KOO, *Ex p.* HONG KONG LAND INVESTMENT & AGENCY CO., LTD. (1906), 2 Hong Kong 18.—HONG KONG.

Sect. 16.—*Contracts and disclaimer of onerous property: Sub-sect.* 5, *C.*]

has power to impose a condition, such as payment to the lessor of the rent in full up to the date of the disclaimer, even though no third party has acquired from bkpt. an interest in the lease.—*Re* TURNER, *Ex p.* LADBURY (1881), 17 Ch. D. 532 ; 50 L. J. Ch. 838 ; 45 L. T. 5, C. A.

Annotations :—**Expld.** *Re* Knight, *Ex p.* Isherwood (1882), 22 Ch. D. 384, C. A. **Folld.** *Re* Salkeld, *Ex p.* Good (1884), 13 Q. B. D. 731, C. A. **Refd.** *Re* Witton, *Ex p.* Arnal (1883), 24 Ch. D. 26, C. A.

7706. —— Discretion of court.]—The imposing of conditions on the trustee is a matter of judicial discretion.—*Re* WITTON, *Ex p.* ARNAL (1883), 24 Ch. D. 26 ; 53 L. J. Ch. 134 ; *sub nom. Re* WHITTON, *Ex p.* ARNAL, 49 L. T. 221, C. A.

Annotation :—**Folld.** *Re* Salkeld, *Ex p.* Good (1884), 13 Q. B. D. 731, C. A.

7707. —— Lease deposited by way of equitable mortgage.]—When the trustee desires to disclaim a lease, which bkpt. has deposited by way of equitable mtge., he will not be allowed to do so to the prejudice of the mtgee.—*Re* MÜLLER, *Ex p.* BUXTON (1880), 15 Ch. D. 289 ; 43 L. T. 183 ; 29 W. R. 28, C. A.

Annotation :—**Mentd.** *Re* Levy, *Ex p.* Walton (1881), 17 Ch. D. 746, C. A.

7708. —— Lessee having agreed to assign lease.]—The lessee of premises having agreed, prior to the filing of a liquidation petition, to assign the lease to a third party, the trustee in the liquidation will not be permitted to execute a disclaimer of the lease, except upon the terms of executing such assignment, but upon executing the assignment he will be entitled to an indemnity against any liability which he may incur thereby.—*Re* TIPPING, *Ex p.* EDMONDS (1883), 48 L. T. 77.

7709. —— Trade fixtures removable by bankrupt lessee.]—Where there are trade fixtures on the leasehold premises of bkpt., removable by the tenant, & the trustee applies for leave to disclaim the lease, the same rule will be applied as between the landlord & trustee as would obtain if the lease had been determined in an ordinary way, & the landlord must either take over the fixtures at a valuation, or the trustee must have a reasonable time, before disclaiming, in which to sever & remove them.—*Re* MOSER, *Ex p.* PAINTER (1884), 13 Q. B. D. 738 ; 33 W. R. 16 ; 1 Morr. 244.

7710. —— Bankruptcy of one of two joint tenants—After dissolution of partnership—Rent paid by solvent retired partner.]—A lease of land & minerals was granted to two partners as joint tenants. The partnership was afterwards dissolved, on the terms that the business should be carried on by one of the partners alone, & that he should purchase the interest of the other for £12,000, which was to be paid in forty equal half-yearly instalments. The retiring partner covenanted that he would stand possessed of his share & interest in the demised premises in trust for the continuing partner. The continuing partner covenanted with the retiring partner to pay the £12,000 in the manner agreed upon, & assigned to him the buildings, machinery, & fixtures on the demised premises by way of mtge. to secure the payment of the £12,000, & covenanted that the leasehold premises should stand charged therewith. A year afterwards the continuing partner filed a petition, under which a trustee of his property was appointed. The trustee occupied the demised property for some time with a view to the benefit of debtor's estate. The rent due under the lease was paid to the landlord by the retired partner :—*Held :* leave to disclaim debtor's interest in the lease ought to be given to the trustee, only on condition of his paying to the retired partner the rent of the premises from the date of the trustee's appointment until the day when his beneficial occupation ceased.—*Re* SALKELD, *Ex p.* GOOD (1884), 13 Q. B. D. 731 ; 54 L. J. Q. B. 96 ; 51 L. T. 876 ; 33 W. R. 22, C. A.

7711. —— Trustee having unreconcilable duties.]—Bkpt. held a sub-lease of a quarry, which he had mortgaged to his bankers as security for a loan. Before the bkpcy. the bankers had entered into possession of the quarry & worked it by their agent. The agent was appointed trustee in the bkpcy., & continued to work the quarry on behalf of his principals :—*Held :* leave to disclaim could only be granted upon terms, the trustee having in his dual position undertaken unreconcilable duties.—*Re* CROWTHER, *Ex p.* DUFF (1887), 4 Morr. 100, D. C.

7712. —— Compensation for occupation by trustee—Estate benefited.]—On giving leave to the trustee to disclaim a leasehold interest of bkpt., the ct. will not order the trustee to pay the landlord any compensation for his use & occupation of the demised property, except in special circumstances, one instance being where the trustee's occupation has been beneficial to bkpt.'s estate.—*Re* KNIGHT, *Ex p.* ISHERWOOD (1882), 22 Ch. D. 384 ; 52 L. J. Ch. 370 ; 48 L. T. 398 ; 31 W. R. 442, C. A.

Annotations :—**Folld.** *Re* Bushell, *Ex p.* Izard (1883), 23 Ch. D. 115, C. A. **Extd.** *Re* Witton, *Ex p.* Arnal (1883), 24 Ch. D. 26, C. A. **Folld.** *Re* Salkeld, *Ex p.* Good (1884), 13 Q. B. D. 731, C. A.

7713. —— —— ——.]—The lessor of a disclaimed property will not be compensated for its use, unless it has been used by the trustee for the benefit of the estate.—*Re* ZAPPERT & Co., *Ex p.* TRUSTEE (1884), 1 Morr. 72.

7714. —— —— —— Landlord kept out of possession.]—When the trustee applies for leave to disclaim a lease of bkpt., the ct. will not order any compensation to be paid to the landlord, unless the trustee has kept him out of possession of the property, & his occupation has resulted in a benefit to bkpt.'s estate. The principle is that the trustee ought not to be allowed to increase bkpt.'s estate at the expense of the landlord.—*Re* BUSHELL, *Ex p.* IZARD (1883), 23 Ch. D. 115 ; 48 L. T. 502, C. A.

Annotations :—**Expld.** *Re* Witton, *Ex p.* Arnol (1883), 24 Ch. D. 26, C. A. **Folld.** *Re* Salkeld, *Ex p.* Good (1884), 13 Q. B. D. 731, C. A.

7715. —— —— —— Possession retained to make profit.]— In determining whether, on giving leave to the trustee to disclaim a lease of bkpt., the trustee should be ordered to pay compensation to the landlord in respect of his occupation of the leasehold premises, the ct. will have regard not merely to the question whether the occupation has actually produced a profit to bkpt.'s estate, but also to the question whether the possession was retained by the trustee with a view to obtaining such a profit.

The ct. ordered compensation to be paid by the trustee as a condition of giving him leave to disclaim the lease of bkpt.'s place of business, although during part of the time during which the trustee had been in occupation a bailiff had been in possession of bkpt.'s goods under a distress for rent, & the landlord had been allowed to place bills on the premises stating that they were to be let, & that application for that purpose was to be made to him.—*Re* WITTON, *Ex p.* ARNAL (1883), 24 Ch. D. 26 ; 53 L. J. Ch. 134 ; *sub nom. Re* WHITTON, *Ex p.* ARNAL, 49 L. T. 221, C. A.

Annotation :—**Folld.** *Re* Salkeld, *Ex p.* Good (1884), 13 Q. B. D. 731, C. A.

7716. —— —— —— Retention for benefit of creditors.]—In cases where a trustee seeks to disclaim, if subsequent to the adjudication any advantage has been derived from the use of the landlord's property, that is the use of the creditors & not of debtor, & for such advantage the landlord is entitled to be paid.—*Re* BROOKE, *Ex p.* TRUSTEE (1844), 1 Morr. 82.

7717. When refused—Lease mortgaged by way of underlease—Leave to disclaim equity of redemption.]—A lease was made by A. to B., who assigned it to C., who again assigned it to D. On the day following the assignment to D., D. made a mtge. of the property by way of underlease to C. D. having become unable to pay his debts, his creditors came to a resolution that his affairs should be liquidated by arrangement, & the lease having become of no value, the trustee of D.'s estate applied for leave to disclaim the lease:—*Held:* leave to disclaim the lease should be refused, but, upon the landlord undertaking not to make any claim or to prove against the estate of D., the trustee might be at liberty to execute a disclaimer of the equity of redemption in the mtge.—*Re* WILSON (1871), L. R. 13 Eq. 186; 20 W. R. 363.

Annotation:—**Refd.** *Re* Clarke, *Ex p.* East & West India Dock Co. (1881), 17 Ch. D. 759, C. A.

7718. —— Time for answering notice expiring before application—Party serving notice waiving time limit for reply.]—A trustee received from the lessors on Nov. 24 a notice calling on him to disclaim a lease held by debtor within twenty-eight days, under 1869 Act, s. 24. The lessors wrote another letter to the trustee on the day before the twenty-eight days expired, in which they asked for a reply to their letter of Nov. 24, "at his earliest convenience." The trustee, after the twenty-eight days had expired, applied to the ct. for leave to disclaim the lease:—*Held:* the lessors had waived their right to insist on an answer within twenty-eight days, & leave to disclaim should be given.—*Re* STOKOE, *Ex p.* MOORE (1876), 2 Ch. D. 802; 35 L. T. 386; 24 W. R. 720, C. A.

Annotations:—**Distd.** *Re* Richardson, *Ex p.* Harris (1880), 16 Ch. D. 613; Wilson *v.* Wallani (1880), 5 Ex. D. 155.

7719. —— Application after expiry of lease—Failure of lessor to appear on trustee's appeal from refusal of leave.]—A lease of a house was vested in bkpt. as assignee. The trustee did not disclaim, but he did not take possession of the property or exercise any act of ownership over it. Bkpt. continued to live in the house, his friends paying the rent for him. After the expiration of the term the lessor sued the original lessee on his covenant to repair. The lessee served a third party notice on the trustee, claiming to be indemnified by him as assignee of the term, against all breaches of the covenant since the date of the bkpcy. & the trustee's appointment. The trustee then applied for leave to execute a disclaimer in respect of the lease. The lessor opposed the application, which was refused on the ground that the lease had expired. The trustee appealed, giving notice to the lessor, who did not appear on the hearing of the appeal:—*Held:* leave to disclaim might be given, as it could not prejudice the rights of any person who was not before the ct.—*Re* THROCKMORTON, *Ex p.* PATERSON (1879), 11 Ch. D. 908; 41 L. T. 249; 27 W. R. 928, C. A.

Annotation:—**Folld.** *Re* Morrish, *Ex p.* Hart Dyke (1882), 22 Ch. D. 410, C. A.

7720. Form of order—Bankruptcy of sub-lessee—Leaseholder asking for vesting order.]—A. & B., being mtgees. of premises, sub-mortgaged them to their bankers by way of security for an advance. They then acquired a sub-lease of the premises from the leaseholder, & let the premises to a third party for a term of years with an option of purchase. Upon the bkpcy. of A. & B. the trustee asked for leave to disclaim, & the leaseholder asked for an order vesting the property in him:—*Held:* the right order to make was one giving leave to disclaim, subject to the leaseholder's & second lessee's right to prove against the estate for any injury accruing through the disclaimer, & putting the sub-mtgees. to their election whether or not they would within fourteen days take a vesting order to themselves, &, if they adopted the latter alternative, excluding them from all interest in & security upon the property:—*Semble:* it was doubtful whether the words of 1883 Act, s. 55 (6), were intended to apply to a landlord.—*Re* PARKER & PARKER, *Ex p.* TURQUAND (1884), 14 Q. B. D. 405; 51 L. T. 667; 33 W. R. 752; 1 Morr. 275.

Annotations:—**Consd.** *Re* Cock, *Ex p.* Shilson (1887), 20 Q. B. D. 343; *Re* Finley, *Ex p.* Clothworkers' Co. (1888), 21 Q. B. D. 475, C. A.; *Re* Baker, *Ex p.* Lupton, [1901] 2 K. B. 628, C. A. **Mentd.** *Re* Osborne, *Ex p.* Marillier (1896), 3 Mans. 238.

7721. Costs of application—Failure of trustee to elect after notice given.]—When a landlord gives a trustee notice requiring him to decide whether he will disclaim or not bkpt.'s leaseholds, & the trustee declines or neglects within the twenty-eight days limited by 1883 Act, s. 55 (4) to give notice whether he disclaims or not, & subsequently applies to the ct. for leave to disclaim, he may render himself personally liable to the payment of rent & costs.—*Re* PAGE, *Ex p.* MACKAY (1884), 14 Q. B. D. 401; 33 W. R. 825; 1 Morr. 287.

Annotation:—**Mentd.** *Re* Finley, *Ex p.* Clothworkers' Co. (1888), 21 Q. B. D. 475, C. A.

7722. —— Estate less than £300—Taxation.]—The costs of a trustee's application under 1883 Act, s. 55, to disclaim leaseholds, are costs of a "proceeding under the Act" which, as a general rule, are payable out of the estate, & where the assets are under £300, such costs are taxable on the lower scale.—*Re* PROCTER, [1891] 2 Q. B. 433; 65 L. T. 348; 39 W. R. 655; 7 T. L. R. 620; 8 Morr. 251.

Annotation:—**Apld.** *Re* Marsh, *Ex p.* Board of Trade (1894), 71 L. T. 776.

7723. Appeals—From discretion of court—Appeal to House of Lords.]—The Ct. of Appeal in the exercise of its discretion under 1869 Act, s. 23, gave a trustee leave to disclaim a lease. Leave to appeal to the House of Lords was refused, as being an appeal from the discretion of the ct.—*Re* CLARKE, *Ex p.* EAST & WEST INDIA DOCK CO. (1881), 17 Ch. D. 759; 50 L. J. Ch. 789; 45 L. T. 6; 30 W. R. 22, C. A.

Annotations:—**Folld.** *Re* Tipping, *Ex p.* Edmonds (1883), 48 L. T. 77. **Mentd.** East & West India Dock Co. *v.* Hill (1882), 22 Ch. D. 14; Harding *v.* Preece (1882), 9 Q. B. D. 281.

7724. —— —— County court.]—The discretion of the county ct. judge in giving leave to disclaim is not properly the subject of appeal.—*Re* TIPPING, *Ex p.* EDMONDS (1883), 48 L. T. 77.

7725. —— —— In imposing conditions.]—The Ct. of Appeal will not readily interfere with the exercise of the discretion by the judge of first instance in imposing conditions on a trustee disclaiming.—*Re* WITTON, *Ex p.* ARNAL (1883), 24 Ch. D. 26; 53 L. J. Ch. 134; *sub nom. Re* WHITTON, *Ex p.* ARNAL, 49 L. T. 221, C. A.

Annotation:—**Mentd.** *Re* Salkeld, *Ex p.* Good (1884), 13 Q. B. D. 731, C. A.

7726. —— After disclaimer executed—Stay of proceedings—Mortgagee's application.]—On the application of the trustee leave was given him to disclaim a lease vested in bkpt. After the trustee had executed a disclaimer, but within the time allowed for bringing an appeal, a person with

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whom bkpt. had deposited the lease by way of equitable mtge., & who was present when the order giving leave to disclaim was made, gave notice to appeal from the order:—*Held:* the disclaimer having been executed, the lessor's title was complete, & the appeal must be dismissed.

A person interested in preventing a disclaimer, should apply at once to stay proceedings under the order pending his appeal.—*Re* WOODS, *Ex p.* DITTON (1876), 3 Ch. D. 459; 45 L. J. Bcy. 141; 24 W. R. 1008; 2 Char. Pr. Cas. 66, C. A.

Annotations:—**Folld.** *Re* Hawes, *Ex p.* Sadler (1881), 19 Ch. D. 122, C. A. **Mentd.** Smalley *v.* Hardinge (1881), 50 L. J. Q. B. 367, C. A.

7727. —— —— —— Landlord's application.]—After unconditional leave has been given by the ct. to a trustee to disclaim a lease of bkpt. & the trustee has executed a disclaimer, it is too late for the lessor to appeal from the order even for the purpose of getting conditions imposed on the trustee. The Ct. of Appeal has then no power to impose conditions. If the lessor desires to appeal from such an order, he ought to apply when it is made for a stay of proceedings under it.—*Re* HAWES, *Ex p.* SADLER (1881), 19 Ch. D. 122; 51 L. J. Ch. 201; 30 W. R. 173, C. A.

D. Application to compel Trustee to elect.

7728. In what circumstances.]—In circumstances leaving it in doubt whether the assignees are adopting a lease or not, the lessor should take steps to compel the assignees to elect, under 1849 Act, s. 145.—GOODWIN *v.* NOBLE (1857), 8 E. & B. 587; 27 L. J. Q. B. 204; 4 Jur. N. S. 208; 120 E. R. 219.

Annotations:—**Mentd.** *Re* Skeen, *Ex p.* Sykes (1858), 32 L. T. O. S. 19; *Re* Caston, *Ex p.* De Buisson (1864), 10 L. T. 792; Bradshaw *v.* James (1869), 17 W. R. 1010; Williams *v.* Taylor (1869), 21 L. T. 612; White *v.* Hunt (1870), 23 L. T. 559; Titterton *v.* Cooper (1882), 46 L. T. 870, C. A.

7729. —— Purchaser with judgment for specific performance against bankrupt.]—Where a vendor has got a judgment for specific performance against the purchaser, & the purchaser becomes bkpt., the vendor's proper course is to go on & enforce his rights under such judgment, not to serve notice on the trustee under 1883 Act, s. 55 (1), (4), calling on him to elect whether he will disclaim or not.

When a mtgor. becomes bkpt., the bkpcy. is no bar to a foreclosure action. The same principle applies to an action for specific performance (VAUGHAN WILLIAMS, J.).—*Re* JEWELL (1897), 4 Mans. 28.

7730. Notice requiring trustee to disclaim—Whether posting sufficient—Receipt denied—Delivery to person in charge of trustee's office.]—Pltf., the lessor of premises occupied by a tenant who became bkpt., posted to deft., bkpt.'s trustee, an application requiring him to decide whether he would disclaim the premises or not. The receipt of the application was denied by deft., & no disclaimer was made within twenty-eight days:—*Held:* the mere posting of the notice was not sufficient, but it must be received by the trustee. *Semble:* It would be received if delivered at the office of the trustee to the person in charge.—REED *v.* HARVEY (1880), 5 Q. B. D. 184; 49 L. J. Q. B. 295; 42 L. T. 511; 44 J. P. 474; 28 W. R. 423, D. C.

Annotations:—**Mentd.** *Re* Turner, *Ex p.* Ladbury (1881), 17 Ch. D. 532, C. A.; *Re* Hann, *Ex p.* Foreman (1887), 18 Q. B. D. 393, C. A.

7731. Who may be required to disclaim—Official receiver.]—Under 1883 Act, s. 55 (4), the official receiver may be required by any person interested in bkpt.'s onerous property to decide whether he will disclaim or not.—*Re* COHEN, *Ex p.* TRUSTEE, [1905] 2 K. B. 704; 74 L. J. K. B. 864; 93 L. T. 659; 54 W. R. 83; 21 T. L. R. 725; 49 Sol. Jo. 712; 12 Mans. 358, C. A.

7732. In respect of what property—Agreement to procure lease from third party.]—Petitioner covenanted with bkpt. that he would procure a lease to be granted to him of certain premises by a third party:—*Held:* this was an agreement for a lease within 6 Geo. 4, c. 16, s. 75, & petitioner was entitled to call on the assignees to elect whether they would accept or decline such agreement.—*Re* PEARSON, *Ex p.* BENECKE (1835), 1 Deac. 186; 2 Mont. & A. 692; 4 L. J. Bcy. 84, Ct. of R.; *subsequent proceedings*, (1836), 2 Deac. 46, Ct. of R.

7733. —— Parol lease from year to year.]—Bkpt. held two farms on a parol lease from year to year. The assignees had allowed bkpt. to remain in possession, & the landlord petitioned that they might elect either to take or decline bkpt.'s interest:—*Held:* a parol lease was within 6 Geo. 4, c. 16, s. 75, & the assignees must elect.—*Re* REEVES, *Ex p.* HOPTON (1841), 2 Mont. D. & De G. 347; 5 Jur. 804, Ct. of R.

7734. —— Lease to which bankrupt entitled as trustee for himself & petitioners.]—By lease dated Jan. 2, 1837, between N. of the first part, R. of the second part, & the lessee of the third part, N. & R. demised to the lessee for ten years certain mills & other premises, which had been previously mortgaged by N. to R. in fee. At the same time the lessee & N. entered into partnership by articles of even date with the lease, according to which articles the demised mills & other premises were to be considered partnership property. The lessee & N. carried on business together till Aug. 6, 1842, when a separate fiat issued against the lessee which was annulled in Nov., 1842. The lessee also carried on a distinct trade with G. & M. against whom & himself a joint fiat was issued. The accounts of the partnership between the lessee & N. had not been adjusted, but N. had all along occupied & still continued to occupy & carried on business upon the demised premises. N. & R. having presented a petition under the joint fiat praying that the assignees might elect whether they would accept or abandon the lease, the assignees contended that 6 Geo. 4, c. 16, s. 75, extended expressly to the case only of bkpt. "entitled to a lease or an agreement for a lease," neither of which descriptions were applicable, bkpt. being only a trustee for himself & N. & being only entitled to one moiety of the lease beneficially:—*Held:* independently of 6 Geo. 4, c. 16, the ct. could order the assignees to act with regard to the matter in such manner as it thought fit, & had jurisdiction to order the assignees to elect whether they would accept or abandon the lease, & the Lord Chancellor had jurisdiction by the express terms of the sect. to order the assignees to elect & deliver up the lease, if they declined it, & the possession of the premises, or make any such other order as he should think fit.—*Re* RALEIGH, *Ex p.* NORTON (1843), 3 Mont. D. & De G. 312, Ct. of R.

7735. —— Lease deposited with equitable mortgagee.]—*Held:* a lessor was entitled under 6 Geo. 4, c. 16, s. 75, to an order on the assignees to elect whether they would accept or decline a lease, notwithstanding the lease had been deposited by bkpt. by way of equitable mortgage.—*Re*

BUTT, *Ex p.* VARDY (1843), 3 Mont. D. & De G. 340, Ct. of R.
Annotation :—**Consd.** Mackley *v.* Pattenden (1861), 7 Jur. N. S. 1056.

7736. What answers available—Question of title.]—A question of title is not an answer to a petition, seeking that assignees may be compelled to elect whether they will accept or not an agreement for a lease, under 6 Geo. 4, c. 16, s. 75.—*Re* PEARSON, *Ex p.* BENECKE (1835), 1 Deac. 186 ; 2 Mont. & A. 692 ; 4 L. J. Bcy. 84, Ct. of R. ; *subsequent proceedings*, (1836), 2 Deac. 46, Ct. of R.

7737. Effect of application—Whether bar to petition for leave to prove for rent, etc.]—Where a party, who has let bkpt. into possession of premises under an agreement to procure him a lease, petitions the ct. for an order that the assignees may accept or abandon the agreement, he is not precluded from applying to the ct. upon another petition for leave to prove for ground rent, dilapidations, & occupation rent by the assignees.—*Re* PEARSON, *Ex p.* BENECKE (1836), 2 Deac. 46 ; 5 L. J. Bcy. 51, Ct. of R.

7738. Time for compliance.]—Assignees ought to elect within a reasonable time after notice whether or not they will accept a lease belonging to bkpt.—*Re* SKEEN, *Ex p.* SYKES (1858), 32 L. T. O. S. 19.

7739. —— Extension of—When application must be made.]—Where the trustee has received a notice calling upon him to disclaim a lease within twenty-eight days, & requires an extension of time beyond the twenty-eight days in order to obtain the consent of the ct., he must apply for such extension before the twenty-eight days have elapsed, unless he can show some special circumstances to excuse the delay.—*Re* JONES, *Ex p.* LOVERING (1874), 9 Ch. App. 586 ; 43 L. J. Bcy. 94 ; 30 L. T. 621 ; 38 J. P. 726, L. JJ.
Annotations :—**Folld.** *Re* Stokoe, *Ex p.* Moore (1876), 2 Ch. D. 802, C. A **Consd.** *Re* Richardson, *Ex p.* Harris (1880), 16 Ch. D. 613. **Mentd.** *Re* Finley, *Ex p.* Clothworkers' Co. (1888), 21 Q. B. D. 475, C. A.

7740. —— —— Grounds for granting—Trustee compelled by lessor to pay rent in advance.]—The mere fact that the lessor has availed himself of the provisions contained in debtor's lease to compel the trustee to pay half a year's rent in advance, is not, in the absence of negotiation, or of anything to mislead the trustee, or of special circumstances to excuse the delay, a ground for enlarging the time, after the expiration of the twenty-eight days for notice to be given by the trustee, whether he disclaims the lease or not.—*Re* RICHARDSON, *Ex p.* HARRIS (1880), 16 Ch. D. 613 ; 44 L. T. 282 ; 29 W. R. 899.

7741. Adjournment of application—Grounds for.]—An application by the landlord for the assignees to elect whether they would take a lease in which bkpt. was lessee, was resisted on the ground that the assignees' decision would be much affected by the result of accounts to be taken between bkpt. & his partners :—*Held :* there were circumstances which rendered it proper to postpone this case for a short time.—*Re* RALEIGH, *Ex p.* NORTON (1843), 3 Mont. D. & De G. 312 ; 1 L. T. O. S. 151, Ct. of R.

7742. Costs—Of landlord.]—On petition by a lessor to compel assignees to elect whether they will accept or decline the lease, the ct. has no power to make the assignees pay the costs, or to give the lessor the costs out of bkpt.'s estate.—*Re* CLARK, *Ex p.* BRIGHT (1825), 2 Gl. & J. 79.
Annotations :—**Consd.** *Re* Woodburn's Will (1857), 1 De G. & J. 333, L. C. & L. JJ. **Refd.** *Re* Oldham, *Ex p.* Lucas (1833), 3 L. J. Bcy. 66, Ct. of R.

7743. —— ——.]—*Qu. :* whether upon a petition under 6 Geo. 4, c. 16, s. 75, the ct. had jurisdiction to give the landlord his costs.—*Re* REEVES, *Ex p.* HOPTON (1841), 2 Mont. D. & De G. 347 ; 5 Jur. 804, Ct. of R.

7744. —— —— Special circumstances.]—*Semble :* in the absence of special circumstances, an order, on an application by the lessor, for the assignees to elect whether they would take a lease in which bkpt. was lessee, should be made without costs.—*Re* RALEIGH, *Ex p.* NORTON (1843), 3 Mont. D. & De G. 312 ; 1 L. T. O. S. 151, Ct. of R.

7745. —— Of equitable mortgagee served with petition.]—Petition by the lessor, praying that the assignees should be directed to elect whether they would take the lease or not. The lease was subject to an equitable mtge., & the mtgee. was served with a copy of the petition :—*Held :* he should be paid his costs, as it was quite unnecessary that he should have been brought before the ct. upon the petition.—*Re* BUTT, *Ex p.* VARDY (1843), 3 Mont. D. & De G. 340 ; 1 L. T. O. S. 433, Ct. of R.
Annotation :—**Mentd.** Mackley *v.* Pattenden (1861), 7 Jur. N. S. 1056.

E. Effect of Disclaimer.

7746. On Crown—Right to disclaimed freeholds.]—Where freehold property of bkpt. is disclaimed by the trustee, it reverts to the Crown.—*Re* MERCER & MOORE (1880), 14 Ch. D. 287 ; 49 L. J. Ch. 201 ; 42 L. T. 311 ; *sub nom. Re* BEARDSWORTH & MOORE'S CONTRACT, 28 W. R. 485.
Annotation :—**Mentd.** Hill *v.* East & West India Dock Co. (1884), 48 J. P. 788, H. L.
See, now, 1914 Act, s. 54 (6).

7747. —— Bound.]—The provisions of 1883 Act, s. 55, as to the disclaimer of onerous property are "provisions relating to the remedies against the property of debtor," & are binding upon the Crown.—*Re* THOMAS, *Ex p.* WOODS & FORESTS COMRS. (1888), 21 Q. B. D. 380 ; 59 L. T. 447 ; 36 W. R. 735 ; 5 Morr. 209 ; *sub nom. Re* TROTTER, *Ex p.* THOMAS, 57 L. J. Q. B. 574, D. C.

7748. On jurisdiction of court.]—Where the assignees had already elected to abandon the lease & had given up possession :—*Held :* the ct. had no jurisdiction, on the petition of the lessor of bkpt. lessee, to order payment of rent due after the bkpcy. or compensation for hay, etc., carried off by the assignees.—*Re* HAUGH, *Ex p.* WARWICK (1819), Buck, 326.

7749. —— To grant same relief as court of equity.]—The ct. has jurisdiction, upon the assignees electing to abandon a contract, upon ordering petitioner to deliver up the agreement, & securities for the performance thereof to be cancelled, to grant such relief as a ct. of equity could have granted in the circumstances.—*Re* PEARSON, *Ex p.* BENECKE (1836), 2 Deac. 46 ; 5 L. J. Bcy. 51, Ct. of R.

7750. —— To grant compensation in summary administration—Disclaimer without application to court.]—Where an order is made for the summary administration of bkpt.'s estate, & the trustee disclaims, without application to the ct., the leasehold premises of bkpt., the ct. has no jurisdiction to give any compensation to the landlord out of bkpt.'s estate for the use & occupation

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7735 i. *In respect to what property—Lease subject to mortgage.*]—The rule of practice acted on for several years in bkpcy. in Ireland, that the ct. will not, in the exercise of its discretion, order an assignee to elect whether or not he will accept a lessee's interest in a lease vested in bkpt., when it is subject to a mtge., is not a hard & fast rule, but ought to be departed from in special circumstances.—*Re* COLEMAN, [1917] 2 I. R. 623.—IR.

7738 i. *Time for compliance.*]—The period of time within which assignees will be ordered to elect, depends on the circumstances of each particular case.—*Re* COLEMAN, [1917] 2 I. R. 623.—IR.

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by the trustee of the leasehold premises for the purposes of the bkpcy., even although a benefit has thereby resulted to the estate.—*Re* SANDWELL, *Ex p.* ZERFASS (1885), 14 Q. B. D. 960; 54 L. J. Q. B. 323; 52 L. T. 692; 33 W. R. 522; 2 Morr. 95.

On bankrupt—Liability to be placed on list of contributories—In windng up of company.]—*See* COMPANIES.

7751. On trustee—Generally.]—The effect of the disclaimer is to put an end to both the rights & the liabilities of the trustee in respect of the disclaimed property. That is the primary object. By the disclaimer the trustee elects to have nothing to do with the property, which is onerous, & from which nothing can be got for the benefit of the creditors. He is at liberty to disclaim it, & the effect of the disclaimer is to extinguish all the rights & liabilities of the trustee himself (LINDLEY, L.J.).—*Re* FINLEY, *Ex p.* CLOTHWORKERS' CO. (1888), 21 Q. B. D. 475; 57 L. J. Q. B. 626; 60 L. T. 134; 37 W. R. 6; 4 T. L. R. 745; *sub nom. Re* FINLEY, *Ex p.* HANBURY, 5 Morr. 248, C. A.

Annotations:—**Consd.** Stacey *v.* Hill, [1901] 1 K. B. 660, C. A. **Mentd.** *Re* Morgan, *Ex p.* Morgan (1889), 22 Q. B. D. 592, C. A.; *Re* Smith, *Ex p.* Hepburn (1890), 25 Q. B. D. 536, C. A.; *Re* Baker, *Ex p.* Lupton, [1901] 2 K. B. 628, C. A.; Lea *v.* Thursby, [1904] 2 Ch. 57; *Re* Carter & Ellis, *Ex p.* Savill, [1905] 1 K. B. 735, C. A.

7752. —— Disclaimer of agricultural lease—Effect of covenants as to way-going crops.]—By a covenant in a lease the lessee was bound at the end or sooner determination of the term to leave on the demised premises the hay, straw, etc. The lessee became bkpt., & the lessor petitioned under 49 Geo. 3, c. 121, s. 19, that the assignees might either accept or deliver up the lease, & that they might be restrained from removing the hay, straw, etc. The assignees declined to take the lease, but contended they were entitled to remove the hay, straw, etc. The Lord Chancellor determined the lease, ordered the assignees to deliver possession of the premises, granted the injunction asked for & directed the opinion of a ct. of law to be taken on the construction of the covenant:—*Held:* on determination of the lease by order of ct. the assignees were not entitled to be paid for the hay, straw, etc.—*Re* GOUGH (1814), Buck, 85; *previous proceedings*, (1813), 1 Rose, 445, L. C.

Annotation:—**Mentd.** *Re* Dark, *Ex p.* Maundrell (1817), Buck, 83.

7753. —— —— ——.]—If a lease is determinable upon notice at the will of the lessor or lessee & the lessee covenants to leave at quitting, the hay, straw, etc., on the premises, the bkpcy. of the lessee & the election of his assignees not to take up the lease, have the same effect with reference to the covenant, as though the lessee had quitted upon notice.—*Re* ADAMS, *Ex p.* WHITTINGTON (1817), Buck, 87, L. C.

7754. —— —— Right to way-going crop—On payment of rent.]—Covenant in a lease, "that the lessee shall & may have & take a going-off crop from two-third parts of the arable lands, etc., on the effluxion of the lease, or sooner determination of the term." The lessee became a bkpt., & his assignees, on a petition, under 49 Geo. 3, c. 121, s. 19, refused to accept the lease:—*Held:* they were entitled to the off-going crop, paying rent up to the time when possession of the premises & lease should be delivered to the landlord.—*Re* DARK, *Ex p.* MAUNDRELL (1817), 2 Madd. 315; Buck, 83; 56 E. R. 351.

7755. —— —— Whether bound by stipulations against selling crops.]—A lessee was bound by the covenants in his lease not to sell the hay, straw, etc., grown on his farm without the consent of the landlord. The lessee became a liquidating debtor under 1869 Act, s. 125, & the trustee in the liquidation disclaimed the lease:—*Held:* the trustee was bound by 56 Geo. 3, c. 50, s. 11, notwithstanding the disclaimer, & an injunction should be granted to restrain him from selling the hay, straw, etc., grown on the farm.—LYBBE *v.* HART (1885), 29 Ch. D. 8; 54 L. J. Ch. 860; 52 L. T. 634; 1 T. L. R. 235, C. A.

Annotations:—**Consd.** Clegg *v.* Hands (1890), 44 Ch. D. 503. **Mentd.** Chapman *v.* Smith, [1907] 2 Ch. 97.

7756. —— —— ——.]—A tenant of a farm, restrained by agreement from selling the hay & straw grown on the farm, became bkpt. The trustee sold hay in breach of the agreement, & then disclaimed the lease:—*Held:* the trustee was personally liable for his wrongful act in selling the hay; & he was not protected by 1883 Act, s. 55 (2).—SCHOFIELD *v.* HINCKS (1888), 58 L. J. Q. B. 147; 60 L. T. 573; 37 W. R. 157; 5 T. L. R. 101, D. C.

7757. —— Right to enforce agreement for purchase of fixtures by landlord.]—By indenture of demise, reciting that the lessee had purchased certain fixtures on the premises, on condition of their being repurchased as after mentioned, it was agreed between the lessor & lessee, & the lessor covenanted, that on the expiration or other sooner determination of the term, he, the lessor, should & would take the fixtures at such price as they should be appraised at by two competent persons, one to be named on each side. The lessee became bkpt., & his assignee declined the lease, which was delivered up, but he required the fixtures to be repurchased, & brought an action of covenant against the lessor for not appointing an appraiser:—*Held:* as by 6 Geo. 4, c. 16, s. 75, bkpt., on delivering up the lease, was discharged from all the covenants on his part, performance of the covenant in question could not be enforced by the assignee against the lessor.—KEARSEY *v.* CARSTAIRS (1831), 2 B. & Ad. 716; 9 L. J. O. S. K. B. 328; 109 E. R. 1310.

Annotations:—**Apld.** Fairburn *v.* Eastwood (1840), 6 M. & W. 679. **Refd.** Beckham *v.* Drake (1849), 2 H. L. Cas. 579, H. L.

See also, No. 7765, *post.*

7758. —— Right to retain sum spent on premises erected by bankrupt—Under arrangement that expenditure might be deducted from rent.]—Bkpt. agreed in writing to take a lease of a factory for a term of years, & the landlord agreed to erect at his own expense certain buildings, upon bkpt. paying as an additional rent £7 10*s.* per cent. on the amount so expended, but the buildings were subsequently erected by bkpt. on the landlord's verbal assurance that the amount expended might be deducted from the rent. The assignees elected not to adopt the agreement for the lease, but refused to deliver up possession to the landlord, unless he allowed them the sum bkpt. had expended on the buildings:—*Held:* as both written & verbal agreements contemplated a continuance of

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m. *In general.*]—Where a person, who obtains a promise of sale becomes insolvent, & the promise is rescinded with the approval of the ct., by the curator & inspectors of the estate, after ineffectually endeavouring to dispose of insolvent's right in same, it ceases to have any effect.—DESAUTELS *v.* PARKER (1894), Q. R. 6 S. C. 419.—CAN.

o. —— *Debtors & Creditors Act*, 1876, *s.* 69.]—*Held:* the effect of the above sect. was that a disclaimer by the trustee operated as an actual surrender.—MILLER *v.* YOUNG (1882), 2 N. Z. L. R. C. A. 1.—N.Z.

the tenancy, which the assignees had repudiated, they had no lien on the premises for the money expended by bkpt.—*Re* RYLAND, *Ex p.* LADD, *Ex p.* MOLE (1834), 3 Deac. & Ch. 647, Ct. of R.

7759. —— Right to recover excess value of machinery installed by bankrupt.]—Deft., by indenture, demised to E. & W. a fulling mill, for fourteen years. The lease, after reciting that the machinery had been valued at a certain sum, contained covenants, that at the end or other sooner determination of the term, the machinery should be again valued by two indifferent persons chosen by the lessees & the lessor, & that if such second valuation should amount to less than the first, the difference should be paid by the lessees to the lessor, but if it should be greater, the surplus should be paid by the lessor to the lessees. During the existence of the lease, the lessees became bkpt., & their assignees declined to take the lease, but they required deft. to appoint a person to value the machinery, & on his refusal to do so, appointed one themselves, who valued the machinery then in the mill, most of which had been brought in by bkpts., at a sum exceeding the original valuation. The assignees then delivered possession of the premises to deft., & demanded of him the difference between the two valuations, which he refused to pay:—*Held:* the remedy of the assignees was not by an action on the covenants, which had been determined by the bkpcy., & by their refusal to take the lease.—FAIRBURN *v.* EASTWOOD (1840), 6 M. & W. 679; 9 L. J. Ex. 226; 151 E. R. 585.

Annotation:—**Mentd.** Weeton *v.* Woodcock (1840), 7 M. & W. 14.

7760. —— Duty to deliver up lease to bankrupt.]—Assignees of bkpt., who have elected to decline a lease, will be compelled to deliver it up to bkpt.—ANON. (1851), 18 L. T. O. S. 42.

7761. —— Right to remove fixtures.]—After the trustee has executed a disclaimer of a lease vested in bkpt., he is not entitled, even though he be in possession of the leasehold premises, to remove the tenant's fixtures.—*Re* LAVIES, *Ex p.* STEPHENS (1877), 7 Ch. D. 127; 47 L. J. Bcy. 22; 37 L. T. 613; 26 W. R. 136, C. A.

Annotations:—**Expld. & Apld.** *Re* Roberts, *Ex p.* Brook (1878), 10 Ch. D. 100, C. A. **Distd.** *Re* Harrison, *Ex p.* Meads (1879), 49 L. J. Bcy. 47. **Folld.** *Re* Latham, *Ex p.* Glegg (1881), 19 Ch. D. 7, C. A. **Consd.** Hill *v.* East & West India Dock Co. (1884), 48 J. P. 788, H. L. **Refd.** East & West India Dock Co. *v.* Hill (1882), 22 Ch. D. 14, C. A.

7762. —— Right as against landlord to assert invalidity of disclaimer.]—A trustee, who after separating the fixtures disclaims the lease, cannot as against the landlord assert the invalidity of his own disclaimer.—*Re* ROBERTS, *Ex p.* BROOK (1878), 10 Ch. D. 100; 48 L. J. Bcy. 22; 39 L. T. 458; 43 J. P. 53, 286; 27 W. R. 255, C. A.

Annotations:—**Consd.** Lowrey *v.* Barker (1880), 5 Ex. D. 170, C. A.; *Re* Latham, *Ex p.* Glegg (1881), 19 Ch. D. 7, C. A. **Refd.** East & West India Dock Co. *v.* Hill (1882), 22 Ch. D. 14, C. A.; Leschallas *v.* Woolf, [1908] 1 Ch. 641. **Mentd.** *Re* Glasdir Copper Works, English Electro-Metallurgical Co. *v.* Glasdir Copper Works, [1904] 1 Ch. 819.

7763. —— Right to convey property—Disclaimer of freeholds.]—An owner of freehold property, burdened with onerous covenants the title deeds of which he had deposited with an equitable mtgee., became bkpt. The trustee executed a disclaimer of the property. Subsequently he & bkpt. purported to convey the property to the equitable mortgagee, whose assigns contracted to sell same to a purchaser:—*Held:* as there had been a complete disclaimer by the trustee, the subsequent conveyance was inoperative, & the legal estate was outstanding & could not be got in under Trustee Act, 1850 (c. 60).—*Re* MERCER & MOORE (1880), 14 Ch. D. 287; 49 L. J. Ch. 201; 42 L. T. 311; *sub nom. Re* BEARDSWORTH & MOORE'S CONTRACT, 28 W. R. 485.

Annotation:—**Refd.** Hill *v.* East & West India Dock Co. (1884), 48 J. P. 788, H. L.

7764. —— Liability for rent for period from cesser of occupation until disclaimer—For actual use after disclaimer.]—A trustee used & occupied leasehold premises of bkpts., & paid the next quarter's rent to the landlord. Thenceforth the trustee ceased to use the premises, but for a time retained the key of them, & ultimately disclaimed the lease & handed over the key to the landlord:—*Held:* the trustee was not personally liable, either upon an implied contract of tenancy or as a trespasser, to pay the landlord in respect of the possession of the premises between the time when the trustee's actual occupation ceased & the date of the disclaimer. *Qu.:* whether a trustee, although he had disclaimed, would not be personally liable to the lessor in respect of any actual use and occupation of the premises.—LOWREY *v.* BARKER (1880), 5 Ex. D. 170; 49 L. J. Q. B. 433; 42 L. T. 215; 28 W. R. 559, C. A.

7765. —— Right to benefit of provisions becoming operative on termination—Disclaimer of expired lease.]—Where the trustee has disclaimed a lease, which has expired by effluxion of time or by forfeiture between his appointment & the execution of the disclaimer, he cannot claim the benefit of any provisions contained in the lease which were to come into operation at the expiration or sooner determination of the term.—*Re* MORRISH, *Ex p.* HART DYKE (1882), 22 Ch. D. 410; 52 L. J. Ch. 570; 48 L. T. 303; 31 W. R. 278, C. A.

Annotations:—**Consd.** Lybbe *v.* Hart (1885), 29 Ch. D. 8, C. A. **Mentd.** Ware *v.* Booth (1894), 10 T. L. R. 446; Serjeant *v.* Nash, Field, [1903] 2 K. B. 304, C. A.

See, also, Nos. 7752 *et seq.*, 7757, *ante.*

7766. —— Right to claim chattels under reputed ownership clause—Land & chattels leased for one entire rent.]—Where a trustee disclaims a lease of land & chattels let at one entire rent, he cannot claim the chattels as having been at the commencement of the bkpcy. in the order or disposition of bkpt. as reputed owner with the consent of the true owner.—*Re* FUSSELL, *Ex p.* ALLEN (1882), 20 Ch. D. 341; 51 L. J. Ch. 724; 47 L. T. 65; 30 W. R. 601, C. A.

Annotations:—**Refd.** *Re* Morrish, *Ex p.* Hart Dyke (1882), 22 Ch. D. 410, C. A. **Mentd.** Lybbe *v.* Hart (1885), 29 Ch. D. 8, C. A.

7767. —— Release from all liability—Not merely from date of adjudication.]—A disclaimer of a lease to bkpt. by the trustee operates to relieve the trustee from all liability under the lease, not merely from liability as from the date of the adjudication.—*Re* FUSSELL, *Ex p.* ALLEN (1882),

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7764 i. *On trustee—Liability for rent from cesser of occupation until disclaimer.*]—Where the trustees of an insolvent estate took possession of premises held under lease by insolvents, & retained same for several months after the transfer of the property of insolvents to them:—*Held:* the trustees were, notwithstanding their having taken possession, at liberty to eject insolvents' interest in the term of the lease, & were only liable to pay as for use & occupation during the period they actually held possession of the premises.—LITTLE *v.* DOOLING & KELLY'S TRUSTEES (1817), 1 Nfld. L. R. 29.—**NFLD.**

q. —— *Liability to landlord for rents received before disclaimer.*]—After an adjudication, the assignees received the rents from the occupying tenants, & then disclaimed bkpt.'s interest in the premises:—*Held:* that the assignees were bound to pay over the rents so received to the landlord of bkpt.—*Re* HUDSON (1877), 1 L. R. Ir. 6.—**IR.**

7767 i. —— *Release from all liability.*]—The abandonment of an agreement of sale under Ordinance No. 64, s. 79. has the effect of (*inter alia*)

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20 Ch. D. 341; 51 L. J. Ch. 724; 47 L. T. 65; 30 W. R. 601, C. A.

Annotations:—**Refd.** *Re* Morrish, *Ex p.* Hart Dyke (1882), 22 Ch. D. 410, C. A. **Mentd.** Lybbe *v.* Hart (1885), 29 Ch. D. 8, C. A.

7768. —— Liability as assignee or trespasser—Disclaimer dating back to adjudication.]—W., who occupied premises as a yearly tenant, was adjudicated bkpt. on Sept. 7. Deft., as trustee, entered into possession of the premises & held them until Jan. 29, 1884, when he tendered the keys to pltf., the landlord, for the purpose of winding up bkpt.'s business & realising his assets for the benefit of the estate, paying rent down to Dec. 25, 1883. On Feb. 26, 1881, the trustee with the leave of the ct., & after notice to the landlord, disclaimed all interest in the term:—*Held:* the disclaimer relating back to the date of the adjudication, the trustee was not liable in respect of his subsequent occupation of the premises, either as assignee or as a trespasser, the landlord's only remedy being by application to the Ct. of Bkpcy. under 1871 Rules, r. 28.—GABRIEL *v.* BLANKENSTEIN (1884), 13 Q. B. D. 684; 33 W. R. 151, D. C.

7769. —— Right to deposit on purchase of land by bankrupt.]—By a contract for sale of real estate it was stipulated that a portion of the purchase-money should be paid immediately, & the residue on completion of the contract. There was no stipulation as to the forfeiture of the deposit in case the purchase went off through the purchaser's default. After the title had been accepted the purchaser became bkpt., & the trustee disclaimed the contract, & called upon the vendor to repay the deposit:—*Held:* the vendor was entitled to retain the deposit.—*Re* PARNELL, *Ex p.* BARRELL (1875), 10 Ch. App. 512; 44 L. J. Bcy. 138; 33 L. T. 115; 23 W. R. 846, L. JJ.

Annotations:—**Consd.** Howe *v.* Smith (1884), 27 Ch. D. 89, C. A.; Hart *v.* Porthgain Harbour Co., [1903] 1 Ch. 690; Workman Clark *v.* Lloyd Brazileño, [1908] 1 K. B. 968, C. A. **Mentd.** Cornwall *v.* Henson, [1899] 2 Ch. 710.

7770. On landlord—Right to distrain—Lease not given up by bankrupt.]—Where the assignees, under 6 Geo. 4, c. 16, s. 75, have declined a lease to which bkpt. was entitled, but bkpt. has not delivered up the lease to the lessor, the lessor retains, until such delivery up to him, his right of distress for the rent. *Semble:* (1) the effect of the sect. is only to exempt bkpt. from personal liability, & not to affect the landlord's right of distress; (2) it applies only to cases where covenants are broken or rent becomes due after the delivery up of the lease by bkpt. *Qu.:* whether it applies to the case of a demise not in writing.—BRIGGS *v.* SOWRY (1841), 8 M. & W. 729; 11 L. J. Ex. 193; 151 E. R. 1234.

Annotations:—**Consd.** Phillips *v.* Shervill (1845), 6 Q. B. 944. **Refd.** *Re* Mackenzie, *Ex p.* Hertfordshire, [1899] 2 Q. B. 566, C. A.

7771. —— —— Goods of bankrupt in possession of mortgagees.]—The goods of a trader on premises of which he was tenant were mtged. for more than their value. The mtgee. entered & took possession. The tenant became bkpt. owing more than a year's rent, & the assignees declined the tenancy. No formal notice was given to bkpt., & nothing was done. Then, a fresh quarter having elapsed:—*Held:* the tenancy continued, & the landlord might distrain on the goods of the mtgees. for the quarter's rent thus accruing.—BROCKLEHURST *v.* LAWE (1857), 7 E. & B. 176; 26 L. J. Q. B. 107; 3 Jur. N. S. 436; 5 W. R. 311; 119 E. R. 1213.

Annotations:—**Folld.** Railton *v.* Wood (1890), 15 App. Cas. 363, P. C. **Consd.** Crosse *v.* Welch (1892), 8 T. L. R. 401.

7772. —— Right to fixtures—From order of adjudication.]—The effect of a disclaimer is to give the landlord an absolute title to the fixtures as from the date of the order of adjudication.—*Re* LAVIES, *Ex p.* STEPHENS (1877), 7 Ch. D. 127; 47 L. J. Bcy. 22; 37 L. T. 613; 26 W. R. 136, C. A.

Annotations:—**Apld.** *Re* Roberts, *Ex p.* Brook (1878), 10 Ch. D. 100, C. A. **Distd.** *Re* Harrison, *Ex p.* Meads (1879), 49 L. J. Bcy. 47. **Apld.** *Re* Latham, *Ex p.* Glegg (1881), 19 Ch. D. 7, C. A. **Refd.** Hill *v.* East & West India Dock Co. (1884), 48 J. P. 788, H. L. **Mentd.** East & West India Dock Co. *v.* Hill (1882), 22 Ch. D. 14, C. A.

7773. —— —— From date of trustee's appointment.]—The effect of a disclaimer by the trustee of a lease vested in debtor is to place the trustee in the position of never having had any estate in the leasehold property, & any severance by the trustee of the fixtures attached to the property after the date at which the term is put an end to by the disclaimer, *i.e.*, the date of the trustee's appointment, is necessarily a wrongful act, & gives the landlord a right to recover the value of the fixtures from the trustee.—*Re* ROBERTS, *Ex p.* BROOK (1878), 10 Ch. D. 100; 48 L. J. Bcy. 22; 39 L. T. 458; 43 J. P. 53, 286; 27 W. R. 255, C. A.

Annotations:—**Consd.** Lowrey *v.* Barker (1880), 5 Ex. D. 170, C. A.; *Re* Latham, *Ex p.* Glegg (1881), 19 Ch. D. 7, C. A. **Refd.** East & West India Dock Co. *v.* Hill (1882), 22 Ch. D. 14, C. A. **Mentd.** *Re* Glasdir Copper Works, English Electro-Metallurgical Co. *v.* Glasdir Copper Works, [1904] 1 Ch. 819; Leschallas *v.* Woolf, [1908] 1 Ch. 641.

7774. —— —— ——.]—A lease contained a proviso that the lessee, his exors., administrators, & assigns, might at any time or times during the continuance of the term, or within twelve months from the expiration or other sooner determination thereof, but not afterwards, remove any buildings or machinery which he or they might have erected on the demised premises for trade purposes. The lessee filed a liquidation petition, & the trustee sold the trade machinery & fixtures, which were then removed by the purchaser. The trustee afterwards disclaimed the lease:—*Held:* the

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discharging the trustee from all liability to fulfil any of the stipulations or conditions of the agreement, which remained unperformed or unfulfilled.—SMUTS (NEETHLING'S TRUSTEE) *v.* NEETHLING (1844), 3 Men. 283.—S. AF.

s. —— *Right to claim refund of instalments already paid.*]—Where creditors have decided to abandon a contract of sale subject to a suspensive condition entered into by insolvent, the trustee, in the absence of any stipulation in the contract, is not entitled to claim a refund of instalments of the purchase price already paid before abandoning the property sold to the owner.—MANGOLD BROTHERS *v.* GREYLING'S TRUSTEE (1910), E. D. L. 471.—S. AF.

t. —— *After election to adopt not accepted by lessor—Claim for use & occupation.*]—LAZIER *v.* ARMSTRONG (1905), 5 O. W. R. 596.—CAN.

w. —— *Right to retain sum spent on premises erected by bankrupt.*]—Deft. leased property in the Orange Free State for five years, & undertook, at the expiration of the lease, to pay the lessee £150, being half the cost of certain buildings erected by the lessee upon the property. Before the five years had expired the lease was terminated by the assignment of the lessee's estate. Thereupon deft. offered to receive the trustee as lessee for the unexpired term of the lease. The trustee refused the offer, & claimed from deft. immediate payment of the £150:—*Held:* as deft.'s offer had been refused, deft. was entitled to absolution from the instance.—CRESSWELL'S ESTATE TRUSTEE & DURBACH *v.* COETZEE (1916), App. D. 14.—S. AF.

7770 i. *On landlord—Costs of vesting order.*]—Where a lessee becomes bkpt. & the official assignee disclaims the lease, the lessor is entitled to the costs of obtaining an order revesting in him the estate of bkpt. in the leasehold premises.—*Re* PAULIN, *Ex p.* INGLIS (1886), 4 N. Z. L. R. 338.—N.Z.

a. —— *Right to rent between adjudication & disclaimer.*]—The landlord of premises, of which bkpt. was lessee, & which the assignee has elected to take, & subsequently disclaimed, is not entitled as of right to the rent accruing between adjudication & disclaimer, or to any compensation for the assignee's occupation, unless he can establish a case of special circumstances under 1872 Act, s. 97.—*Re* THOMPSON, *Re* LOW (1891), 26 I. L. T. 15.—IR.

disclaimer having the operation of a surrender of the lease as from the date of the appointment of the trustee, the proviso was, by construction of law, with all the other provisions of the lease, put an end to before the removal, & the removal could not be justified, & the lessor was entitled to the proceeds of sale.—*Re* LATHAM, *Ex p.* GLEGG (1881), 19 Ch. D. 7 ; 51 L. J. Ch. 367 ; 45 L. T. 484 ; 30 W. R. 144, C. A.

Annotations :—**Consd.** *Re* Fussell, *Ex p.* Allen (1882), 20 Ch. D. 341, C. A. **Refd.** East & West India Dock Co. *v.* Hill (1882), 22 Ch. D. 14, C. A. ; *Re* Morrish, *Ex p.* Hart Dyke (1882), 22 Ch. D. 410, C. A. ; Lybbe *v.* Hart (1885), 29 Ch. D. 8, C. A.

7775. —— Right to benefit of provisions becoming operative on termination—Disclaimer of expired lease.]—Where the trustee has disclaimed a lease, which has been determined by effluxion of time or by forfeiture between his appointment & the execution of the disclaimer, the lessor cannot claim the benefit of any provisions contained in the lease which were to come into operation at the expiration or sooner determination of the term. —*Re* MORRISH, *Ex p.* HART DYKE (1882), 22 Ch. D. 410 ; 52 L. J. Ch. 570 ; 48 L. T. 303 ; 31 W. R. 278, C. A.

Annotations :—**Consd.** Lybbe *v.* Hart (1885), 29 Ch. D. 8, C. A. **Mentd.** Ware *v.* Booth (1894), 10 T. L. R. 446 ; Serjeant *v.* Nash, Field, [1903] 2 K. B. 304, C. A.

7776. —— Surrender of chattels as well as land—Chattels & land let for one entire rent.]—The effect of a disclaimer of a lease to bkpt. by the trustee, is to give up to the lessor the entirety of that which is comprised in the demise. If bkpt. be the lessee of land & personal chattels, demised as one subject-matter at one entire rent, a disclaimer of the lease by the trustee operates as a surrender to the lessor of the chattels, as well as the land.—*Re* FUSSELL, *Ex p.* ALLEN (1882), 20 Ch. D. 341 ; 51 L. J. Ch. 724 ; 47 L. T. 65 ; 30 W. R. 601, C. A.

Annotations :—**Refd.** *Re* Morrish, *Ex p.* Hart Dyke (1882), 22 Ch. D. 410, C. A. **Mentd.** Lybbe *v.* Hart (1885), 29 Ch. D. 8, C. A.

7777. On bankrupt—Generally.]—Where the assignees declined a lease, & bkpt. within fourteen days after notice of that fact delivered up the lease to the lessor :—*Held :* bkpt. was discharged from any subsequent payment of the rent or observance of the covenants.—MANNING *v.* FLIGHT (1832), 3 B. & Ad. 211 ; 1 L. J. K. B. 95 ; 110 E. R. 79.

Annotations :—**Apld.** Smyth *v.* North (1872), L. R. 7 Exch. 242. **Consd.** Hill *v.* East & West India Dock Co. (1884), 9 App. Cas. 448, H. L. **Refd.** East & West India Dock Co. *v.* Hill (1882), 22 Ch. D. 14, C. A. ; Harding *v.* Preece (1882), 9 Q. B. D. 281. **Mentd.** Slack *v.* Sharpe (1838), 8 Ad. & El. 366.

7778. —— ——.]—If there is nothing more than a lease, & the lessee becomes bkpt., the disclaimer determines his interest in the lease. He gets rid of all his liabilities, & he loses all his rights by virtue of the disclaimer. There is no need of any provision for vesting the property in the landlord, but the natural & legal effect of 1883 Act, s. 55 (2), is that the reversion will become accelerated. There is nothing to be vested in the landlord. But he may require delivery of possession, &, if so, he can get it under s. 55 (6) (LINDLEY, L.J.).—*Re* FINLEY, *Ex p.* CLOTHWORKERS' CO. (1888), 21 Q. B. D. 475 ; 57 L. J. Q. B. 626 ; 60 L. T. 134 ; 37 W. R. 6 ; 4 T. L. R. 745 ; *sub nom. Re* FINLEY, *Ex p.* HANBURY, 5 Morr. 248, C. A.

Annotations :—**Refd.** *Re* Baker, *Ex p.* Lupton, [1901] 2 K. B. 628, C. A. Stacey *v.* Hill, [1901] 1 K. B. 660, C. A. **Mentd.** *Re* Morgan, *Ex p.* Morgan (1889), 22 Q. B. D. 592, C. A. ; *Re* Smith, *Ex p.* Hepburn (1890), 25 Q. B. D. 536, C. A. ; Lea *v.* Thursby, [1904] 2 Ch. 57 ; *Re* Carter & Ellis, *Ex p.* Savill, [1905] 1 K. B. 735, C. A.

7779. —— Liability for use & occupation—Possession offered to landlord—Verbal lease.]—A lessee, under an unwritten contract reserving rent on Apr. 6 & Oct. 6, became bkpt., & a fiat issued in Mar., the rent due in the previous Oct. having been paid. Upon the assignees refusing to accept the premises, bkpt. offered, within fourteen days after his receiving notice of such refusal, & one day before Apr. 6, to deliver up possession to the lessor :—*Held :* (1) under 6 Geo. 4, c. 16, s. 75, he was not liable in *assumpsit* for use & occupation to pay anything in respect of the time subsequent to Oct. 6 ; (2) where bkpt. held by an unwritten lease, offering possession was a delivery within s. 75.—SLACK *v.* SHARPE (1838), 8 Ad. & El. 366 ; 3 Nev. & P. K. B. 390 ; 1 Will. Woll. & H. 496 ; 7 L. J. Q. B. 225 , 2 Jur. 839 ; 112 E. R. 876.

Annotations :—**Consd.** Colles *v.* Evanson (1865), 19 C. B. N. S. 372. **Refd.** Briggs *v.* Sowry (1841), 8 M. & W. 729. **Mentd.** Maples *v.* Pepper (1856), 18 C. B. 177.

7780. —— Lease not delivered up—Property remains vested in bankrupt.]—Where the assignees of a bkpt., under 6 Geo. 4, c. 16, s. 75, have declined a lease to which bkpt. was entitled, but bkpt. has not delivered up the lease to the lessor, the property in the demised premises, in the meantime, continues vested in bkpt.—BRIGGS *v.* SOWRY (1841), 8 M. & W. 729 ; 11 L. J. Ex. 193 ; 151 E. R. 1234.

Annotations :—**Mentd.** Phillips *v.* Shervill (1845), 6 Q. B. 944 ; *Re* Mackenzie, *Ex p.* Hertfordshire, [1899] 2 Q. B. 566, C. A.

7781. —— Right to costs—Refusal of trustees to deliver up lease.]—Assignees, who had elected to decline a lease, having been compelled to deliver it up to bkpt. :—*Held :* as bkpt. had been compelled to come before the ct. by the refusal of the assignees to deliver up the lease to him, on his application, he was entitled to his costs.—ANON. (1851), 18 L. T. O. S. 42.

7782. —— Right to maintain policies—& to proceeds thereof.]—Bkpt., after his bkpcy., kept up the premiums of certain policies of insurance

7779 i. *On bankrupt—Liability to deliver up possession.*]—When the assignees elect not to take an interest held by bkpt., although he has obtained his certificate, the ct. will order him to give up possession to the landlord, & thus obviate the necessity of bringing an ejectment on the title.—*Re* LAMBERT (1885), 18 Ir. Jur. 325.—IR.

b. —— *Holding shares & failing to pay calls.*]—A railway co. proved for calls on bkpt.'s estate. The assignees did not then accept the shares. Further calls were subsequently made, & notice thereof given to bkpt., but were not paid :—*Held :* the shares had continued the property of bkpt., & had been forfeited for non-payment of the calls.—TURNER *v.* DUBLIN & BELFAST JUNCTION RY. CO. (1853), 3 I. Ch. R. 526 ; 6 Ir. Jur. 225.—IR.

c. —— *Right to re-enter against under-lessee.*]—H. & her husband let property to M., who under-let to C. & became bkpt., his trustee not electing to keep the original lease alive :—*Semble :* M.'s right to avoid the lease & to re-enter continued to exist as against the under-lessee.—HOUGHTON *v.* COMPTON (1882), 1 N. Z. L. R. 56.—N.Z.

f. —— *Right to sue sub-lessee for breach of covenants.*]—Resps. were the joint propretors of a lease of licensed premises, the lease being registered under Land Transfer Act, & applt was the lessee of the premises under a sub-lease. One of resps. was adjudicated a bkpt. The official assignee, though he did not disclaim the lease, took no steps to register a transmission of bkpt.'s interest to himself, & bkpt. remained a registered proprietor, applt., who had no knowledge of the bkpcy., paying rent to him & other resp. up to the end of the term of the sublease. Resps. sued applt. on the covenants contained in the sublease for the price of certain repairs to the premises, which had been ordered by the local licensing committee as a condition precedent to the renewal of the licence : —*Held :* as resps. were the registered proprietors of the lease, & no transmission of bkpt. lessor's interest to the official assignee had been registered, they were, notwithstanding the bkpcy. of one of them, entitled to sue applt. on the covenants contained in the sub-lease.—MESSITER *v.* WOLLERMAN & FREEMAN (1907), 27 N. Z. L. R. 589.—N.Z.

g. —— *Co-tenant.*]—Where land is held on lease by two co-tenants & one becomes bkpt., if the trustee of bkpt. tenant elects not to take the lease, bkpt.'s interest under it reverts to the lessor.—GARDNER *v.* SIDEY, Mac. 1051.—N.Z.

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which he had mortgaged previous to his bkpcy., & the premiums on which he had covenanted to keep up, & in which the assignees had disclaimed any interest, fulfilling also the condition on which he had obtained his discharge.

On the death of bkpt. the mtgees. received the sum due on the policies & after deducting the amount due under the mtge. paid the balance into ct.:—*Held:* bkpt.'s representatives, & not the assignees under the bkpcy., were entitled to the balance in ct.—*Re* LEARMOUTH (1866), 14 W. R. 628.

7783. On assignor to bankrupt—Liability for rent.]—Action on covenant for rent. Plea, that before the rent became due, defts., assigned all their interest in the demised premises to A., subject to the payment of the rent, & performance of the covenants contained in the lease, & that he, by the assignment, covenanted to pay the rent & perform the covenants contained in the lease. The plea then stated that A. became bkpt., & the arrears of rent accrued after the date of the commission, & that the assignee declined the lease:—*Held:* the plea was bad, as 6 Geo. 4, c. 16, s. 75, did not put an end to the lease,—MANNING *v.* FLIGHT (1832), 3 B. & Ad. 211; 1 L. J. K. B. 95; 110 E. R. 79.

Annotations:—**Apld.** Smyth *v.* North (1872), L. R. 7 Exch. 242. **Consd.** Hill *v.* East & West India Dock Co. (1884), 9 App. Cas. 448, H. L. **Refd.** East & West India Dock Co. *v.* Hill (1882), 22 Ch. D. 14, C. A.; Harding *v.* Preece (1882), 9 Q. B. D. 281. **Mentd.** Slack *v.* Sharpe (1883), 8 Ad. & El. 366.

7784. —— ——.]—The assignee of a lease became bkpt., & his trustee disclaimed. In an action by the lessor against the lessee upon his covenant in the lease, to recover rent which accrued due between the order of adjudication & the disclaimer:—*Held:* the lessee was liable. *Semble:* a disclaimer by the trustee of the assignee of a lease did not affect the rights & liabilities *inter se* of the lessor & original lessee.—SMYTH *v.* NORTH (1872), L. R. 7 Exch. 242; 41 L. J. Ex. 103; 20 W. R. 683.

Annotations:—**Expld.** *Re* Roberts, *Ex p.* Brook (1878), 10 Ch. D. 100, C. A. **Consd.** *Re* Clarke, *Ex p.* East & West India Dock Co. (1881), 17 Ch. D. 759, C. A.; Harding *v.* Preece (1882), 9 Q. B. D. 281; Hill *v.* East & West India Dock Co. (1884), 9 App. Cas. 448, H. L.; Tozer *v.* Viola, [1918] 1 Ch. 75, C. A. **Refd.** East & West India Dock Co. *v.* Hill (1882), 22 Ch. D. 14, C. A.

7785. —— **Liability for rent.**]—The lessee of a farm assigned the lease to P. During the term P. became bkpt. & his trustee disclaimed the lease:—*Held:* the lessee remained liable for the rent to the lessor.—HARDING *v.* PREECE (1882), 9 Q. B. D. 281; 51 L. J. Q. B. 515; 47 L. T. 100; 46 J. P. 646; 31 W. R. 42.

Annotation:—**Distd.** Stacey *v.* Hill (1900), 69 L. J. Q. B. 796.

7786. —— ——.]—The assignee of a lease for a term of years became bkpt., & his trustee disclaimed all bkpt.'s property & interest in the premises. The lessor brought an action against the original lessee upon his covenant to pay rent for the rent accrued due since the appointment of the trustee:—*Held:* notwithstanding the disclaimer the lessee remained liable upon his covenant.—HILL *v.* EAST & WEST INDIA DOCK CO. (1884), 9 App. Cas. 448; 53 L. J. Ch. 842; 51 L. T. 163; 48 J. P. 788; 32 W. R. 925, H. L.; *affg.* 22 Ch. D. 14.

Annotations:—**Consd.** Harding *v.* Preece (1882), 9 Q. B. D. 281. **Distd.** Stacey *v.* Hill (1900), 69 L. J. Q. B. 796; Ball *v.* Hunt (1912), 5 B. W. C. C. 459, H. L. **Expld.** Tozer *v.* Viola (1917), 117 L. T. 17. **Consd.** Tozer *v.* Viola, [1918] 1 Ch. 75, C. A. **Refd.** Lybbe *v.* Hart (1885), 29 Ch. D. 8, C. A.; *Re* Cock, *Ex p.* Shilson (1887), 20 Q. B. D. 343; *Re* Finley, *Ex p.* Clothworkers' Co. (1888), 21 Q. B. D. 475, C. A.; De Vesci *v.* O'Connell, [1908] A. C. 298, H. L.; O'Grady *v.* Wilmot, [1916] 2 A. C. 231, H. L.; Revill *v.* Bethell, [1918] 1 K. B. 638. **Mentd.** Railton *v.* Wood (1890), 15 App. Cas. 363, P. C.; Heritable Reversionary Co. *v.* Millar, [1892] A. C. 598, H. L.; R. *v.* Dibdin, [1910] P. 57, C. A.

7787. On sub-lessee from bankrupt—Right to compel landlord to grant lease in terms of sub-lease.]—The lessee of a house agreed to underlet a portion of it at less than he paid & taking a premium, & the provisions of the agreement differed in material respects from those of the lease. The under-lessee paid the premium & took possession under the agreement. The lessee afterwards became bkpt., his trustee disclaimed the lease, & the lessor commenced an action of ejectment against the under-lessee. Upon bill filed by the under-lessee to restrain the action of ejectment & compel the lessor to grant him a lease in accordance with the terms of his agreement with the lessee:—*Held:* the under-lessee had no equity to compel the lessor to grant him a lease in accordance with the terms of the under-lease, & bill dismissed with costs.—TAYLOR *v.* GILLOTT (1875), L. R. 20 Eq. 682; 44 L. J. Ch. 740; 32 L. T. 795; 24 W. R. 65.

Annotations:—**Foll.** Smalley *v.* Hardinge (1881), 6 Q. B. D. 371. **Consd.** Smalley *v.* Hardinge (1881), 7 Q. B. D. 524, C. A. **Refd.** Wood *v.* Hayes (1885), 1 T. L. R. 207.

7788. —— **Liability to ejectment.**]—When a lessee sublets, & afterwards becomes bkpt., & his trustee disclaims the lessee's interest in the premises, the lessor is not entitled to eject the sub-tenant.

A lessee for a term of years demised part of the premises for a shorter term, & the sub-lessee entered into possession. The lessee afterwards liquidated by arrangement, & his trustee, under an order of the ct., disclaimed the lessee's interest in the premises. Notice of the application to the ct. for leave to disclaim was given to the sub-lessee within a reasonable time before the order was made. The lessor having brought an action to recover possession of the part of the premises demised to the sub-lessee as from the date of the appointment

7783 i. *On assignor to bankrupt—Liability for rent.*]—A. demised to B., who assigned the term to C., who subsequently became bkpt. His trustee did not elect to take the lease. A. sued B. for rent from Jan. 1, 1870, up to which day it had been paid by C., the adjudication of bkpcy. taking place on Jan. 3, 1871. B. admitted his liability for rent up to Apr. 1, 1871, being the first quarter day after the adjudication on which rent was payable, but, as to the rest, he contended that 1867 Act, s. 139, operated as a surrender in law of the original term:—*Held:* B. was not liable for the rent claimed, the land having reverted to A., who could not take the land back & sue for the rent at the same time.—FISHER *v.* TRAVERS, 4 J. R. N. S. 40.—N.Z.

7783 ii. ——.]—*Held:* where the assignee of a lease became bkpt. under 1883 Act, & the official assignee disclaimed the lease, the lessor took back the land, & could not recover future rent from the original lessee.—HUNTER *v.* GOULD (1884), 3 N. Z. L. R. 181.—N.Z.

7787 i. *On sub-lessee from bankrupt.*]—A surrender of a lease by assignees does not affect the position of under-tenants of bkpt., further than to render the immediate sub-lessee of bkpt. the tenant of the owner of the reversion next expectant upon the termination of the lease, & that owner can take advantage of powers contained in the lease to treat it as void, on the violation of such sub-lessee of its covenants.—O'FARRELL *v.* STEPHENSON (1879), 13 I. L. T. 161.—IR.

7787 ii. ——*Liability for rent.*]—H. & her husband let property to M., who under-let to C. & became bkpt., his trustee not electing to keep the original lease alive. H.'s husband died, & she subsequently received the rent from C., but always refusing to acknowledge him as her tenant. C. subsequently agreed to assign his under-lease again to M., who entered into possession, but refused to pay rent except on certain conditions. H. then sued C. for the rent:—*Held:* (1) the original lease had merged in the fee by virtue of Debtors & Creditors Act, 1876, s. 69 (4); (2) the acts of H. amounted to a confirmation of the under-lease notwithstanding her words; (3) there had been no surrender of the under-lease by operation of law, & C. was liable to H. for the rent reserved by the under-lease.—HOUGHTON *v.* COMPTON, [1882] 1 N. Z. L. R. 56.—N.Z.

of the trustee :—*Held :* the lessor was not entitled to recover possession.—SMALLEY *v.* HARDINGE (1881), 7 Q. B. D. 524 ; 50 L. T. Q. B. 367 ; 44 L. T. 503 ; 29 W. R. 554, C. A.

Annotations :—**Consd.** *Re* Levy, *Ex p.* Walton (1881), 17 Ch. D. 746, C. A. ; *Re* Cock, *Ex p.* Shilson (1887), 20 Q. B. D. 343. **Refd.** East & West India Dock Co. *v.* Hill (1882), 22 Ch. D. 14, C. A. ; Harding *v.* Preece (1882), 9 Q. B. D. 281 ; Hill *v.* East & West India Dock Co. (1884), 48 J. P. 788, H. L. **Mentd.** Capital & Counties Bank *v.* Rhodes (1902), 71 L. J. Ch. 573.

7789. On assignee from bankrupt—Liability for rent accruing between assignment & adjudication—Adjudication on assignment as act of bankruptcy.]—The lessee of premises assigned the lease with other property to deft. by a deed, which was an act of bkpcy. The lessee was subsequently adjudicated bkpt. on that act of bkpcy., & a trustee appointed, who disclaimed the lease. During the interval between the assignment of the lease & the date of the lessee's being adjudicated bkpt., two quarters' rent of the premises accrued due under the lease. Before the lessee's bkpcy. pltfs., the owners of the reversion upon the lease, sued deft., & recovered judgment against him, for the first quarter's rent. They had commenced an action for the second quarter's rent, when the lessee was adjudicated bkpt., but the action did not come on for trial until after the adjudication :—*Held :* deft. was liable for the rent, notwithstanding the bkpcy. of the lessee had relation back to the act of bkpcy.—STEIN *v.* POPE, [1902] 1 K. B. 595 ; 71 L. J. K. B. 322 ; 86 L. T. 283 ; 50 W. R. 374 ; 18 T. L. R. 337 ; 9 Mans. 125, C. A.

Annotation :—**Consd.** Davis *v.* Petrie (1905), 93 L. T. 511, D. C.

7790. On purchaser from bankrupt—Equitable interest under uncompleted contract not lost.]—The trustee cannot by a disclaimer take away from a purchaser of land from bkpt. the equitable interest which vested in him under his contract.—*Re* BASTABLE, *Ex p.* TRUSTEE, [1901] 2 K. B. 518 ; 70 L. J. K. B. 784 ; 84 L. T. 825 ; 49 W. R. 561 ; 17 T. L. R. 560 ; 45 Sol. Jo. 576 ; 8 Mans. 239, C. A.

7791. On third parties—Not interfered with further than necessary.]—The effect of 1869 Act, s. 23 is that the property burdensome to bkpt.'s estate is to be disclaimed so as not to interfere with the rights of third parties further than is necessary to free bkpt., his trustee, & the estate from liability in respect of the disclaimed property.—*Re* LEVY, *Ex p.* WALTON (1881), 17 Ch. D. 746 ; 50 L. J. Ch. 657 ; 45 L. T. 1 ; 30 W. R. 395, C. A.

Annotations :—**Expld. & Apld.** *Re* Clarke, *Ex p.* East & West India Dock Co. (1881), 17 Ch. D. 759, C. A. **Consd.** East & West India Dock Co. *v.* Hill (1882), 9 Ch. D. 14, C. A. ; Harding *v.* Preece (1882), 9 Q. B. D. 281. **Apld.** Wood *v.* Hayes (1885), 1 T. L. R. 207. **Consd.** De Vesci *v.* O'Connell, [1908] A. C. 298, H. L. **Refd.** *Re* Latham, *Ex p.* Glegg (1881), 19 Ch. D. 7, C. A. ; *Re* Morrish, *Ex p.* Hart Dyke (1882), 22 Ch. D. 410, C. A. ; *Re* Cock, *Ex p.* Shilson (1887), 20 Q. B. D. 343 ; Heritable Reversionary Co. *v.* Millar, [1892] A. C. 598, H. L. **Mentd.** Hill *v.* East & West India Dock Co. (1884), 9 App. Cas. 448, H. L. ; O'Grady *v.* Wilmot, [1916] 2 A. C. 231, H. L. ; R. *v.* Halliday, [1917] A. C. 260, H. L. ; Tozer *v.* Viola, [1918] 1 Ch. 75.

7792. —— —— Surety for bankrupt assignee of lease.]—Pltf. being lessee of a farm assigned the lease to P., taking the covenant of deft. as surety for due payment of the rent to the lessor for the residue of the term. During the continuance of the term P. became bkpt., & his trustee disclaimed the lease. Subsequently the lessor demanded from pltf. the half-year's rent accruing after the bkpcy. Pltf. paid the rent, & brought an action to recover the amount from deft. under his covenant. Neither pltf. nor deft. had entered upon or taken possession of the farm :—*Held :* pltf. was entitled to recover, on the ground that the disclaimer operated only as a surrender so far as was necessary to relieve bkpt., his estate, & the trustee, from liability, without otherwise affecting third parties, & pltf. as lessee remained liable for the rent & had his remedy over against deft. as bkpt.'s surety.—HARDING *v.* PREECE (1882), 9 Q. B. D. 281 ; 51 L. J. Q. B. 515 ; 47 L. T. 100 ; 46 J. P. 646 ; 31 W. R. 42.

Annotation :—**Distd.** Stacey *v.* Hill (1900), 69 L. J. Q. B. 796.

7793. —— —— Surety for lessee.]—Deft. guaranteed the payment of rent, which might from time to time be in arrear for twenty-one days under a lease. There was no under-lease or assignment of the lease. The lessee having become bkpt. the trustee disclaimed the lease. The lessor sued deft. for rent in arrear in respect of a period subsequent to the disclaimer :—*Held :* as the lease was determined from the date of the disclaimer as between the lessor & the lessee, the liability of deft. for rent was also determined.—STACEY *v.* HILL, [1901] 1 K. B. 660 ; 70 L. J. K. B. 435 ; 84 L. T. 410 ; 49 W. R. 390 ; 17 T. L. R. 311 ; 45 Sol. Jo. 325 ; 8 Mans. 169, C. A.

7794. —— —— Equitable mortgagee of lease.]—The rights of an equitable mtgee. of a lease are not affected by the disclaimer of the trustee of the lessee.—WOOD *v.* HAYES (1885), 1 T. L. R. 207.

F. Liability of Trustee on Failure to disclaim.

7795. On covenants generally—Bankrupt's effects on premises—Keys delivered up immediately after sale.]—When assignees enter upon & take possession of bkpt.'s leasehold property, they become chargeable with the covenants in the lease, although bkpt.'s effects were upon those premises, & the assignees delivered up the keys immediately after the effects were sold.—HANSON *v.* STEVENSON (1818), 1 B. & Ald. 303 ; 106 E. R. 112.

Annotations :—**Refd.** Hill *v.* Dobie (1818), 8 Taunt. 325 ; Mackley *v.* Pattenden (1861), 1 B. & S. 178 ; Williams *v.* Taylor (1869), 21 L. T. 612 ; *Re* Solomon, *Ex p.* Dressler (1878), 9 Ch D. 252, C. A. ; Hill *v.* East & West India Dock Co. (1884), 9 App. Cas. 461, n., H. L.

7796. —— & responsibilities connected therewith.]—If assignees elect to take to a lease, they must take all the responsibility attaching to it.—*Re* COLLINS & PRIOR, *Ex p.* FLETCHER (1832), 1 Deac. & Ch. 318 ; 1 L. J. Bcy. 44, Ct. of R.

7797. —— No valid disclaimer.]—The leaseholds of a liquidating debtor vest in the trustee on

7791 i. *On third parties—Purchasing at auction—Right to possession against bankrupt.*]—When a tenant of land owing arrears of rent takes the benefit of 11 & 12 Vict. c. 21, & the official assignee has not elected to take the land *cum onere*, insolvent cannot plead a *jus tertii* in the assignee in a suit for possession brought by a purchaser at an auction-sale held by the revenue authorities for the arrears.—CHINNA SUBBARAYA MUDALI *v.* KANDASVAMI REDDI (1876), I. L. R. 1 Mad. 59.—**IND.**

k. —— *Purchasing bankrupt's unexpired term in lease vested in trustee—After disclaimer.*]—ROBERTSON *v.* MCLEOD, ROBERTSON *v.* HALEY (1877), 1 P. & B. 15.—**CAN.**

l. —— *Co-tenants.*]—Where land is leased to five persons as tenants in common, who covenant jointly & severally for the payment of the whole rent, & two of them become bkpt., & their trustees do not elect to take their interest under the lease, the remaining lessees are discharged from the payment of two-fifths of the rent, & the lessors must contribute to the cost of performing all covenants of a divisible nature to the extent of the lapsed interests.—MILLER *v.* YOUNG (1882), 2 N. Z. L. R. C. A. 1.—**N.Z.**

m. *On derivative estates.*]—*Held :* the fact that the trustee did not elect to take a lease held by bkpt. did not, under 1867 Act, s. 139, determine the lease & all derivative estates under it, but operated only to the extent of bkpt.'s interest therein as existing at the time of the bkpcy.—GRATTAN *v.* GILES, 2 J. R. N. S. 213.—**N.Z.**

Sect. 16.—Contracts and disclaimer of onerous property: Sub-sect. 5, F.; sub-sect. 6.]

his appointment, subject to his power of disclaimer, & if there is no valid disclaimer, the trustee is personally liable for the rent accruing due after his appointment & on the covenants of the lease.—WILSON *v.* WALLANI (1880), 5 Ex. D. 155; 49 L. J. Q. B. 437; 42 L. T. 375; 44 J. P. 475; 28 W. R. 597.

Annotations:—**Apprvd.** Titterton *v.* Cooper (1882), 9 Q. B. D. 473, C. A. **Refd.** Hopkinson *v.* Lovering (1883), 11 Q. B. D. 92.

7798. —— Breach of covenant before appointment.]—The leasehold estate of bkpt. or debtor liquidating his affairs by arrangement vests absolutely in the trustee upon his appointment, & he has no right of election to accept or decline the leases, his only remedy being by disclaimer, & if he neglects or is unable to disclaim, he becomes personally liable in respect of the covenants contained in the leases as from the date of his appointment, but he is not liable for any breach of covenant happening before his appointment.—TITTERTON *v.* COOPER (1882), 9 Q. B. D. 473; 51 L. J. Q. B. 472; 46 L. T. 870; 30 W. R. 866, C. A.

Annotations:—**Distd.** *Re* Zappert, *Ex p.* Trustee (1884), 1 Morr. 72. **Refd.** Alloway *v.* Steere (1882), 10 Q. B. D. 22; Hopkinson *v.* Lovering (1883), 11 Q. B. D. 92; Stein *v.* Pope, [1902] 1 K. B. 595, C. A. **Mentd.** Rendall *v.* Andrea (1892), 61 L. J. Q. B. 630.

—— Contract adopted—What amounts to adoption.]—*See* Nos. 7646 *et seq.*, *ante*.

7799. For rent—Possession never taken.]—When bkpt. holds under a lease rendering rent, the assignees are not liable for rent becoming due after the bkpcy., if they have never taken possession of the premises occupied by bkpt.—BOURDILLON *v.* DALTON (1794), 1 Esp. 332; Peake, 312.

Annotations:—**Consd.** Copeland *v.* Stephens (1818), 1 B. & Ald. 593. **Refd.** Turner *v.* Richardson (1806), 7 East, 335; Doe d. Palmer *v.* Andrews (1827), 4 Bing. 348.

7800. —— Liability on covenant.]—Mtgor. & mtgee. of an undivided moiety of certain premises, jointly with the owner of the other moiety, demised the whole for twenty-one years to G., the latter covenanting with the three lessors jointly & severally to pay the rent reserved, but not saying to whom. G. entered upon the premises, & afterwards became bkpt. His assignees having accepted the lease:—*Held:* the assignees were liable in covenant at the suit of the three lessors for rent accruing while they were possessed of the premises.—MAGNAY *v.* EDWARDS (1853), 13 C. B. 479; 22 L. J. C. P. 170; 21 L. T. O. S. 103; 17 Jur. 839; 1 W. R. 331; 1 C. L. R. 141; 138 E. R. 1286.

Annotation:—**Mentd.** Graham *v.* Furber (1853), 2 C. L. R. 10.

7801. —— During occupation—For purpose of realising fixtures and property in premises.]—If assignees continue in possession, not so much for the purpose of deciding whether to accept the lease or not, as for their own advantage in disposing of the fixtures & property upon the premises, they will be ordered to pay the rent accrued due during the time of their so continuing in possession.—*Re* SKEEN, *Ex p.* SYKES (1858), 32 L. T. O. S. 19.

7802. —— & for damage from neglect to cultivate.]—R., who held of pltf., as tenant from year to year, two farms, became bkpt. R.'s assignees took possession of the farms, & disputes having arisen between them & the landlord, the assignees refused to allow the landlord to enter on the farms, & sold the feed of parts of the farms:—*Held:* the assignees were liable for the rent owing up to the time of their delivering up possession, & for the damage caused by their neglect to cultivate the farms.—BRADSHAW *v.* JAMES (1869), 20 L. T. 781; 17 W. R. 1010.

7803. —— & for damage for non-repair—For rent due before appointment.]—Pltf. let property to bkpt., by a lease containing covenants to pay rent & to repair. Deft., his trustee, did not disclaim, nor did he enter into possession, but he attempted to sell the lease. In an action by pltf. to recover damages for non-repair, & also rent become due after the bkpcy., part of which had accrued due before & part after the appointment of deft. as trustee:—*Held:* pltf. was entitled to damages for the non-repair, & also to so much of the rent claimed as accrued due after the appointment of deft. as trustee, but deft. was not liable for the rent due before the date of his appointment.—TITTERTON *v.* COOPER (1882), 9 Q. B. D. 473; 51 L. J. Q. B. 472; 46 L. T. 870; 30 W. R. 866, C. A.

Annotations:—**Distd.** *Re* Zappert, *Ex p.* Trustee (1884), 1 Morr. 72. **Distd.** Alloway *v.* Steere (1882), 10 Q. B. D. 22; Hopkinson *v.* Lovering (1883), 11 Q. B. D. 92; Stein *v.* Pope, [1902] 1 K. B. 595, C. A. **Mentd.** Rendall *v.* Andreae (1892), 61 L. J. Q. B. 630.

7804. —— Accruing after taking possession—Personal liability.]—A trustee, who takes actual possession of leasehold property of bkpt., & does not disclaim the lease, is personally liable for the rent which accrues due after he takes possession.—*Re* SOLOMON, *Ex p.* DRESSLER (1878), 9 Ch. D. 252; 48 L. J. Bcy. 20; 39 L. T. 377; 43 J. P. 23; 27 W. R. 144, C. A.

Annotations:—**Folld.** Wilson *v.* Wallani (1880), 5 Ex. D. 155. **Expld. & Folld.** Titterton *v.* Cooper (1882), 9 Q. B. D. 473, C. A. **Expld.** Hopkinson *v.* Lovering (1883), 11 Q. B. D. 92.

7805. —— Application of Apportionment Act, 1870 (c. 35)—Assignment by trustee during currency of quarter.]—The residue of a term under a lease having become vested in the trustee of the lessee, a liquidating debtor, the trustee assigned over during a current quarter. In an action, brought after the expiration of the quarter against the trustee by the lessor, to recover a proportionate part of the quarter's rent up to the time of the

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PART XX. SECT. 16, SUB-SECT. 5.—F.

7801 i. *For rent—During occupation.*]—Where assignees remain in possession of bkpt.'s lands without disclaiming, an occupation rent, at the same rate as the premises were let at, will be given from the date of the adjudication, until the giving up of possession.—*Re* MATTHEWS (1888), 21 L. R. Ir. 507.—**IR.**

7801 ii. —— ——.]—In Feb., 1873, pltf. leased a wharf & warehouse to S., for a term of five years, from Jan. 1, 1873, at annual rent of $4,800, payable quarterly. The lease contained a covenant that the lessee would not assign, underlet, or part with the demised premises by his own act or deed, or by act or operation of law, without the lessor's written consent, & there was a proviso for re-entry in case of non-payment of rent, or failure to keep any of the covenants in the lease. The lessee entered & occupied till Oct. 12, 1875, when he became insolvent, & assigned under Insolvent Act, 1875, to deft. as official assignee. At the time of assignment $1,800 was due pltf. from S. for rent due on Oct. 1 preceding. Deft., as assignee, collected wharfage for the use of the demised premises from Oct. 13, 1875, to Jan. 29, 1876, which was the only act deft. did in reference to the property, except giving notice to pltf. on Dec. 24, 1875, that the inspectors intended to retain the property only up to the end of 1875, & that on Dec. 31 the lease would be surrendered, & the possession of the property given up to him:—*Held:* pltf. was entitled to recover from deft. the quarter's rent due Jan. 1, 1876, but not for the period between that & Jan. 29, because the current quarter's rent could not be apportioned, & deft. did not incur any personal liability to pay the rent.—ROBERTSON *v.* MCLEOD, ROBERTSON *v.* HALEY (1877), 1 P. & B. 15.—**CAN.**

7801 iii. —— —— *For purpose of realising estate.*]—A trustee of the estate of an insolvent tenant is liable to the landlord for the rent of the premises from the time of sequestration to the time of disclaimer, & where he has entered upon the premises to make an inventory of the goods of insolvent, & has kept the goods there for some time before selling them, he is, in the absence of sufficient assets in insolvent's estate, personally liable for the rent, until he gives up possession to the landlord.—BRASHER *v.* DAVEY (1886), 12 V. L. R. 343.—**AUS.**

assignment over by him :—*Held :* the above Act, 1870, applied, & the lessor was entitled to recover. —SWANSEA BANK *v.* THOMAS (1879), 4 Ex. D. 94 ; 48 L. J. Q. B. 344 ; 40 L. T. 558 ; 43 J. P. 494 ; 27 W. R. 491.

Annotations :—**Consd.** Hopkinson *v.* Lovering (1883), 11 Q. B. D 92. **Apld.** *Re* Wilson, *Ex p.* Hastings (1893), 62 L. J. Q. B. 628 ; *Re* Howell, *Ex p.* Mandleberg, [1895] 1 Q. B. 844 ; Rochester *v.* Le Fanu, [1906] 2 Ch. 513. **Refd.** Hartcup *v.* Bell (1883), Cab. & El. 19.

7806. —— Right to assign to avoid liability—Pauper assignee.]—Assignees may assign the lease to an insolvent person, to exonerate themselves from future claims for rent.—ONSLOW *v.* CORRIE (1817), 2 Madd. 330 ; 56 E. R. 357.

Annotations :—**Refd.** Hopkinson *v.* Lovering (1883), 11 Q. B. D. 92. **Mentd.** Rowley *v.* Adams (1839), 4 My. & Cr. 534.

7807. —— —— ——.]—Although a trustee, who has taken actual possession of leasehold property of bkpt., receives notice from the landlord to disclaim the lease, but does not disclaim, he may nevertheless relieve himself of liability to the landlord by assigning the lease, even without having previously offered to surrender it, & the mere fact that the trustee knows the assignee to be a pauper will not invalidate such assignment.—HOPKINSON *v.* LOVERING (1883), 11 Q. B. D. 92 ; 52 L. J. Q. B. 391 ; 47 J. P. 519.

7808. Under hay & straw covenant.]—Covenant by a tenant, a brickmaker & market gardener, not to sell or carry off any hay or straw from the land without bringing back a load of dung or other manure, under a penalty of £5 for every load so sold or carried off. The tenant becoming bkpt., & a quantity of hay & breese being upon the land at the time, which latter was used in the manufacture of bricks :—*Held :* the hay passed to the assignees subject to the terms of the covenant, but the breese, having been brought on the land by bkpt., passed to his assignees as part of bkpt.'s estate.—*Re* COLLINS, *Ex p.* COLLINS (1858), 32 L. T. O. S. 50.

7809. Under clause prohibiting assignment without licence.]—Bkpcy. supersedes an agreement in a lease, not to assign without licence, in favour of general creditors.—WEATHERALL *v.* GEERING (1806), 12 Ves. 504 ; 33 E. R. 191.

Annotations :—**Consd.** Powell *v.* Lloyd (1827), 2 Y. & J. 372, Ex. Ch. ; Crosbie *v.* Tooke (1833), 1 My. & K. 431, L. C. **Mentd.** Bowser *v.* Colby (1841), 1 Hare, 109 ; Buckland *v.* Papillon (1866), L. R. 1 Eq. 477.

7810. ——.]—A covenant that the lessee, his exors. or administrators will not assign does not bind his assignees.—DOE *v.* SMITH (1814), 5 Taunt. 795 ; 1 Marsh. 359 ; 128 E. R. 905.

Annotation :—**Mentd.** Williams *v.* Earle (1868), L. R. 3 Q. B. 739.

7811. ——.]—Under a demise for years to S., S. covenanted that he, his exors., administrators, or assigns, would not assign the indenture, or his or their interest therein, or assign the premises to any person whatsoever, without the consent in writing of the lessor. Proviso that in case S., his exors., administrators, or assigns, should part with his or their interest contrary to his covenant, the lessor might re-enter. S. deposited the lease as a security for money borrowed, & became bkpt., & the lease was sold to pay that debt :—*Held :* the assignees under the commission might assign the lease to the vendee without the consent of the lessor.—DOE D. GOODBEHERE *v.* BEVAN (1815), 3 M. & S. 353 ; 2 Rose, 456 ; 105 E. R. 644.

Annotations :—**Refd.** *Re* Riggs, *Ex p.* Lovell, [1901] 2 K. B. 16 ; *Re* Birkbeck Permanent Benefit Bldg. Soc., Official Receiver *v.* Licenses Ins. Corpn., [1913] 2 Ch. 34.

7812. ——.]—The ct. will not interfere by injunction to restrain the assignees of a lessee from parting with the lease contrary to the covenants contained therein, unless some irreparable damage is likely to be caused by the assignment.—DYKE *v.* TAYLOR (1861), 3 De G. F. & J. 467 ; 30 L. J. Ch. 281 ; 3 L. T. 717 ; 25 J. P. 515 ; 7 Jur. N. S. 83 ; 9 W. R. 403 ; 45 E. R. 959, L. JJ.

7813. ——.]—A trustee, who sells leasehold property of bkpt. that is subject to a covenant not to assign without consent, & does not obtain the necessary consent, is not personally liable under the covenant, though it extends to assigns by operation of law.—*Re* JOHNSON, *Ex p.* BLACKETT (1894), 70 L. T. 381 ; 1 Mans. 54 ; 10 R. 138.

Realisation of property, generally, *see* Sect. 18, *post.*

7814. Under obligation to grant lease—Form of lease.]—By an order made in a cause, it was referred to the master to settle a lease to be granted by assignees pursuant to a contract entered into by a prior owner of the property, inserting proper covenants from the assignees to the lessee. The master settled a draft lease containing covenants to repair, etc., by the assignees, & providing that the covenants should be limited to the beneficial interest of the assignees in the premises, & that their liability thereunder should cease on their procuring like covenants from a purchaser from them, but without a proviso limiting the liability of such purchaser to his beneficial interest in the premises :—*Held :* the lease was proper as settled by him.—PAGE *v.* BROOM (1842), 6 Jur. 308.

SUB-SECT. 6.—RESCISSION OF CONTRACTS.

7815. In what cases—Order to elect ignored by trustee.]—An order was obtained & served upon an assignee, that he should elect whether he would accept or decline an agreement for a lease, but he took no notice of the order. On a fresh petition :—*Held :* the agreement should be rescinded, & the possession of the premises delivered up to petitioner.—*Re* FOSTER, *Ex p.* BLANDY (1835), 1 Deac. 287, Ct. of R.

7816. Grounds for granting—Grounds for refusing—Co-ordination.]—Motion under 1914 Act, s. 54 (5), for an order rescinding three contracts for the making & delivery of cotton cloth by appct. to S. Brothers against whom a receiving order & an order of adjudication had been made. At the date of the bkpcy. there had been part deliveries under two contracts, & there was a sum of £95 due & owing in respect of such deliveries. No delivery had been made in respect of the third contract :—*Held :* (1) there must be some co-ordination between the three contracts to enable appct. to say it was unfair to carry out one & not the others ; (2) there was no such co-ordination ; & (3) the two contracts under which there had been part deliveries should be rescinded, & appct. prove in the bkpcy. for £95, the amount due in respect of such deliveries ; (4) as no case had been made out for the cancellation of the third contract, appct. should give the trustee notice to elect whether he would carry out such contract within a reasonable time.—*Re* CASTLE, *Ex p.* HASLAM BROTHERS (1917), 87 L. J. K. B. 753 ; [1917] H. B. R. 205.

7817. Special form of order—Dispute as to title of property bought by bankrupt.]—Bkpt. had bought freehold property by auction, & had paid a deposit of £20 per cent. on the amount of the purchase-money, but there being some dispute about the title, the purchase was not completed before the bkpcy. Upon a petition by the vendor, that the assignee might be ordered to deliver up

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the agreement, & that the vendor might retain the deposit money, a special order was made, giving the assignee a fortnight to elect whether he would fulfil or abandon the agreement, without prejudice to his right to a return of the deposit money.—*Re* GLOVER, *Ex p.* BRIDGER (1836), 1 Deac. 581, Ct. of R.

SUB-SECT. 7.—VESTING ORDER.

7818. Notice of motion for—Time for service.]—Upon application by a trustee for leave to disclaim a lease, the lessor may serve notice of motion for a vesting order on parties interested as sub-lessees, as soon as he is served with the notice of the trustee, & need not wait until leave to disclaim has been actually given, but in such case the lessor will run the risk of having his motion dismissed, with costs, if leave to disclaim is refused, or if it appears that he is not entitled to a vesting order.—*Re* BRITTON (1889), 61 L. T. 52; 37 W. R. 621; 6 Morr. 130.

Annotation:—**Refd.** Lea *v.* Thursby, [1904] 2 Ch. 57.

7819. —— On whom served.]—Upon an application by an original lessee for a vesting order in relation to leasehold property of bkpt., which has been disclaimed by the trustee, the ct. has a discretion to direct which of the persons entitled to apply for such an order shall be served with notice of the application, &, if in the opinion of the ct., appct. has not served all the persons who ought to be served, he may be ordered to pay the costs occasioned by his default.

B., the freeholder, demised to I. for a term of twenty-one years. I. assigned the terms to E., who assigned to M., who mortgaged the premises by sub-demise to W. On the bkpcy. of M. his trustee disclaimed the lease, & I. was compelled to pay rent to B. I. applied for an order under 1883 Act, s. 55 (6), calling on W. to accept a vesting order. Notice of motion was served on W. only.—*Re* MORGAN, *Ex p.* MORGAN (1889), 22 Q. B. D. 592; 58 L. J. Q. B. 295; 60 L. T. 941; 37 W. R. 344; 5 T. L. R. 308; 6 Morr. 57.

Annotation:—**Apld.** *Re* Baker, *Ex p.* Lupton, [1901] 2 K. B. 628, C. A.

7820. Who may apply—Not landlord—Only person claiming through or under bkpt.]—On a disclaimer of leaseholds by a trustee under 1883 Act, s. 55 (6), the landlord has not such an interest in the disclaimed property as to be entitled to a vesting order under the sub-sect. The right to a vesting order is only conferred on a person claiming an interest in the property through or under bkpt.—*Re* PARKER & PARKER, *Ex p.* TURQUAND (1884), 14 Q. B. D. 405; 51 L. T. 667; 33 W. R. 752; 1 Morr. 275.

Annotations:—**Consd.** *Re* Cock, *Ex p.* Shilson (1887), 20 Q. B. D. 343, D. C.; *Re* Finley, *Ex p.* Clothworkers' Co. (1888), 21 Q. B. D. 475, C. A. **Refd.** *Re* Baker, *Ex p.* Lupton, [1901] 2 K. B. 628, C. A. **Mentd.** *Re* Osborne, *Ex p.* Marillier (1896), 3 Mans. 238.

7821. —— For order vesting lease in sub-lessee—Lessor.]—When the trustee of a lessee has disclaimed a lease, which bkpt. had mortgaged by a sub-demise, not only can the sub-lessee apply for an order vesting the lease in him, but the lessor can apply for an order vesting the lease in the sub-lessee; but, whether the application is made by the sub-lessee or by the original lessor, in either case the vesting order can only be made in favour of the sub-lessee, subject to the covenants & conditions of the original lease, &, if the sub-lessee will not take the property on those terms, which he need not do, the sub-lessee will be excluded from all interest in the disclaimed property.—*Re* FINLEY, *Ex p.* CLOTHWORKERS' CO. (1888), 21 Q. B. D. 475; 57 L. J. Q. B. 626; 60 L. T. 134; 37 W. R. 6; 4 T. L. R. 745; *sub nom. Re* FINLEY, *Ex p.* HANBURY, 5 Morr. 248, C. A.

Annotations:—**Consd.** *Re* Morgan, *Ex p.* Morgan (1889), 22 Q. B. D. 592, C. A. **Apld.** *Re* Smith, *Ex p.* Hepburn (1890), 25 Q. B. D. 536, C. A. **Consd.** *Re* Carter & Ellis, *Ex p.* Savill, [1905] 1 K. B. 735, C. A. **Refd.** *Re* Baker, *Ex p.* Lupton, [1901] 2 K. B. 628, C. A.; Stacey *v.* Hill, [1901] 1 K. B. 660, C. A.; Lea *v.* Thursby, [1904] 2 Ch. 57.

7822. On what foundation—Invalid disclaimer.]—Bkpt. had contracted to sell leaseholds, & the purchaser had sold his right under the contract. The trustee purported to disclaim the contract without disclaiming the lease. The purchaser applied for a vesting order:—*Held:* the disclaimer was a nullity & could not be made the foundation of a vesting order.—*Re* KERKHAM, *Ex p.* TRUSTEE & MARTELLI (1886), 80 L. T. Jo. 322.

Annotations:—**Apprvd.** *Re* Bastable, *Ex p.* Silverstone (1901), 84 L. T. 328, D. C. **Mentd.** Pearce *v.* Bastable's Trustee in Bkpcy., [1901] 2 Ch. 122.

7823. Affidavits in support—Whether necessary.]—Whether an affidavit or other evidence is required in support of a notice of motion by the lessor for a vesting order is a matter for the judge, whose duty it is to see that resps. are not taken at a disadvantage by reason of their ignorance of the terms of the option which is offered to them.—*Re* BRITTON (1889), 61 L. T. 52; 37 W. R. 621; 6 Morr. 130.

Annotation:—**Refd.** Lea *v.* Thursby, [1904] 2 Ch. 57.

7824. The order—Power of court to impose conditions—What conditions.]—The Ct. of Bkpcy. has power, under 1890 Act, s. 13, to subject, if it thinks fit, the person in whose favour it makes a vesting order to the same liabilities & obligations only as if he were an assignee of bkpt.'s lease (CHARLES, J.).—CHOLMELEY SCHOOL, HIGHGATE (WARDENS, ETC.) *v.* SEWELL, [1894] 2 Q. B. 906; 71 L. T. 88; 58 J. P. 591; 10 T. L. R. 509; *sub nom.* CHOMELEY SCHOOL (WARDENS) *v.* SEWELL & NICHOLSON, 63 L. J. Q. B. 820.

Annotations:—**Mentd.** Imray *v.* Oakshette, [1897] 2 Q. B. 218, C. A.; Ewart *v.* Fryer, [1901] 1 Ch. 499; West *v.* Gwynne (1911), 80 L. J. Ch. 578.

7825. —— —— ——.]—Where a lease has been disclaimed & application is made for a vesting order, the ct. will, as a general rule, make such vesting order upon the terms that the person in whose favour it is made shall take upon himself the burden of the unperformed obligations, both past & future, to which bkpt. was liable when the petition was filed; but the ct. may, in special circumstances, modify such terms, so as to make the person in whose favour the vesting order is made subject only to the same liabilities & obligations as if the lease had been assigned to him at the date when the petition was filed, & such modification is the only one which the ct. is expressly empowered to make by 1890 Act, s. 13, there being no power conferred upon the ct., to graduate the terms upon which the vesting order is made to meet each case, though this can in effect be done by adopting s. 13 if the lessor will not do what is right & reasonable.—*Re* WALKER, *Ex p.* MILLS (1895), 64 L. J. Q. B. 783; 72 L. T. 330; 2 Mans. 319; 15 R. 350.

Annotation:—**Expld.** *Re* Carter & Ellis, *Ex p.* Savill, [1905] 1 K. B. 735, C. A.

7826. —— —— —— Rules as to exercise of discretion.]—Seven leases of seven houses, for the terms of ninety-nine years, were granted to lessees, who had erected the houses under a prior building agreement. Each lease reserved a small ground rent. None of the leases contained any restriction

on the lessee's right to assign. On the same day the lessees mortgaged all the houses by way of underlease for the residues of the several terms, except the last day of each term.

The lessees having been adjudicated bkpts., the trustee disclaimed all his interest in the leases. There had been no breach of any of the lessees' covenants :—*Held :* in the circumstances the ct. ought, on an application by the lessor under 1883 Act, s. 55 (6), to exercise its discretion by making an order vesting the disclaimed property in the mtgees., subject only to the same liabilities & obligations as if the leases had been assigned to them at the date when the bkpcy. petition was filed.

If in such a case the exercise of the discretion in favour of the mtgee. will place him in no better position, & will place the lessor in no worse position, than if there had been no disclaimer, the discretion ought to be exercised in favour of the mtgee.—*Re* CARTER & ELLIS, *Ex p.* SAVILL BROTHERS, [1905] 1 K. B. 735 ; 74 L. J. K. B. 442 ; 92 L. T. 523 ; 53 W. R. 433 ; 21 T. L. R. 334 ; 49 Sol. Jo. 364 ; 12 Mans. 118, C. A.

7827. —— When granted.]—Where a lessor, who applies for a vesting order, brings himself within 1883 Act, s. 55, an order will as a general rule be made, although such rule may be subject to exceptions.—*Re* BRITTON (1889), 61 L. T. 52 ; 37 W. R. 621 ; 6 Morr. 130.

Annotation :—**Refd.** Lea *v.* Thursby, [1904] 2 Ch. 57.

7828. —— What property included.]—The lessee of a plot of land subject to a rent of £150 a year, mortgaged by sub-demise four portions of the plot to four different mtgees. by separate mtges. He did not mtge. the remaining portion of the plot nor deal with it in any way. He subsequently became bkpt., & his trustee disclaimed the lease. The four mtgees. appointed a trustee of their interests under the mtges., & he applied to a county ct. judge on their behalf for an order vesting in him as trustee for them all the rights, interest, & title of bkpt. under the lease, including the portion of the plot not mortgaged, subject to the rent, covenants, & conditions contained in the lease. The county ct. judge made the order. Appct. was solvent, & no suggestion was made that he was not a proper person to be appointed trustee by the mtgees. :—*Held :* the vesting order was rightly made.—*Re* HOLMES, *Ex p.* ASHWORTH, [1908] 2 K. B. 812 ; 77 L. J. K. B. 1129 ; 52 Sol. Jo. 728 ; 15 Mans. 331, D. C.

7829. —— Mortgagee refusing order on terms offered—Power of court.]—If a mtgee. refuses to accept a vesting order on the terms offered by the order of the ct., it is competent for the ct. to order that the property be vested in or delivered to the lessor.—*Re* COCK, *Ex p.* SHILSON (1887), 20 Q. B. D. 343 ; 57 L. J. Q. B. 169 ; 58 L. T. 586 ; 36 W. R. 187 ; 5 Morr. 14, D. C.

Annotations :—**Apprvd.** *Re* Finley, *Ex p.* Clothworkers' Co. (1888), 21 Q. B. D. 475, C. A. **Consd.** *Re* Baker, *Ex p.* Lupton, [1901] 2 K. B. 628, C. A.

SUB-SECT. 8.—APPLICATION TO EXCLUDE PARTY REFUSING TO ACCEPT VESTING ORDER.

7830. Jurisdiction of county court judge.]—Where a lessee is adjudicated bkpt. in a county ct., & his trustee disclaims the lease, in application by the landlord for an order putting mtgees. by demise to their election to take a vesting order of the lease *cum onere*, or be excluded from all interest, is an application to enforce a claim arising out of the bkpcy., which could not have been enforced by action in the High Ct. prior to 1883 Act, & by virtue of s. 102 (1), the county ct. has jurisdiction, without any consent of the parties, to decide all questions of law or fact arising on the application, including the question whether the lease is subsisting, or whether it was merged by a temporary coalescence of the freehold & leasehold estates in the lessee.—LEA *v.* THURSBY, [1904] 2 Ch. 57 ; 73 L. J. Ch. 518 ; 90 L. T. 667 ; 20 T. L. R. 470 ; 11 Mans. 151.

7831. Who may apply—Lessor.]—A lessee mortgaged the leasehold property by sub-demise, & was subsequently adjudicated a bkpt. The trustee obtained leave to disclaim, & thereupon the lessor obtained an order that the mtgee. should be excluded from all interest in & security upon the property, unless within seven days he elected to accept an order vesting in him the disclaimed property subject to the same liabilities & obligations as bkpt. was subject to under the lease :—*Held :* the order excluding the mtgee.'s interest, unless he accepted the terms proposed, could be made upon the application of the lessor.—*Re* COCK, *Ex p.* SHILSON (1887), 20 Q. B. D. 343 ; 57 L. J. Q. B. 169 ; 58 L. T. 586 ; 36 W. R. 187 ; 5 Morr. 14, D. C.

Annotations :—**Apprvd.** *Re* Finley, *Ex p.* Clothworkers' Co. (1888), 21 Q. B. D. 475, C. A. ; *Re* Baker, *Ex p.* Lupton, [1901] 2 K. B. 628, C. A.

7832. —— ——.]—A lessee mortgaged leasehold property by sub-demise & became bkpt. The trustee having disclaimed, the lessors applied for an order under 1883 Act, s. 55 (6), to exclude the mtgee. by sub-demise, unless he should elect to accept a vesting order :—*Held :* the lessors were entitled to make the application.—*Re* FINLEY, *Ex p.* CLOTHWORKERS' CO. (1888), 21 Q. B D. 475 ; 57 L. J. Q. B. 626 ; 60 L. T. 134 ; 37 W. R. 6 ; 4 T. L. R. 745 ; *sub nom. Re* FINLEY, *Ex p.* HANBURY, 5 Morr. 248, C. A.

Annotations :—**Apld.** *Re* Smith, *Ex p.* Hepburn (1890), 25 Q. B. D. 536, C. A. **Folld.** *Re* Baker, *Ex p.* Lupton, [1901] 2 K. B. 628, C. A. **Apld.** Lea *v.* Thursby, [1904] 2 Ch. 57. **Refd.** *Re* Morgan, *Ex p.* Morgan (1889), 22 Q. B. D. 592, C. A. ; Stacey *v.* Hill, [1901] 1 K. B. 660, C. A. ; *Re* Carter & Ellis, *Ex p.* Savill, [1905] 1 K. B. 735, C. A.

7833. —— —— Only necessary to serve mortgagee.]—The lessee of a house assigned it, & the assignee again assigned it to a person, who afterwards became bkpt. Before the bkpcy. bkpt., had mortgaged the house by sub-demise. The trustee disclaimed the lease :—*Held :* the lessor was entitled, without serving any one but the mtgee., to apply for an order putting the mtgee. to his election whether he would accept an order vesting the house in him, subject to the liabilities to which at the date of the filing of the bkpcy. petition bkpt. was subject under the lease, or to be excluded from all interest in and security upon the property.—*Re* BAKER, *Ex p.* LUPTON, [1901] 2 K. B. 628 ; 70 L. J. K. B. 856 ; 85 L. T. 33 ; 49 W. R. 691 ; 17 T. L. R. 673 ; 45 Sol. Jo. 670 ; 8 Mans. 279, C. A.

Annotation :—**Refd.** Lea *v.* Thursby, [1904] 2 Ch. 57.

7834. Against whom order may be made—Mortgagees who had assigned underlease in trust.]—Bkpt., being lessee of premises, the trustee, with the leave of the ct., disclaimed the lease. Bkpt. had mortgaged the premises by way of underlease, & the day before the application for leave to disclaim was heard the mtgees. assigned the mtge. debt & the security to a nominee, a person of small means, who was to hold the property for the residue unexpired of the term of the underlease, subject to the subsisting equity of redemption. The deed of assignment contained a declaration by the assignee that he would stand possessed of the debt & the security in trust for

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the assignors, & to be assigned & disposed of as they might direct. The assignment was made for the purpose of escaping liability under the lease:—*Held:* notwithstanding the assignment, the assignors still remained "mtgees. by demise" of or "entitled to" the leasehold property within 1883 Act, s. 55 (6), &, on an application by the lessor under the above sub-sect., they must be excluded from all interest in, & security upon, the property, unless they were willing to accept a vesting order, the assignment in trust for the mtgees. being, as between them & the original lessor, absolutely void.—*Re* SMITH, *Ex p.* HEPBURN (1890), 25 Q. B. D. 536; 59 L. J. Q. B. 554; 63 L. T. 621; 38 W. R. 744; 6 T. L. R. 422; 7 Morr. 246, C. A.

Annotation:—**Refd.** Lea *v.* Thursby, [1904] 2 Ch. 57.

7835. Terms of order.]—A lessee mortgaged leasehold property by sub-demise, & became a bkpt. The trustee disclaimed, & the lessors obtained an order that the mtgee, by sub-demise should be excluded from all interest in & security upon the property, unless he should, within fourteen days, elect to accept an order vesting in him the property disclaimed, subject to the same liabilities & obligations as bkpt. was subject to under the lease at the time when the bkpcy. petition was filed:—*Held:* the order was properly made.—*Re* FINLEY, *Ex p.* CLOTHWORKERS' CO. (1888), 21 Q. B. D. 475; 57 L. J. Q. B. 626; 60 L. T. 134; 37 W. R. 6; 4 T. L. R. 745; *sub nom. Re* FINLEY, *Ex p.* HANBURY, 5 Morr. 248, C. A.

Annotations:—**Consd.** *Re* Carter & Ellis, *Ex p.* Savill, [1905] 1 K. B. 735, C. A. **Refd.** *Re* Morgan, *Ex p.* Morgan (1889), 22 Q. B. D. 592, C. A.; *Re* Smith, *Ex p.* Hepburn (1890), 25 Q. B. D. 536, C. A.; *Re* Baker, *Ex p.* Lupton, [1901] 2 K. B. 628, C. A.; Stacey *v.* Hill, [1901] 1 K. B. 660, C. A.; Lea *v.* Thursby, [1904] 2 Ch. 57.

7836. Effect of order.]—*Qu.:* whether under the vesting order made in No. 7835, *ante*, the mtgee. became subject to the same liabilities & obligations as if he were the original lessee, or only as if he were an assignee of the original lessee.—*Re* FINLEY, *Ex p.* CLOTHWORKERS' CO. (1888), 21 Q. B. D. 475; 57 L. J. Q. B. 626; 60 L. T. 134: 37 W. R. 6; 4 T. L. R. 745; *sub nom. Re* FINLEY, *Ex p.* HANBURY, 5 Morr. 248, C. A.

Annotations:—**Consd.** Stacey *v.* Hill, [1901] 1 K. B. 660, C. A. **Refd.** *Re* Morgan, *Ex p.* Morgan (1889), 22 Q. B. D. 592, C. A.; *Re* Smith, *Ex p.* Hepburn (1890), 25 Q. B. D. 536, C. A.; *Re* Baker, *Ex p.* Lupton, [1901] 2 K. B. 628, C. A.; Lea *v.* Thursby, [1904] 2 Ch. 57; *Re* Carter & Ellis, *Ex p.* Savill, [1905] 1 K. B. 735, C. A.

SECT. 17.—LANDLORD'S POWER OF DISTRESS.

See, now, 1914 Act, s. 35.

SUB-SECT. 1.—RIGHT OF DISTRESS.

7837. How made effectual—Landlord also trustee—Right to claim goods in both capacities on same record.]—In replevin, deft. avowed for rent in arrear from J., & also claimed the goods as being the property of himself & another as assignees of J., against whom a commission had issued. A verdict having been taken for deft. on the whole record, the ct. directed it to be entered for pltf. on the issue taken on the title of the assignees, on the ground that deft. could not be permitted on the same record to claim the goods as a distress for rent, & also to set up the title of the assignees.—EMERY & MIDDLETON *v.* MUCKLOW (1834), 4 Moo. & S. 263.

7838. —— No leave required.]—The only person who may interfere with the possession of a receiver is a landlord distraining for rent. Any other person who claims a better title than the receiver ought to apply to the ct. for leave to enforce his rights.—*Re* MEAD, *Ex p.* COCHRANE (1875), L. R. 20 Eq. 282; 44 L. J. Bcy. 87; 32 L. T. 508; 23 W. R. 726.

7839. Against whom right limited—Not mortgagee.]—The goods of a trader on premises of which he was tenant were mortgaged for more than their value. The mtgee. entered & took possession. The tenant became bkpt. owing more than a year's rent:—*Held:* the landlord might make his distress upon those goods available for the whole rent due, 1849 Act, s. 129, protecting only the interest of the assignees of bkpt., & not that of his mtgee.—BROCKLEHURST *v.* LAWE (1857), 7 E. & B. 176; 26 L. J. Q. B. 107; 3 Jur. N. S. 436; 5 W. R. 311; 119 E. R. 1213.

Annotations:—**Consd.** Railton *v.* Wood (1890), 15 App. Cas. 363, P. C. **Refd.** Crosse *v.* Welch (1892), 8 T. L. R. 401.

7840. —— ——.]—The limitations imposed upon landlords in regard to distresses do not extend to protect mtgagees. in possession.—CROSSE *v.* WELCH (1892), 8 T. L. R. 401; *affd.* 8 T. L. R. 709, C. A.

7841. —— Not creditor obtaining order for administration in Chancery.]—*Held:* an order obtained in the Ch. Div. by a creditor for administration of a deceased debtor's estate, not followed by any proceedings in bkpcy., was not equivalent to or included in the term "order of adjudication" in 1883 Act, s. 42, so as to limit the power of the landlord, or other person to whom rent was due from the deceased person's estate, to recover by distress one year's rent only accrued due prior to the date of the administration order.—*Re* FRYMAN'S ESTATE, FRYMAN *v.* FRYMAN (1888), 38 Ch. D. 468; 57 L. J. Ch. 862; 58 L. T. 872; 36 W. R. 631.

7842. Restraint of distress—Jurisdiction of court—Liquidation under 1869 Act, s. 125.]—*Held:* the Ct. of Bkpcy. had jurisdiction, under 1869 Act, ss. 13, 65, 72, 78, & 125, to restrain a distress for rent or other legal proceedings against debtor or his estate in respect of any debt provable, & to decide the question of the landlord's right to distrain.—*Re* RUSSELL, *Ex p.* RUSSELL (1870), 18 W. R. 753.

7843. —— —— Liquidation under 1869 Act, s. 126.]—A distress under a statutory power was levied by a gas co. against the goods of debtor, who, on the day of but after the seizure, filed a petition for liquidation by arrangement, & obtained an *ex p.* injunction restraining the sale of the goods seized. At the first meeting of creditors a composition under 1869 Act, s. 126, was resolved upon by the requisite majority of creditors, & the resolution was afterwards duly confirmed & registered. Subsequently, on the application of debtor, an order was made, directing the co. to

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PART XX. SECT. 17, SUB-SECT. 1.

a. *Common law right not affected.*]—M. was put in liquidation. The official assignee took charge of the estate, including goods on the premises of McG., the landlord of M. McG. distrained for rent:—*Held:* landlord's common law remedy by distress was not taken away by 1869 Act.—McLEOD *v.* McGUIRK (1874), 2 Pug. 248.—**CAN.**

b. ——.]—*Held:* 1883 Act did not take away the landlord's common law right of distraint.—GUTHRIE (OFFICIAL ASSIGNEE IN BANKRUPTCY OF) *v.* BROWN (1884), 3 N. Z. L. R. 152.—**N.Z.**

c. ——.]—Goods of a tenant were seized under an attachment. The landlord distrained for rent. No sale took place, but the landlord continued in possession for fourteen days. The tenant was declared insolvent:—*Held:* the distress was not superseded by the insolvency.—*Re* BULGER'S INSOLVENCY (1867), 5 Nfld. L. R. 207.—**NFLD.**

deliver up the goods seized by them under the distress:—*Held:* the order must be discharged.—*Re* ADAMS, *Ex p.* BIRMINGHAM GASLIGHT & COKE CO. (1870), L. R. 11 Eq. 204; 40 L. J. Bcy. 1; 24 L. T. 42; *sub nom.* BIRMINGHAM GAS CO. *v.* ADAMS, 19 W. R. 123.

Annotation:—**Distd.** *Re* Fanshaw & Yorston, *Ex p.* Birmingham & Staffordshire Gaslight Co. (1871), 40 L. J. Bcy. 52.

7844. —— —— Under 1869 Act, s. 13.]—Under a local statute a gas co. had the same rights with respect to recovering the rent or "charge" due for the supply of gas, as landlords had with respect to recovering rent. The co., after notice that a firm indebted to them for a supply of gas had filed a petition under 1869 Act, s. 125, distrained in pursuance of their statutory rights upon petitioners' goods. The creditors of petitioners afterwards resolved on liquidation, & a trustee was appointed:—*Held:* the distress was not liable to be restrained as "an execution or other legal process" within s. 13, &, assuming the filing of the petition to be equivalent to the commencement of a bkpcy., the co. were entitled under s. 34 to distrain, after the filing, for one year's supply of gas.—*Re* FANSHAW & YORSTON, *Ex p.* BIRMINGHAM & STAFFORDSHIRE GASLIGHT CO. (1871), L. R. 11 Eq. 615; 40 L. J. Bcy. 52; 24 L. T. 639; 19 W. R. 503.

Annotations:—**Consd.** *Re* Roberts, *Ex p.* Hill (1877), 6 Ch. D. 63, C. A.; *Re* Peake, *Ex p.* Harrison (1884), 13 Q. B. D. 753, C. A.

7845. —— —— ——.]—The special Act of a gas co. empowered them to levy by distress all sums of money due to them for the supply of gas, the amount of which would not be disputed, & provided that any justice, on application, might inquire into & ascertain the amount due, & issue his warrant for levying same. Gasworks Clauses Act, 1847 (c. 15), s. 16, was incorporated with the special Act. The co., after one of their customers had filed a liquidation petition, & with notice of the petition, proceeded to seize his goods under a distress warrant granted by the justices, in respect of money due for gas supplied to him within a year before the filing of the petition:—*Held:* the distress was a legal process against the estate of debtor in respect of a provable debt, which the ct. had, under s. 13, power to restrain.—*Re* ROBERTS, *Ex p.* HILL (1877), 6 Ch. D. 63; 46 L. J. Bcy. 116; 37 L. T. 46; 25 W. R. 784, C. A.

Annotations:—**Consd.** *Re* Peake, *Ex p.* Harrison (1884), 13 Q. B. D. 753, C. A. **Refd.** *Re* Howells, *Ex p.* Mandleberg (1895), 2 Mans. 192, D. C.

7846. —— —— Right of landlord under 1869 Act, s. 34.]—After a petition had been filed & a receiver had been appointed & had taken possession of debtor's property, debtor's landlord, without leave of the ct., levied a distress:—*Held:* the ct. could not interfere with the statutory right given to the landlord by the above sect.—*Re* MAYHEW, *Ex p.* TILL (1873), L. R. 16 Eq. 97; 42 L. J. Bcy. 84; 37 J. P. 580; 21 W. R. 574.

Annotation:—**Distd.** *Re* Mead, *Ex p.* Cochrane (1875), L. R. 20 Eq. 282.

7847. How lost—Bankruptcy of tenant pending replevin—Goods in trustee's hands.]—Goods were taken in distress for rent, & replevied. The tenant became bkpt. pending the cause in replevin, & his assignees took possession of the goods:—*Held:* the distrainor had no lien on the goods, but was left to his remedy on the replevin bond.—BRADDYLL *v.* BALL (1785), 1 Bro. C. C. 427; 28 E. R. 1219, L. C.

Annotations:—**Expld.** Newton *v.* Scott (1842), 9 M. & W. 434. **Refd.** British Empire Shipping Co. *v.* Somes (1858), E. B. & E. 353.

7848. —— Discharge.]—A landlord distrained the goods of A. on his tenant's premises, for rent. The tenant afterwards became bkpt., & obtained his certificate:—*Held:* the certificate did not operate as a release of the rent, & the landlord had a right, in replevin at the suit of A., to avow for a return of the goods.—NEWTON *v.* SCOTT (1842), 10 M. & W. 471; 12 L. J. Ex. 488; 152 E. R. 556, Ex. Ch.

Annotations:—**Consd.** Phillips *v.* Shervill (1845), 6 Q. B. 944. **Refd.** Toppin *v.* Field (1843), 3 Gal. & Dav. 340.

Effect of discharge, *see, generally*, Part XVIII., Sect. 7, *ante*.

7849. —— Petition for adjudication against tenant.]—Landlords who had distrained, & to whom, in addition to arrears of rent, a sum was due from the tenant exceeding £50 for goods sold & delivered, petitioned for adjudication in bkpcy. against him:—*Held:* they were not bound to forgo their distress.—*Re* TAYLOR, *Ex p.* BELL (1851), 4 De G. & Sm. 597; 64 E. R. 974.

7850. Repayment of proceeds of levy— & damages for excessive distress—Jurisdiction of court to order.]—On Dec. 3, 1878, a brewing co., in pursuance of a power contained in an agreement for letting, entered upon the premises of their tenant & levied a distress. On Dec. 7 the tenant committed an act of bkpcy. Upon the application of the trustee the county ct. judge directed the brewing co. to pay to the trustee the amount so levied by them, & damages for the distress, as being excessive:—*Held:* the Ct. of Bkpcy. had no jurisdiction to make an order.—*Re* CLIFFE, *Ex p.* EATOUGH & CO., LTD. (1880), 42 L. T. 95; 28 W. R. 433.

7851. Lawful possession under distress becoming tortious—Measure of damages of trustee against landlord.]—Where a landlord is in lawful possession under a distress at the commencement of the tenant's bkpcy., & the possession subsequently becomes tortious, the trustee of the tenant may recover damages for the conversion, but in arriving at the true measure the landlord must be allowed what the trustee, if he had asserted his title at the commencement of the bkpcy., would have had to pay to obtain possession.—COX *v.* LIDDELL (1895), 2 Mans. 212.

SUB-SECT. 2.—WHO CAN DISTRAIN.

7852. "Landlord or other person to whom any rent is due"—Gas company—"Rent."]—The special Act of a gas co. empowered them to levy by distress all sums of money due to them for the supply of gas, the amount of which should not be disputed, & provided that any justice, on application, might inquire into & ascertain the amount due, & issue his warrant for levying the same. The Act incorporated Gasworks Clauses Act, 1847 (c. 15), s. 16, in which money due to a gas co. for gas supplied was spoken of as "rent." The co., after one of their customers had filed a liquidation

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7847 i. *How lost.*]—D. was tenant to M. D. made an assignment in insolvency & M. distrained for rent. At the request of the official assignee, M. abandoned the distress, but subsequently issued a second distress for same rent:—*Held:* the second distress was bad & could not be supported under Landlord & Tenant Act, 1709 (c. 18), as having been made within six months after the determination of the term.—MAY *v.* SEVERS (1874), 24 C. P. 396.—CAN.

d. *Claim by assignee.*]—A *fi. fa.* issued against the goods of A., & the sheriff seized & proceeded to sell. During progress of the sale the landlord claimed rent. A commission of bkpcy. issued, & an assignee was appointed, who required the sheriff to pay him the proceeds of sale:—*Held:* a claim by bkpt.'s assignee did not displace landlord's right to distress.—GILL *v.* WILSON (1853), 3 I. C. L. R. 544; 6 Ir. Jur. 132.—IR.

Sect. 17.—*Landlord's power of distress: Sub-sects.* 2, 3 & 4.]

petition, & with notice of the petition, proceeded to seize his goods under a distress warrant granted by the justices in respect of money due for gas supplied to him within a year before the filing of the petition:—*Held:* (1) the co. did not come within the words "landlord or other person to whom any rent is due from bkpt." in 1869 Act, s. 34; (2) the words "other person to whom any rent is due" in s. 34 applied to a case where rent was payable in respect of a tenancy, though the person entitled to the rent was not in popular language a "landlord."—*Re* ROBERTS, *Ex p.* HILL (1877), 6 Ch. D. 63; 46 L. J. Bcy. 116; 37 L. T. 46; 25 W. R. 784, C. A.

Annotations:—**Consd.** *Re* Peake, *Ex p.* Harrison (1884), 13 Q. B. D. 753, C. A. **Refd.** *Re* Howells, *Ex p.* Mandleberg (1895), 2 Mans. 192, D. C.

7853. —— —— ——.]—The payment due to a gas co. for gas supplied, though it is called "rent" in some Acts of Parliament, is not really of the nature of rent, & a gas co. does not come within the words "other person to whom any rent is due" in 1869 Act, s. 34. Those words apply only to a person who, though he is not the landlord of bkpt., fills a position analogous to that of a landlord, because he is entitled to receive that which is "rent" strictly so called.

By their special Act a corpn. were empowered to recover from any person any rent or charge due to them by him for gas supplied, by the like means as landlords were for the time being by law allowed to recover rent in arrear:—*Held:* the corpn. were not, within 1869 Act, s. 34, "other persons" to whom any rent was due by debtor, but, by virtue of the special Act, they were entitled to the rights given to landlords by s. 34.—*Re* PEAKE, *Ex p.* HARRISON (1884), 13 Q. B. D. 753; 53 L. J. Ch. 977; 51 L. T. 878, C. A.

7854. —— **After proof of debt.**]—A commission issued against A., who owed B. twelve years' rent. B. proved the debt under the commission, the assignees sold the goods of A. to petitioner, who lived in A.'s house. B. three years after proving his debt distrained on those goods as being still upon the premises:—*Held:* the vendee of the goods was entitled to them, & the proceedings of B. upon his replevin must be restrained & confined to his remedy under the commission.—*Ex p.* GROVE (1747), 1 Atk. 104; 26 E. R. 69, L. C.

Annotation:—**Mentd.** Briggs *v.* Sowry (1841), 11 L. J. Ex. 193.

See, also, No. 3261, *ante,* & No. 7863, *post.*

7855. Mortgagee—Under attornment clause.]—An attornment clause in a mtge. creates the relation of landlord & tenant, & if the rent is not so unreasonable as to be fraudulent, the mtgee. has the same right of distress as any other landlord.—*Re* STOCKTON IRON FURNACE CO. (1879), 10 Ch. D. 335; 48 L. J. Ch. 417; 40 L. T. 19; 27 W. R. 433, C. A.

Annotations:—**Consd.** *Re* Bridgewater Engineering Co. (1879), 12 Ch. D. 181; *Re* Bowes, *Ex p.* Jackson (1880), 14 Ch. D. 725, C. A.; *Re* Knight, *Ex p.* Voisey (1882), 21 Ch. D. 442, C. A. **Refd.** *Re* Betts, *Ex p.* Harrison (1881), 18 Ch. D. 127, C. A.; *Re* Willis, *Ex p.* Kennedy (1888), 21 Q. B. D. 384, C. A. **Mentd.** *Re* Crumlin Viaduct Works, Co. (1879), 48 L. J. Ch. 537; *Re* Kitchin, *Ex p.* Punnett (1880), 16 Ch. D. 226, C. A.; Shubrook *v.* Tufnell (1882), 30 W. R. 740, C. A.; *Re* Lewis, Lewis *v.* Williams (1886), 31 Ch. D. 623, C. A.; Green *v.* Marsh, [1892] 2 Q. B. 330, C. A.; *Re* Gardner, Long *v.* Gardner (1894), 71 L. T. 412, C. A.; *Re* Roundwood Colliery Co., Lee *v.* Roundwood Colliery Co. (1896), 13 T. L. R. 75.

7856. —— ——.]—A mtge. deed contained an attornment clause, whereby A. attorned & became tenant from year to year to B. for & in respect of the mortgaged premises, at the yearly rent of £800, to be paid by equal quarterly payments, & it was thereby agreed that it should be lawful for B., at any time after three months from the date of the mtge., without giving previous notice of his intention so to do, to enter upon & take possession of the premises whereof A. had attorned tenant, & to determine the tenancy created by the attornment. A. filed a liquidation petition, & on the same day a receiver was appointed, who entered into possession of A.'s estate & effects. Notice of the petition & of the appointment of a receiver was sent to B., who two days later, by virtue of the attornment clause, distrained upon the goods & chattels on the mortgaged premises for a half-year's rent then due:—*Held:* B. was entitled, under 1869 Act, s. 34, to distrain for the rent due to him from A. at the time of filing the liquidation petition.—*Re* THRELFALL, *Ex p.* QUEEN'S BENEFIT BUILDING SOCIETY (1880), 16 Ch. D. 274; 44 L. T. 74; 29 W. R. 128, C. A.

Annotations:—**Mentd.** *Re* Knight, *Ex p.* Voisey (1882), 21 Ch. D. 442, C. A.; King *v.* Eversfield, [1897] 2 Q. B. 475, C. A.

7857. —— —— **Second mortgagee—Under second attornment.**]—An attornment by a mtgor. to a second mtgee. is valid, notwithstanding the fact that the mtgor. has already attorned tenant to the first mtgee. of the same property, & if the amount of the rents fixed by the two attornments clauses is a fair rent of the property, so that there is no fraud on the bkpcy. law, valid distresses can be levied by both mtgees. after the commencement of the bkpcy. of the mtgor.—*Re* KITCHIN, *Ex p.* PUNNETT (1880), 16 Ch. D. 226; 50 L. J. Ch. 212; 44 L. T. 226; 29 W. R. 129, C. A.

Annotations:—**Consd.** *Re* Willis, *Ex p.* Willoughby de Eresby (1888), 5 Morr. 189. **Mentd.** *Re* Knight, *Ex p.* Voisey (1882), 21 Ch. D. 442, C. A.; West London Syndicate *v.* I. R. Comrs., [1898] 2 Q. B. 507, C. A.

7858. Receiver—Under attornment clause.]—By a receivership deed executed contemporaneously with a mtge. in fee, which it recited, the mtgor. & mtgee. appointed a receiver, & constituted him their agent & attorney to receive the rents of the mortgaged property, & to use such remedies by way of entry & distress as should be requisite for that purpose. By the same deed the mtgor. attorned as tenant from year to year to the receiver, & there was a proviso, that if default should be made in payment of the mtge. money, or interest, at the times appointed, the mtgee. might enter & avoid the tenancy created by the attornment. There was also a proviso, that nothing therein contained should lessen the rights, powers or remedies of the mtgee. under the mtge. On the mtgor. being found bkpt.:—*Held:* the relation of landlord & tenant had been created between the receiver & mtgor. by the receivership deed, & the receiver was entitled to distrain & take the goods which had belonged to the mtgor. on the mortgaged premises.—JOLLY *v.* ARBUTHNOT (1859), 4 De G. & J. 224; 28 L. J. Ch. 547; 33 L. T. O. S. 263; 23 J. P. 677; 5 Jur. N. S. 689; 7 W. R. 532; 45 E. R. 87, L. C.

Annotations:—**Distd.** Hampson *v.* Fellows (1868), 37 L. J. Ch. 694. **Consd.** Morton *v.* Woods (1868), L. R. 3 Q. B. 658. **Folld.** Morton *v.* Woods (1869), L. R. 4 Q. B. 293, Ex. Ch. **Refd.** *Re* Roberts, *Ex p.* Hill (1877), 6 Ch. D. 63, C. A.; *Re* Threlfall, *Ex p.* Queen's Benefit Bldg. Soc. (1880), 16 Ch. D. 274, C. A.; Kearsley *v.* Philips (1883), 11 Q. B. D. 621, C. A.

See, further, Sub-sect. 7, *post;* MORTGAGE.

PART XX. SECT. 17, SUB-SECT. 2.

7855 i. *Mortgagee—Under attornment clause.*]—If insolvent executes a mtge. containing a provision that in case of default he shall become tenant of the mtgee., the relation of landlord & tenant is created on insolvency of mtgor.—*Re* GAMBLE (1893), 19 V. L. R. 627.—**AUS.**

SUB-SECT. 3.—WHAT PROPERTY SUBJECT TO DISTRESS.

7859. Goods seized by messenger under fiat in bankruptcy.]—Goods seized by a messenger under a fiat in bkpcy. are not, while in his custody, privileged from distress for rent due from bkpt. to his landlord.—BRIGGS *v.* SOWRY (1841), 8 M. & W. 729; 11 L. J. Ex. 193; 151 E. R. 1234.

Annotations :—**Refd.** *Re* Mackenzie, *Ex p.* Hertfordshire, [1899] 2 Q. B. 566, C. A. **Mentd.** Phillips *v.* Shervill (1845), 6 Q. B. 944.

7860. —— & remaining on premises.]—Notwithstanding a commission, & that the messenger is in possession of the goods, the landlord may distrain for the rent, even after an assignment of the goods are on the premises.—*Ex p.* GROVE (1747), 1 Atk. 104; 26 E. R. 69, L. C.

Annotation :—**Refd.** Briggs *v.* Sowry (1841), 11 L. J. Ex. 193.

7861. Partnership goods—Separate attornments by each partner.]—P. & F. were in partnership as brickmakers, & they mortgaged lands which they used for their partnership purposes, & of which they were seized as tenants in common, & each of them separately attorned as tenants to the mtgees. in respect of a moiety of the property which was in their joint occupation & at a separate rent. Subsequently the mtgees. took out separate distresses against the mtgors. for six years' rent due from each for his one equal undivided moiety of the premises, & they seized the chattels on the partnership premises. The mtgors. became bkpt., & the receiver in the bkpcy. claimed the goods as against the mtgees. :—*Held :* the mtgees. having in both cases distrained on goods which were the joint partnership property of bkpts. had exceeded their rights, & they could not distrain on goods in which the tenant & another person had an undivided interest.—*Re* POTTER, *Ex p.* PARKE (1874), L. R. 18 Eq. 381; 43 L. J. Bcy. 139; 30 L. T. 618; 38 J. P. 760; 22 W. R. 768.

SUB-SECT. 4.—TIME FOR DISTRESS.

7862. After trustee in possession.]—Assignees were in possession, & the landlord distrained. LORD KING, C., confirmed the right of the landlord to distrain.—*Ex p.* DILLON (1733), cited at p. 1 Atk. 104; 26 E. R. 68, L. C.

Annotation :—**Refd.** *Ex p.* Plummer (1739), 1 Atk. 103, L. C.

7863. After goods sold by trustee—Before removal.]—A landlord may distrain for his whole rent, even after assignment or sale by the assignees, if goods are not removed.—*Ex p.* PLUMMER (1739), 1 Atk. 103; 26 E. R. 68.

Annotations :—**Consd.** Lee *v.* Lopes (1812), 15 East, 230. **Distd.** Mavor *v.* Croome (1823), 8 Moore C. P. 171. **Refd.** Briggs *v.* Sowry (1841), 8 M. & W. 729. **Mentd.** *Re* Hart, *Ex p.* Caldicott (1883), 48 L. T. 910.

See, also, No. 7854, *ante.*

7864. After "an act of bankruptcy"—1849 Act, s. 129.]—On Mar. 27, 1861, J. committed an act of bkpcy. under 1849 Act, s. 67, by making a fraudulent conveyance of all his goods & chattels to A., his landlord, but no attempt was made by any creditor to obtain an adjudication upon it, nor did it appear that there was any creditor who could have done so. On Oct. 11, the day from & after which 1861 Act came into operation, A. made a distress on the goods of J. for four years' rent, &, on Oct. 17 J., who was not a trader, was adjudicated bkpt. on his own petition under ss. 86, 87 of the latter Act, & assignees appointed :—*Held :* (1) the words "an act of bkpcy." in 1849 Act, s. 129, meant one to which the title of the assignees could relate; (2) the title of the assignees could not relate back to the act of bkpcy. in the preceding Mar., & s. 129 did not apply.—PAULL *v.* BEST (1863), 3 B. & S. 537; 1 New Rep. 311; 32 L. J. Q. B. 96; 7 L. T. 738; 27 J. P. 181; 9 Jur. N. S. 519; 11 W. R. 280; 122 E. R. 203.

Annotation :—**Consd.** *Re* Richards, *Ex p.* Assignees (1864), 11 L. T. 576.

7865. After filing liquidation petition.]—By their special Act a corpn. were empowered to recover from any person any rent or charge due to them by him for gas supplied, by the like means as landlords were for the time being by law allowed to recover rent in arrear :—*Held :* after the filing of a liquidation petition by a customer, the corpn. were entitled as against the trustee in the liquidation to levy a distress in respect of a sum due by debtor for gas supplied to him before the filing of the petition.—*Re* PEAKE, *Ex p.* HARRISON (1884), 13 Q. B. D. 753; 53 L. J. Ch. 977; 51 L. T. 878, C. A.

PART XX. SECT. 17, SUB-SECT. 3.

f. *Property on premises.*]—The only right, which the landlord has, is to distrain on whatever property is found on the premises at the time the rent falls due.—*Re* O'MULLIN & JOHNSTONE, R. E. D. 157.—CAN.

g. *Goods in custodiâ legis.*]—Goods of bkpt. in the hands of assignees on premises demised to bkpt. are not in *custodiâ legis*, & may be distrained.—*Re* COLLINS (1888), 21 L. R. Ir. 508.—IR.

k. ——.]—M. liquidated, & the official assignee took possession of insolvent's goods on premises leased to M. by McG. While such goods were in possession of the assignee McG. distrained :—*Held :* the goods were distrainable.—MCLEOD *v.* MCGUIRK (1874), 2 Pug. 248.—CAN.

l. —— *Goods in hands of tenant—After assignment.*]—A tenant executed an assignment; before possession had been taken by the assignee, the landlord distrained :—*Held :* (1) landlord's right of distress was not affected; (2) goods so assigned were not in *custodiâ legis.*—EAGRETT *v.* KENT (1887), 15 O. R. 9.—CAN.

m. "*Property*" *not divisible among creditors*—1883 *Act, s.* 71.]—The "property" of bkpt. on which no distress for rent can be levied means the property "divisible among the creditors." That portion of bkpt.'s property which is not divisible among creditors does not vest in the official assignee, & is liable after bkpcy. to be distrained upon for rent.—GREENHOUGH (OFFICIAL ASSIGNEE OF) *v.* JACKSON (1887), 6 N. Z. L. R. 75.—N.Z.

n. *Goods of joint tenants.*]—1871 Act, s. 108, does not apply where a distress for rent has been made on the goods of joint tenants, & one subsequently sequestrates his estate.—OFFICER *v.* HAYNES (1877), 3 V. L. R. 115.—AUS.

PART XX. SECT. 17, SUB-SECT. 4.

p. *After sequestration.*]—After sequestration, a landlord cannot distrain for rent due by insolvent, upon either his goods or those of a stranger.—COHEN *v.* SLADE (1871), 12 N. S. W. S. C. R. 88.—AUS.

q. ——.]—The landlord of a tenant, who has given a bill of sale over his goods, is entitled to distrain on such goods after sequestration of tenant's estate.—*Re* BROWNING (1893), 19 V. L. R. 509.—AUS.

7865 i. *After filing liquidation petition —After vesting order.*]—A landlord, who distrains subsequent to the issuing of the order vesting insolvent's estate in trustees, acquires no title to the goods so distrained.—WALBANK (TRUSTEE OF INSOLVENT ESTATE OF CHANCEY & HEATH) *v.* KNIGHT (1868), 5 Nfld. L. R. 235.—NFLD.

7865 ii. ——.]—After the assignee has taken possession the landlord cannot seize.—*Re* MCCRAKEN, DALLAS *v.* STINSON (1879), 4 A. R. 486.—CAN.

7865 iii. —— *Before vesting order.*]—A distress levied after the filing of the petition of insolvency, but before the vesting order is drawn up, is invalid as against the official assignee.—*Re* BODREY (1870), 5 B. L. R. 309.—IND.

r. *Before insolvency.*]—A landlord distrained for six months' rent while the goods were in the tenant's possession, & afterwards, the goods being in the hands of the bailiff, an attachment in insolvency issued against the tenant :—*Held :* the landlord was entitled to proceed & sell.—MCEDWARDS *v.* MCLEAN (1878), 43 U. C. R. 454.—CAN.

Sect. 17.—*Landlord's power of distress: Sub-sects.* 5 & 6.]

SUB-SECT. 5.—IN RESPECT OF WHAT RENT AND FOR WHAT AMOUNT.

7866. Rent payable in advance—Effect of custom.]—If a trader, after committing an act of bkpcy., take a shop, & agree to pay half a year's rent in advance, where, by the custom of the country, half a year's rent becomes due on the day on which the tenant enters, the landlord, after an assignment under the commission, & before the year expired, may distrain the goods on the premises for half a year's rent, or if he buy the tenant's goods at the sale under the commission, he may retain the amount of the half year's rent.—BUCKLEY *v.* TAYLOR (1788), 2 Term Rep. 600; 100 E. R. 323.

7867. Rent for which goods already distrained—Goods valued & left on premises for use of bankrupt's wife.]—A landlord distrained for rent arrears before the bkpcy. of his tenant, & when the goods were appraised left them on the premises for the use of bkpt.'s wife, bkpt. himself being in prison. After the bkpcy. the landlord distrained again for the very same arrears of rent:—*Held:* the second distress was void.—*Re* DEANE, *Ex p.* SHUTTLEWORTH & HANCOCK (1832), 1 Deac. & Ch. 223, Ct. of R.

7868. Rent from commencement of bankruptcy—Trustee not having disclaimed.]—When the trustee continues in possession of premises, of which debtor was tenant, not having disclaimed the lease, the landlord has a right, as against the trustee, to distrain, without obtaining any leave from the ct., for rent accruing due after the commencement of the bkpcy., even though it be rent which, under the terms of the lease, is payable in advance.—*Re* BINNS, *Ex p.* HALE (1875), 1 Ch. D. 285; 45 L. J. Bcy. 21; 33 L. T. 706; 24 W. R. 300.

Annotations:—**Consd.** *Re* Thomas (1876), Diprose's Friendly Soc. Cases, 64. **Folld.** *Re* Howell, *Ex p.* Mandleberg, [1895] 1 Q. B. 844, D. C.

7869. —— ——.]—Where there is no disclaimer & a stated period arrives for the payment of the rent accrued due subsequent to the adjudication, the landlord is entitled to distrain.—*Re* THOMAS (1876), Diprose's Friendly Society Cases, 64.

7870. Two half-years' rent due before filing petition—Second distress for half year's rent accruing between filing petition & appointment of trustee—1869 Act, s. 34.]—A landlord, between the filing of a liquidation petition by his tenant & the appointment of trustees, levied a distress for two half-years' rent accrued due before the filing of the petition. After the appointment of trustees the landlord levied a second distress for a third half-year's rent accrued due between the filing of the petition & the appointment of the trustees:—*Held:* the second distress was void under 1869 Act, s. 34.—*Re* MORRISH, *Ex p.* HART DYKE

PART XX. SECT. 17, SUB-SECT. 5.

7866 i. *Rent payable in advance—Acceleration clause.*]—Deft. made a lease to R. from Nov. 12, 1884, rent payable half-yearly in advance on Nov. 12, & May 12, in each year. The lease provided that if the lessee made an assignment, the full amount of the current yearly rent should be at once payable. On May 5, 1885, R. assigned; on May 8 deft. distrained for the half-year's rent:—*Held:* the distress was valid.—GRAHAM *v.* LANG (1885), 10 O. R. 248; *dtd.* BAKER *v.* ATKINSON (1886), 14 A. R. 409.—**CAN.**

7866 ii. —— ——.]—Defts. leased premises to O., at a yearly rent, payable quarterly in advance, with a covenant that, if the lessees made an assignment for the benefit of creditors, the lease should immediately be forfeited & the next ensuing year's rent at once payable. O. assigned to B., as trustee for the benefit of creditors, who went into possession. Defts. distrained for six months' rent then in arrear, & one year's rent payable in consequence of the assignment:—*Held:* the distress was illegal, since the year's rent became due only by virtue of the forfeiture.—BAKER *v.* ATKINSON (1886), 11 O. R. 735; 14 A. R. 409.—**CAN.**

7866 iii. ——.]—By a lease made on Oct. 31, 1895, premises were demised at a yearly rent, payable in advance, in even portions monthly on the first day of each month, the first payment to be made on Nov. 1, 1895. The lease provided for an express power of distress for rent in arrear, & that, in the event of lessee assigning for benefit of creditors, the current quarter's rent should immediately be payable. On Jan. 31, 1896, the lessor distrained. On the same day the lessees assigned & by consent the goods were sold by the lessor & were removed from the demised premises before the last day of Feb.:—*Held:* (1) the acceleration clause had no application, even if the words "current quarter," could be read "current three months" as the current three months ended on Jan. 31, 1896; (2) a lessor apart from an acceleration clause was entitled to rent, not exceeding three months in advance, which became in arrear while the assignee remained in possession & while there were sufficient goods on the premises subject to distress; (3) the lessor was entitled to the rent which fell due on Feb. 1, 1896.—LANGLEY *v.* MEIR (1898), 25 A. R. 372.—**CAN.**

7866 iv. —— ——.]—By the terms of a lease rent was payable quarterly in advance with a proviso that, if the lessee made an assignment for benefit of creditors, the then current quarter's rent & succeeding quarter's rent should be at once payable. Thirteen days after a quarter's rent was due, the lessee made an assignment:—*Held:* landlord was, apart from the proviso, in addition to the current quarter's rent, entitled to the quarter's rent payable in advance on the quarter day next after the date of the assignment.—LAZIER *v.* HENDERSON (1898), 29 O. R. 673.—**CAN.**

7866 v. —— ——.]—Before any rent was due, deft. seized goods of B. for three months' rent & took possession. In consequence B. made an assignment to pltf., who entered, & on same day, deft. again seized for one month's rent in advance, & three months' accelerated rent:—*Held:* he had a claim for one month's rent only.—GREENWELL *v.* MCKAY (1909), 7 E. L. R. 85.—**CAN.**

7866 vi. —— —— *Current year's taxes.*]—A lease, under which the rent was payable quarterly in advance, provided that, if the lessee made an assignment for the benefit of creditors, the then current & next ensuing quarter's rent & the current year's taxes should immediately be payable as rent in arrear:—*Held:* the lessor was entitled to recover by distress, in addition to a quarter's rent due & in arrear for the quarter preceding the making of the assignment, the rent of the current quarter in which the assignment was made, which was also due & in arrear, as well as a further quarter's rent, together with the taxes for the current year.—TEW *v.* TORONTO SAVINGS & LOAN CO. (1898), 30 O. R. 76.—**CAN.**

a. *One year's rent—Distraint for greater amount before insolvency.*]—A landlord is restricted to one year's rent, even where he has distrained for more before insolvency of the tenant.—MASON *v.* HAMILTON (1872), 22 C. P 411.—**CAN.**

b. —— *No rent due at time of insolvency.*]—There is no custom in Newfoundland which entitles a landlord to a year's rent, when the insolvency takes place at a time before any rent is positively due.—LITTLE *v.* DOOLING & KELLY'S TRUSTEES (1817), 1 Nfld. L. R. 29.—**NFLD.**

c. *Rent accrued due before bankruptcy.*]—Deft. leased premises to M., who covenanted to pay $700 in ten quarterly payments of $70 each, by way of additional rent, with a proviso that, if he became bkpt. or insolvent, the then current quarter's rent should immediately be payable & the term become void. M. failed to pay any portion of the $700, & after the accrual of the third quarterly payment became insolvent:—*Held:* deft. had the right to distrain for the three quarterly payments that had accrued due before the insolvency, but that he could not distrain for the whole $700.—GRIFFITH *v.* BROWN (1869), 21 C. P. 12.—**CAN.**

d. —— *Goods seized & sold by bill of sale holder.*]—A., being tenant of B., gave to C. a bill of sale over his goods. C. seized. B. put in a distress, & A. sequestrated. By arrangement between C. & the official assignee the latter sold the goods, paid the amount of B.'s distress into a bank, & the overplus, less commission, to C.:—*Held:* B. was entitled, as against C., to be paid the full rent out of proceeds of sale.—*Re* SWEENEY, *Ex p.* O'DIGGINS (1878), 4 V. L. R. 1.—**AUS.**

f. *Six months' rent.*]—A distress for more than six months' rent, levied two days before the tenant's bkpcy. on his own petition:—*Held:* available to the landlord, notwithstanding 1884 Act.—*Re* KRULL (1885), 3 N. Z. L. R. 438.—**N.Z.**

7868 i *Rent from commencement of bankruptcy.*]—The landlord has a right to distrain for rent accrued due after bkpcy.—*Re* ALLEN (1893), 27 I. L. T. 104.—**IR.**

(SIR W.) (1882), 22 Ch. D. 410 ; 52 L. J. Ch. 570 ; 48 L. T. 303 ; 31 W. R. 278, C. A.

Annotations :—**Mentd.** Lybbe *v.* Hart (1885), 29 Ch. D. 8, C. A. ; Ware *v.* Booth (1894), 10 T. L. R. 446 ; Serjeant *v.* Nash, Field, [1903] 2 K. B. 304, C. A.

7871. Rent payable by custom later than period provided in lease—Agricultural Holdings Act, 1883 (c. 61), s. 44.]—A landlord reserved rent of a farm payable in one sum yearly at Midsummer, but, in the ordinary course of dealing with his tenant, received the rent by half-yearly payments, in Sept. & Mar. In Sept., 1886, he distrained for arrear of rent reserved Midsummer, 1885, but ordinarily receivable in Sept., 1885, for the arrear of rent also reserved Midsummer, 1885, but ordinarily receivable in Mar., 1886, & for the whole year's rent due at Midsummer, 1886. On Sept. 24, 1886, a receiving order was made against the tenant :—*Held :* the distress was valid under the proviso at the end of the above sect.—*Re* BEW, *Ex p.* BULL (1887), 18 Q. B. D. 642 ; 56 L. J. Q. B. 270 ; 56 L. T. 571 ; 51 J. P. 710 ; 35 W. R. 455 ; 4 Morr. 94, D. C.

Annotation :—**Refd.** Crosse *v.* Welch (1892), 8 T. L. R. 401.

7872. Terms of lease altered by agreement—Between landlord & assignees.]—Premises had been demised to a tenant at £200 a year. His assignees entered into an agreement with their landlord, altering the terms on which the rent was to be paid under the demise. The rent was paid for a period on the new basis, when the assignees made default & became bkpt. The landlord distrained after the bkpcy. for the rent then due according to the demise, & not on the altered basis : —*Held :* the landlord was entitled to distrain after the bkpcy. for the rent due according to the terms of the demise, as the effect of the agreement was merely to postpone the landlord's rights under the demise so long as the rent was paid on the altered basis according to the agreement, & as the rent had not been so paid, the landlord's rights under the demise could be enforced.—*Re* SMITH & HARTOGS, *Ex p.* OFFICIAL RECEIVER (1895), 73 L. T. 221 ; 44 W. R. 79 ; 39 Sol. Jo. 672 ; 2 Mans. 400 ; 15 R. 641.

7873. Proportionate part of rent from last quarter day till bankruptcy—Application of Apportionments Act, 1870 (c. 35)—"Rent accrued due"—1883 Act, s. 44.]—A lessee became bkpt. between two quarter-days. The trustee refused the landlord's demand at the end of the quarter for the whole quarter's rent upon the assumption that his right was limited to a proof for the rent accruing between the last quarter-day & the date of the commencement of the bkpcy. :—*Held :* the landlord was entitled to distrain upon the expiration of the quarter, the rent apportionable to the part before the adjudication being, by Apportionment Act, 1870, "rent accrued due prior to the date of the adjudication" within 1883 Act, s. 44.—*Re* HOWELL, *Ex p.* MANDLEBERG & CO., [1895] 1 Q. B. 844 ; 64 L. J. Q. B. 454 ; 72 L. T. 472 ; 43 W. R. 447 ; 39 Sol. Jo. 452 ; 2 Mans. 192 ; 15 R. 372, D. C.

Annotation :—**Refd.** Rochester *v.* Le Fanu, [1906] 2 Ch. 513.

SUB-SECT. 6.—EFFECT OF FAILURE TO DISTRAIN.

7874. Loss of priority—Must prove with other creditors.]—If the landlord of bkpt. suffers his assignees to sell off his goods, he is not entitled to his whole rent, but must come in *pro ratâ* with other creditors under the commission.—*Ex p.* DESCHARMES (1742), 1 Atk. 103 ; 26 E. R. 68, L. C.

Annotation :—**Consd.** Mayor *v.* Croome (1823), 8 Moore, C. P. 171.

7875. After seizure under fieri facias.]—In order to enforce a landlord's claim for rent in arrear, against assignees, after a seizure under a *fi. fa.*, he must distrain.

The sheriff had seized under a *fi. fa.*, & the landlord gave notice of his claim for rent before the sale. Afterwards notice was given of a fiat of bkpcy. issued against the execution debtor :—*Held :* the assignees were entitled to the whole proceeds of the sale.—GETHIN *v.* WILKS, GALE *v.* WILKS (1833), 2 Dowl. 189.

Annotation :—**Expld.** *Re* Mackenzie, *Ex p.* Hertfordshire [1899] 2 Q. B. 566, C. A.

7876. —— Where opportunity to distrain.]—A sheriff seized goods & sold them by private sale on Mar. 17. They were removed by the purchaser on Apr. 10. On Apr. 14 a receiving order was made, the act of bkpcy. being the seizure & sale. On Apr. 15 the landlord gave the sheriff notice requiring payment of two quarters' rent to Mar. 25. The sheriff paid the proceeds of sale to the trustee in bkpcy. :—*Held :* the landlord was not entitled to the rent for either quarter, because the rent due for the Christmas quarter might have been distrained for between Mar. 17 & Apr. 10, & the rent for the Lady Day quarter had not become due when the goods were seized.—*Re* DAVIS, *Ex p.* POLLEN'S TRUSTEES (1885), 55 L. J. Q. B. 217 ; 54 L. T. 304 ; 34 W. R. 442 ; 2 T. L. R. 229 ; 3 Morr. 27.

7877. Where receiver appointed—Loss of priority over charging order.]—In an action in the Ch. Div. by one partner against another for a dissolution of the partnership, judgment was given for a dissolution & the appointment of a receiver of the assets of the partnership. Both partners were afterwards adjudged bkpt., the action was transferred to the Q. B. Div. in bkpcy., & the judge having jurisdiction in bkpcy. made an order charging the costs of pltf.'s solr. on the funds in the hands of the receiver. Before that order was made, the landlord of the premises, in which bkpts. had carried on their business, had given notice to the receiver of a claim for rent due to him, but had not attempted to distrain. The judge was not informed of such claim before he made the order, & he subsequently made a further order, by which he directed the receiver to pay the rent due to the landlord, & to pay the balance in his hands to the solr. :—*Held :* the landlord, not having distrained, had no lien on the funds in the hands of the receiver in priority to the solr.—*Re* SUFFIELD & WATTS, *Ex p.* BROWN (1888), 20 Q. B. D. 693 ; 58 L. T. 911 ; 36 W. R. 584 ; *sub nom. Re* SUFFIELD & WATT, *Ex p.* WIGGINS, 5 Morr. 83, C. A.

Annotations :—**Mentd.** *Re* Crown Bank (1890), 44 Ch. D. 634 ; Cole *v.* Eley (1894), 38 Sol. Jo. 533, C. A. ; Preston Banking Co. *v.* Allsup, [1895] 1 Ch. 141, C. A. ; *Re* Wood, *Ex p.* Fanshawe, [1897] 1 Q. B. 314 ; *Re* Humphreys, *Ex p.* Lloyd-George (1898), 67 L. J. Q. B. 412, C. A. ; *Re* Deakin, *Ex p.* Daniell, [1900] 2 Q. B. 489, C. A.

PART XX. SECT. 17, SUB-SECT. 6.

7874 i. *Loss of priority.*]—The payment of six months' rent out of bkpt.'s goods is in lieu of the right to distrain, which the landlord has forborne to exercise. Where the landlord has shown his intention not to distrain, the payment will not be made.—*Re* O'TOOLE, *Ex p.* SHAW (BANKRUPTCY) (1894), 29 I. L. T. 6.—IR.

7874 ii. ——.]—So long as a right of distress remains a landlord is entitled to six months' rent in lieu of distress.—*Re* M'QUILLAN (1894), 29 I. L. T. 4.—IR.

g. Whether doctrine of marshalling applies.]—*Qu. :* whether, when the landlord does not distrain on bkpt. tenant, the doctrine of marshalling applies in favour of the general body of creditors.—*Re* HAYDON, *Ex p.* OFFICIAL ASSIGNEE IN BANKRUPTCY (1884), 2 N. Z. L. R. 372.—N.Z.

SUB-SECT. 7.—AGREEMENTS IN REGARD TO DISTRESS AND THEIR EFFECT.

7878. Agreement giving right of distress—Mortgage attornment clause—Rent unreasonable.]—A mtge. to secure £55,000 contained an attornment clause, under which the mtgors. became yearly tenants to the mtgee. at a yearly rent of £20,000, which was about seven times the letting value of the premises:—*Held:* the arrangement was a mere device to give the mtgee. an additional security in the event of the mtgors.' bkpcy., & was a fraud on the bkpcy. law, & the mtgee. could not, on the bkpcy. of mtgors., distrain for rent under the attornment clause.—*Re* THOMPSON, *Ex p.* WILLIAMS (1877), 7 Ch. D. 138; 47 L. J. Bcy. 26; 37 L. T. 764; 26 W. R. 274, C. A.

Annotations:—**Distd.** *Re* Stockton Iron Furnace Co. (1879), 10 Ch. D. 335, C. A. **Consd.** *Re* Bowes, *Ex p.* Bank of Whitehaven (1880), 42 L. T. 409. **Folld.** *Re* Bowes, *Ex p.* Jackson (1880), 14 Ch. D. 725, C. A. **Apld.** *Re* Harrison, *Ex p.* Jay (1880), 14 Ch. D. 19, C. A. **Distd.** *Re* Betts, *Ex p.* Harrison (1881), 18 Ch. D. 129, n. **Expld.** *Re* Knight, *Ex p.* Isherwood (1882), 46 L. T. 539. **Consd.** *Re* Knight, *Ex p.* Voisey (1882), 21 Ch. D. 442, C. A. **Refd.** *Re* Halstead, *Ex p.* Richardson, [1916] 2 K. B. 902.

7879. —— —— ——.]—Though an attornment clause in a mtge. deed is a valid clause, if it constitutes a real relation of landlord & tenant between the mtgee. & the mtgor., & a distress levied for the rent fixed by the clause will be good as against the trustee of the mtgor., & will thus enable the mtgee. to obtain a security upon chattels of the mtgor., the proceeds of which would otherwise have been distributed among his creditors, yet, if the rent fixed by the clause be so excessive that the ct. comes to the conclusion that it was not intended to create a real rent or a real tenancy, but that the clause was a mere device to enable the mtgee., in the event of the bkpcy. of the mtgor., to obtain an additional security upon chattels, which would otherwise have been distributed among his creditors, the clause & any distress levied under it, even though before the commencement of the bkpcy., will be invalid as against the trustee of the mtgor., as being a fraud upon the bkpcy. law.—*Re* BOWES, *Ex p.* JACKSON (1880), 14 Ch. D. 725; 43 L. T. 272; 29 W. R. 253, C. A.; *revsg.* S. C. *sub nom. Re* BOWES, *Ex p.* BANK OF WHITEHAVEN, 42 L. T. 409.

Annotations:—**Distd.** *Re* Betts, *Ex p.* Harrison (1881), 18 Ch. D. 129, n. **Consd.** *Re* Knight, *Ex p.* Voisey (1882), 21 Ch. D. 442, C. A. **Refd.** *Re* Willis, *Ex p.* Kennedy (1888), 21 Q. B. D. 384; *Re* Roundwood Colliery Co., Lee *v.* Roundwood Colliery Co., [1897] 1 Ch. 373, C. A.; *Re* Halstead, *Ex p.* Richardson, [1916] 2 K. B. 902.

7880. —— —— **Rent fluctuating in amount.**]—A member of a building society borrowed £7,500 from the society, which was to be repaid in a series of instalments, & to secure the loan he executed to the trustees of the society a mtge. of real estate. It was agreed by the deed, "for the better securing the payments, which by the rules of the society ought to be made by the mtgor.," that, if the mtgees. should at any time become entitled to enter into possession or receipt of the rents, & the mtgor. should then or afterwards be in the occupation of the whole or part of the property, he should during such occupation be tenant thereof from month to month to the mtgees., at a monthly rent equal in amount to the money which ought to be paid monthly by the mtgor. from time to time for subscriptions, interest, fines, & other money under the rules, & that the tenancy should commence on the day up to which he should have fully paid all & every part of such subscriptions, interest, fines, & other money, & the rent for the period intervening between the commencement of the tenancy & the day on which the trustees should be entitled to enter into possession or receipt of rents should be payable & paid on that day, & the monthly rent due upon & subsequently to that day should become due monthly in advance, & be payable at the monthly meetings, the first payment of rent becoming due on the day on which the mtgees. should first become entitled to enter into possession. The mtgor. committed default in his payments, & was afterwards adjudicated a bkpt.:—*Held:* (1) it was no objection to the attornment clause that the monthly rent was fluctuating in amount; (2) the attornment clause, & distress levied under it for rent which accrued due both before & after the commencement of the bkpcy., were valid as against the trustee in the bkpcy.—*Re* KNIGHT, *Ex p.* VOISEY (1882), 21 Ch. D. 442; 52 L. J. Ch. 121; 47 L. T. 362; 31 W. R. 19, C. A.

Annotations:—**Refd.** *Re* Knight, *Ex p.* Isherwood (1882), 22 Ch. D. 384, C. A.; *Re* Middlesborough Bldg. Soc. (1884), 49 J. P. 278.

7881. —— —— **Second mortgage—Previous attornment to first mortgagee.**]—*Re* KITCHIN, *Ex p.* PUNNETT, No. 7857, *ante.*

7882. —— —— **Effect of non-registration—Bills of Sale Act, 1878, s. 6.**]—W. mortgaged to E. premises by way of sub-demise to secure a loan of £20,000. By the deed W. attorned & became tenant from quarter to quarter to E. at a yearly rent of £2,000 by equal quarterly payments, the first payment to be made on the first day of the month next after any interest thereby secured should have become in arrear, but all money received by E. for rent was to be first used in satisfaction of the interest then in arrear. It was also provided that the attornment should not make it compulsory on E. to collect the rent, nor compel E. to account to any subsequent incumbrancer for any rent recovered under the attornment, & that E. might at any time after he was by law empowered to sell, without any notice, enter upon & take possession of the premises, & determine the tenancy. A petition was filed against W., & E. distrained under the tenancy, & realised £1,715. W. was adjudicated bkpt., & the trustee claimed the £1,715, on the ground that the attornment clause was rendered void under Bills of Sale Act, 1878 (c. 31), s. 6:—*Held:* the clause was void under the sect., & was not protected by the proviso therein, & the trustee was entitled to the £1,715.—*Re* WILLIS, *Ex p.* KENNEDY (1888), 21 Q. B. D. 384; 57 L. J. Q. B. 634; 59 L. T. 749; 36 W. R. 793; 4 T. L. R. 637; *sub nom. Re* WILLIS, *Ex p.* WILLOUGHBY DE ERESBY (LADY), 5 Morr. 189, C. A.

Annotations:—**Distd.** Mumford *v.* Collier (1890), 25 Q. B. D. 279. **Refd.** Green *v.* Marsh, [1892] 2 Q. B. 330, C. A.; *Re* Roundwood Colliery Co., Lee *v.* Roundwood Colliery Co., [1897] 1 Ch. 373, C. A. **Mentd.** Stevens *v.* Marston (1890), 60 L. J. Q. B. 192, C. A.

7883. —— —— **Nature of tenancy created.**]—A mtge. deed contained an attornment clause, whereby A. attorned & became tenant from year to year to B. for & in respect of the mortgaged premises, at the yearly rent of £800, to be paid by equal quarterly payments, & it was thereby agreed that it should be lawful for B., at any time after three months from the date of the mtge., without giving previous notice of his intention so to do, to enter upon & take possession of the premises whereof A. had attorned tenant, & to determine the tenancy created by the attornment. A. having filed a liquidation petition:—*Held:* a tenancy from year to year, & not a tenancy at will, was created by the attornment clause.—*Re* THRELFALL, *Ex p.*

QUEEN'S BENEFIT BUILDING SOCIETY (1880), 16 Ch. D. 274; 44 L. T. 74; 29 W. R. 128, C. A.

Annotations :—**Mentd.** *Re* Knight, *Ex p.* Voisey (1882), 21 Ch. D. 442, C. A.; *Re* Agricultural Holdings (England) Act, 1883, King *v.* Eversfield (1897), 41 Sol. Jo. 712, C. A.; King *v.* Eversfield, [1897] 2 Q. B. 475, C. A.

7884. —— —— **Application of proceeds.**]—A. assigned the lease for twenty-one years of a house in which he resided, together with two policies of assurance upon his life, to deft., by way of mtge., to secure repayment of £250 & interest, as well as the premiums upon the policies, & the mtge. deed contained a clause by which the mtgor. attorned tenant from year to year to the mtgee. in respect of the leasehold house at the yearly rent of £175, provided that the mtgee. might at any time, without notice, take possession of the premises & determine the tenancy. There was no specific provision that any part of such rent should be applicable to the principal of the debt. The mtgor. became bkpt., & the mtgee. distrained upon the furniture in the house, which was not the property of A., for a year's rent under the attornment clause, though at that time the landlord's rent of £115, the interest upon the money advanced, & the premiums upon the policies had been paid. Pltf., who was the owner of the furniture, filed a bill to restrain the sale :—*Held :* the attornment clause was not intended to enable the mtgee. to repay himself any of the capital advanced, but only to secure the payment of rent, interest, & premiums.—HAMPSON *v.* FELLOWS (1868), L. R. 6 Eq. 575; 37 L. J. Ch. 694; 19 L. T. 6.

Annotation :—**N.F.** *Re* Betts, *Ex p.* Harrison (1881), 18 Ch. D. 127, C. A.

7885. —— —— —— **Towards principal.**]—A mtge. contained a clause, by which the mtgor. attorned tenant to the mtgee. at a rent equal to the annual interest on the mtge. debt, such rent to be paid half-yearly on the same days as the interest. The mtgor. became bkpt. on Mar. 1, & the trustee paid the half-year's interest due on July 1. The mtgee. distrained for half a year's rent reserved by the attornment clause :—*Held :* (1) the mtgee. was entitled to distrain; (2) the proceeds of a distress for rent levied under an attornment clause were, in the absence of any provision to the contrary, applicable to the payment of principal as well as interest; (3) the fact that the yearly rent reserved by the attornment clause was equal to the yearly interest on the mtge., & was payable on the same days, was not of itself sufficient to displace the *primâ facie* right of the mtgee. to apply the proceeds of the distress in satisfaction of principal as well as interest.—*Re* BETTS, *Ex p.* HARRISON (1881), 18 Ch. D. 127; 50 L. J. Ch. 832; 45 L. T. 290; 30 W. R. 38, C. A.

See, further, Sub-sect. 2, *ante;* MORTGAGE.

7886. —— **Ceases to operate as rent charge—On admission of mortgagee.**]—To trespass *de bonis asportatis* by the assignees of L., defts. pleaded that L., before his bkpcy., being seized in fee of certain copyhold tenements, in consideration of £1,400 covenanted to surrender them to the use of defts., subject to a proviso for redemption, & for better payment of the interest of the £1,400, L. granted defts. that as often as the interest should be in arrear for a certain time, it should be lawful for defts. to enter & distrain for same. The plea then averred the surrender & admittance of defts., & justified the seizure of the goods on the premises whilst in possession of L., as a distress for the interest in arrear :—*Held :* pltfs. were entitled to judgment *non obstante veredicto*, for, assuming the grant to operate as a rent charge, it ceased to be so upon the admittance of the mtgees., & afterwards it could only take effect as a covenant, binding such goods of bkpt. as might happen to be on the premises at the time of the distress.—FREEMAN *v.* EDWARDS (1848), 2 Exch. 732; 17 L. J. Ex. 258; 11 L. T. O. S. 271; 154 E. R. 685.

Annotation :—**Mentd.** Jolly *v.* Arbuthnot (1859), 4 De G. & J. 224, L. C.

7887. —— **Validity of clause in hire-purchase agreement.**]—An agreement for the hire of railway waggons, for the term of five years at a yearly rent of £10 apiece, gave power to the lessors, if the rent should be in arrear for seven days, or if the lessee should become bkpt. or make an assignment for the benefit of or compound with his creditors, to distrain goods on the lessee's premises, & sell, etc., as landlords might on distress for rent, the lessee at the end of the term to have the option of purchasing the waggons for 5*s.* each. The lessee having gone into liquidation, the lessors distrained under the agreement. The agreement being admitted to be of a usual character, having regard to the subject-matter :—*Held :* (1) the agreement & the distress thereunder were not in fraud of the general creditors in the lessee's bkpcy.; (2) a motion in an action by debtor & the receiver under his petition to restrain proceedings upon the distress must be refused; (3) a power to distrain would not by itself, in an ordinary case, render such an agreement fraudulent against creditors in bkpcy.—LEMAN *v.* YORKSHIRE RAILWAY WAGGON CO. (1881), 50 L. J. Ch. 293; 29 W. R. 466.

7888. Agreement to avoid distress—Right to money paid thereunder.]—Money paid for rent to a landlord, who was about to distrain, by a trader after an act of bkpcy. committed, is not recoverable back by the assignees.

The landlord has a legal lien on bkpt.'s goods, unconnected with the bkpcy. If he thinks fit to waive that right & accept of the rent from the assignees, who may be benefited by having the goods, the landlord should not be placed in a worse situation than if he had made an actual distress (LORD ELLENBOROUGH, C.J.).—STEVENSON *v.* WOOD (1805), 5 Esp. 200, N. P.

Annotations :—**Follд.** Mavor *v.* Croome (1823), 1 Bing. 261. **Distd.** *Re* Griffith, *Ex p.* Official Receiver (1897), 66 L. J. Q. B. 763.

7889. —— ——.]—Debtor, being possessed of a beneficial lease, proposed, after an act of bkpcy., to dispose of it to a purchaser, who refused to take it, unless the premises should be first discharged from all arrears of rent then due to the landlord. The rent was afterwards paid to the latter out of the money which the purchaser had agreed to give for the lease, the landlord being aware of the situation of bkpt., & there being no property to distrain on the premises, but the landlord having a right of re-entry, according to a proviso in the lease :—*Held :* the assignee could not recover from the landlord the rent so paid to him, as the estate of bkpt. had been benefited by such payment, & as the landlord had thereby waived his right to distrain, as well as to proceed by ejectment, for a breach of the proviso contained in the lease.—MAVOR *v.* CROOME (1823), 1 Bing. 261; 8 Moore C. P. 171; 1 L. J. O. S. C. P. 90; 130 E. R. 105.

Annotations :—**Distd.** *Re* Griffith, *Ex p.* Official Receiver (1897), 4 Mans. 217, D. C. **Refd.** Bourne *v.* Graham (1856), 2 Jur. N. S. 1225.

7890. —— **Between landlord & trustee—Rights of landlord thereunder.**]—A trustee undertook to treat the amount a landlord was entitled to recover by distress, as a first charge on the proceeds of the realisation of such of debtor's goods as should come into his hands, subject to the rights of the preferential creditors :—*Held :* the landlord was

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entitled to payment in priority to the claims of the trustee for the costs of administration.—*Re* CHAPMAN, *Ex p.* GOODYEAR (1894), 10 T. L. R. 449.

7891. —— Limit of amount recoverable.]—A landlord of a farm cannot, by entering into an agreement with his tenant, after bkpcy. of the latter, not to levy a distress on the terms of taking over the dead stock at a valuation, although such agreement is beneficial to the estate, obtain a larger amount in respect of arrears of rent due to him than the six months' rent allowed him by 1883 Act, s. 42, & 1890 Act, s. 28.—*Re* GRIFFITH, *Ex p.* OFFICIAL RECEIVER (1897), 66 L. J. Q. B. 763; 4 Mans. 217, D. C.

7892. Agreement to release distress—Execution creditor paying for release—Right to proceeds of goods in repayment.]—Bkpt.'s goods had been seized in execution, but as an act of bkpcy. had been committed before the levy, the execution could not be sustained. While the execution creditor was in possession under the execution the landlord distrained. The execution creditor, with the consent of bkpt., paid the rent to release the goods. The execution creditor sold part of the goods for less than the amount paid to the landlord. The assignees commenced an action against the execution creditor to recover that amount, which was paid into ct.:—*Held:* the execution creditor might take it out of ct., & an injunction should be granted restraining the assignees from proceeding with the action.—*Re* JERMYN, *Ex p.* ELLIOTT (1838), 3 Deac. 343, Ct. of R.

7893. —— Money paid by trustee under deed of assignment—Whether payment recoverable from landlord.]—On Dec. 29, 1842, deft. distrained for £120, arrears of rent due to him from M. at the preceding Michaelmas, the goods of M. being then in the possession of C., to whom they had on Dec. 13 been conveyed in trust for M.'s creditors. On Jan. 3, 1843, it was agreed between C. & deft. that the rent distrained for should be paid, deft. consenting to forgo the quarter's rent due at Christmas, & the goods were appraised & condemned at £136, being the amount of the rent & expenses, & the money handed over to deft. On Jan. 9, a fiat issued against M., the act of bkpcy. relied on being the execution of the deed of Dec. 13:—*Held:* the assignees were not entitled to recover back the sum so paid to deft.—LACKINGTON *v.* ELLIOTT (1844), 7 Man. & G. 538; 8 Scott, N. R. 275; 13 L. J. C. P. 153; 3 L. T. O. S. 180; 8 Jur. 695; 135 E. R. 216.

SECT. 18.—REALISATION OF PROPERTY.

SUB-SECT. 1.—TRUSTEE'S RIGHT TO POSSESSION OR REGISTRATION AS OWNER.

See 1914 Act, ss. 22, 48.

7894. Goods on board ship—Delivery—On payment of freight— & indemnity to master.]—Comrs. issued their warrant to seize bkpt.'s goods on board twelve ships, & which were consigned to persons in Holland, who had not paid bkpt. for them. The masters refused to deliver the goods notwithstanding the warrant, & the comrs. themselves demanded in person the goods, which were still refused. On motion for an order upon the masters for their contempt:—*Held:* they should deliver the goods upon payment of the freight money, & they should be indemnified by the creditors against the bill of lading, which was sent to the consignees.—ANON. (1709), 2 Eq. Cas. Abr. 98; 22 E. R. 84.

7895. Real estate—Delivery within fourteen days—From personal service of order.]—Bkpt. retained possession of a cottage & land, which had passed to his assignees:—*Held:* he must deliver up possession to the assignees within fourteen days after personal service of the order.—*Re* BLACKBURN, *Ex p.* HARGRAVES & SHAW (1825), 2 Gl. & J. 59.

7896. —— Committal on refusal to comply with order to deliver—Vacant possession to purchaser from trustee.]—The statement of affairs filed by bkpt. duly disclosed certain property belonging to him, which was subsequently sold by the official receiver to petitioning creditors. Bkpt. failed to give up possession of the property to the purchaser, & an order was made by the county ct. judge, on the application of the official receiver, committing him to prison for contempt under 1883 Act, s 24 (4). Bkpt. appealed, on the ground that he had sufficiently complied with the requirements of the sect. in disclosing the property to the official receiver, & that the official receiver, having conveyed all rights in the property to a third party, was not entitled to apply to the ct. for an order of committal under the sect.:—*Held:* the official receiver was entitled to have vacant possession of the property in question & was entitled to the assistance of the ct., if bkpt. refused to deliver up the property, in order that vacant possession might be given to the purchaser, & bkpt. having no authority from the purchaser to continue in possession, the order of committal was rightly made.—*Re* BURGOYNE, *Ex p.* BURGOYNE (1891), 8 Morr. 139, D. C.

7897. Title deeds—Committal on refusal to deliver—Release on showing inability to deliver.]—On the application of the trustee an order was made

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PART XX. SECT. 18, SUB-SECT. 1.

7894 i. *Goods on board ship—Delivery—Payment of freight—Indemnity to master.*]—When goods are shipped for conveyance for an agreed freight, & bills of lading are signed, if subsequently the shippers become bkpt., their assignees cannot, before the ship sails, insist upon redelivery of the goods without paying the freight which would be due at the port of destination, & indemnifying the master against the bills of lading.—*Re* WEBSTER (1864), 17 Ir. Jur. 17.—IR.

a. *Deposit in bank.*]—M. deposited a sum with a bank & absconded. The bank had given him a receipt, stating that the money was payable on the production of that document. An attachment in insolvency issued & an official assignee was appointed. He demanded, without producing the receipt, the money, &, on the bank's refusal, sued therefor:—*Held:* the bank must pay the money to the assignee with costs occasioned by its refusal to the estate.—BANK OF MONTREAL *v.* LITTLE (1870), 17 Gr. 685.—CAN.

7895 i. *Real estate—Right to be registered as owner—Transfer of Land Act,* 1890, *s.* 236.]—Where insolvent's assignee applies under the above sect., to be registered as proprietor of land, part of insolvent's estate, the registrar must register the assignee & disregard any future dealings in such land by insolvent.—*Re* PALMATEER (1890), 16 V. L. R. 793.—AUS.

7895 ii. —— *Proceedings to recover.*]—An official assignee sold his right, title, & interest in lands standing in the name of M. on the condition that the assignee should recover the lands from M.:—*Held:* official assignee entitled to take proceedings to recover the lands.—*Re* MACKEY, *Ex p.* OFFICIAL ASSIGNEE & MACKEY (1899), 20 N. S. W. L. R. 37.—AUS.

7895 iii. —— *Possession resumed by insolvent.*]—Where an assignee, at the request of the creditors, allowed his insolvent to resume possession of his estate & to sell it for benefit of creditors:—*Held:* assignee retained the right of property.—HARVEY *v.* COTTER (1873), 9 N. S. R. 161.—CAN.

b. *Insurance policy—On life.*]—A. became indebted to B. & ceded him a life policy as security. A. subsequently became insolvent, & B. refused to give the policy to the trustees of A.'s estate:—*Held:* B. was bound to hand up the policy to them.—OSMOND'S TRUSTEES *v.* HOFMEYER (1885), 4 S. C. 43.—S. AF.

c. —— *Against fire.*]—The trustee of an insolvent estate is entitled to the amount payable in respect of a fire which took place before insolvency under a fire insurance policy ceded by

committing bkpt. to prison for contempt, by reason of his refusal to deliver up the title-deeds relating to certain of his property, as required by 1883 Act, s. 24. Bkpt. subsequently applied to the ct. for his release, it being contended on his behalf that the omission to deliver up the deeds arose from inability to do so, they having been previously deposited by bkpt. as security for a loan & assigned to a person, whose present whereabouts could not be ascertained. It was further stated that bkpt. had been criminally indicted in respect of the deeds & had been acquitted. Bkpt. had been in prison nine months:—*Held:* there could be no doubt that at one time bkpt. had possession & control of the deeds in question, but the ct. was not satisfied upon the evidence before it whether they were in existence at the time when the order of committal was made & had since ceased to be so, & having regard to all the circumstances an order of release would be made, upon bkpt. entering into his recognisances to come up for judgment when called upon.—*Re* ASHWIN, *Ex p.* ASHWIN (1891), 8 Morr. 130.

7898. Lease—Committal on refusal to deliver.]—A lease belonging to bkpt. having been sold, the ct. directed bkpt. to deliver up possession to the purchaser. Upon bkpt. refusing to comply, he was ordered to be committed.—*Re* WATSON, *Ex p.* HAWKINS (1828), Mont. & M. 115, L. C.

7899. Stock in fictitious name—Order on bank to erase name—& substitute that of bankrupt.]—Bkpt. had invested money in the purchase of stock in a fictitious name, for the purpose of defrauding his creditors. On a bill filed by the assignee against the Bank of England:—*Held:* the bank must erase from their books the fictitious name, & insert that of bkpt.—GREEN *v.* BANK OF ENGLAND (1840), 3 Y. & C. Ex. 722; 160 E. R. 892.

Annotations:—**Refd.** Arthur *v.* Mid. Ry. Co. (1857), 3 K. & J. 204; *Re* Price, *Ex p.* Eddison (1867), 16 L. T. 613.

7900. Pictures in possession of landlord—Right to call on trustee to prove title before delivery.]—At the time of the bkpcy. there were at the chambers occupied by bkpt. previous to his absconding certain pictures, which were taken possession of by the landlord of the chambers, who refused to give them up to the trustee without proof of title, or unless an indemnity were given to him against any risk of an action for conversion, in the event of the pictures afterwards being claimed by third parties:—*Held:* the contention of the landlord could not be allowed, & the pictures having been in the possession of bkpt., the rights which he had in them devolved upon his trustee.—*Re* BRYANT, *Ex p.* GORDON (1889), 6 Morr. 262.

7901. Equitable estate—Interruption of title of assignee.]—*Held:* (TURNER, L.J.), although the property to which debtor was equitably entitled at the time of his taking the benefit of Insolvent Debtors Act might far exceed the amount of the debts payable under the insolvency, neither he nor a purchaser from him could intercept the title of the assignee under the insolvency to recover the surplus, without showing that the property would be in danger if the assignee were permitted to receive it, or that there was some impediment to an application to the Insolvent Ct. to remove the assignee, if such were the case.

It not appearing clear that there was a net surplus:—*Held:* no interference with the title of the assignee ought to have taken place.—DYSON *v.* HORNBY (1855), 7 De G. M. & G. 1; 25 L. T. O. S. 91; 3 W. R. 439; 44 E. R. 1, L. JJ.; *subsequent proceedings, sub nom.* COOK *v.* STURGIS (1859), 3 De G. & J. 506, L. JJ.

Annotations:—**Refd.** Troup *v.* Ricardo (1864), 4 De G. J. & Sm. 489, L. C. **Mentd.** Smith *v.* Moffat (1866), 14 L. T. 323; Martin *v.* Powning (1869), 4 Ch. App. 356, L. JJ.

7902. Debentures—Provision as to assignment—Application to transfer by act of law.]—By a local & personal Act, transfers of debentures were to be by indorsement by deed & in a given form, & were to be entered in the books of the co., & "after such entry, but not till then, the assignee was to be entitled to the benefit:—*Held:* this did not apply to a transfer by act of law, as in the case of bkpcy.—LANE *v.* SMITH (1851), 14 Beav. 49; 18 L. T. O. S. 3; 15 Jur. 735; 51 E. R. 205.

See 1914 Act, s. 53 (4).

7903. Shares—Right to refuse transfer by member indebted to company—Application to transmission by devolution of law.]—A shareholder in a co. subject to Cos. Act, 1862 (c. 89), Table A., became bkpt.:—*Held:* article 10 of Table A., applied only to a transfer by deed, & not to a transmission of shares by devolution of law, & the trustee was entitled to be registered as owner of the shares held by the bkpt., notwithstanding the bkpt. was indebted to the co.—*Re* BENTHAM MILLS SPINNING CO. (1879), 11 Ch. D. 900; 48 L. J. Ch. 671; 41 L. T. 10; 28 W. R. 26, C. A.

7904. —— —— Effect of refusal of previous transfer.]—By the articles of association of a co. it was provided that the directors might refuse to register a transfer of shares while the shareholder making same was indebted to the co., or if they should consider the transferee an irresponsible person. It was also provided that persons becoming entitled to shares in consequence of the death, insolvency, or bkpcy. of a shareholder might be registered, on the production of such evidence as might from time to time be required by the directors, & that any transfer or pretended transfer of shares not being approved by the directors should be absolutely void. A holder of shares in the co. executed transfers of such shares to the nominees of a bank as a security for advances. The co. refused to register the transfers, on the ground that the transferor was indebted to the co. Subsequently, the transferor having filed a liquidation petition, a trustee in liquidation was duly appointed. Such trustee, with the consent of the bank & their nominees, applied to the directors of the co. to be registered as the owner of the shares, but they refused the application. The bank, though consenting to the trustee's registration, had never waived their security:—*Held:* the declining to register the transfers by the directors was not a disapproval of them so as to render them void within the articles, & the trustee was not entitled to the shares within the articles so long as the transfers remained in force, & the trustee was not entitled to be registered, notwithstanding the consent of the transferees.—*Re* CANNOCK & RUGELEY COLLIERY CO., *Ex p.* HARRISON (1885), 28 Ch. D. 363; 54 L. J. Ch. 554; 53 L. T. 189, C. A.

7905. —— Right to lien on all shares for shareholder's indebtedness—Right of trustee to clean certificate.]—A co. formed under Cos. Acts had

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insolvent to a creditor as security for a debt.—NATIONAL BANK OF SOUTH AFRICA, LTD. *v.* COHEN'S TRUSTEE (1911), App. D. 236.—S. AF.

d. *Purchase money of interest in land—Sale prior to insolvency—Payment into court.*]—Where, previous to insolvency, lands in which insolvent, deft. in a Ch. suit, had an equitable interest, had been sold, & the purchase money paid to pltf., the assignee in insolvency moved that such money be paid into ct. for benefit of the general creditors:—*Held:* the motion must be refused.—YALE *v.* TOLLERTON (1866), 2 Ch. Ch. 49.—CAN.

Sect. 18.—*Realisation of property: Sub-sects.* 1 & 2.]

under its articles, which incorporated in part Table A., a "first & paramount lien upon all the shares registered in the name of each member for his debts, liabilities & engagements to & with the co., whether the period for the payment, fulfilment, or discharge thereof shall have actually arrived or not." A shareholder having been adjudicated bkpt., the trustee applied to be entered on the register in his place. The co. claimed the right to enter, in addition to the particulars required by Companies Act, 1862 (c. 89), s. 5, a memorandum that the co. claimed a lien, to establish which an action was pending, on the shares, & to issue the share certificate with a similar memorandum :—*Held :* the co. had no right to put the memorandum on the register, & the trustee was entitled to be registered without the memorandum & to have a "clean certificate."—*Re* KEY & SON, LTD., [1902] 1 Ch. 467 ; 71 L. J. Ch. 254 ; 86 L. T. 374 ; 50 W. R. 234 ; 18 T. L. R. 263 ; 46 Sol. Jo. 231 ; 9 Mans. 181.

7906. —— Legal estate in deceased person—Grant of administration to trustee of bankrupt beneficial owner.]—A., being the owner of shares in two foreign railway cos., handed the certificates to C., who received the dividends as beneficial owner until he became bkpt., after which the trustee in C.'s bkpcy. received such dividends as became payable. A. died, never having divested himself of the legal estate in the shares, & administration to his estate was granted to B., who died leaving part of the estate unadministered. Upon the application of the trustee in C.'s bkpcy., the ct. granted administration to him, in respect of the unadministered estate of A., limited to the shares in the two foreign railway cos.—*In the goods of* AGNESE, [1900] P. 60 ; 69 L. J. P. 27 ; 82 L. T. 204.

7907. Enforcement of payment or delivery—Motion for order—Money admitted due by third party on examination—Right of third party to notice of motion.]—An application to a registrar under 1869 Act, s. 98, that A. may be ordered to pay to applt. assets of bkpt. in his possession, without notice to A. is irregular & improper.—SCHOFIELD *v.* HOLT, *Re* LUMB & TAYLOR (1871), 19 W. R. 525.

Discovery of property, *see, generally*, Part XIX., *ante*.

7908. —— —— Goods in possession of agent—Principal must be made respondent.]—G., the manager of a business belonging to K., had admitted that he had in his hands property of bkpt., deposited with him as security for a debt owing by bkpt. to K. K. had refused to allow G. to deliver the property :—*Held :* no order could be made against G. to deliver up the goods, at any rate unless K. was also made resp. to the motion.—*Re* DAVIS, *Ex p.* GOODMAN (1898), 15 T. L. R. 40 ; 5 Mans. 329, D. C.

7909. —— Application of Trading with Enemy Amendment Act, 1914 (c. 12).]—The trustee of a firm, for whom an alien enemy was in the habit of accepting bills for their accommodation, applied, under s. 4 of the above Act, for an order that certain policies of assurance, some of which had matured, & which the alien enemy alleged he held as security, & which he claimed, but which were in fact, the property of the firm, might be vested in the custodian under the Act :—*Held :* the above Act must not be used as a convenient medium for the recovery of the property of bkpts. which, so long as the war lasted, the trustee could not recover for himself.—*Re* RUBEN, [1915] 2 Ch. 313 ; 84 L. J. Ch. 789 ; 113 L. T. 647 ; 31 T. L. R. 563 ; 59 Sol. Jo. 704 ; [1915] H. B. R. 235.

General nature of trustee's title.]—*See* Sect. 2, *ante*.

What property passes to trustee.]—*See* Sect. 4, *ante*.

SUB-SECT. 2.—POWER OF SALE AND MANNER OF SALE AND GIVING TITLE.

See 1914 Act, s. 55.

7910. Goods in order & disposition—Sale controlled by bankruptcy court.]—Formerly the assignees of bkpt. might take & dispose at their discretion of all goods found in the possession & apparent ownership of bkpt. Now their discretion is controlled by the Ct. of Bkpcy., which has power to inquire whether or not it is fit & proper that the assignees should be ordered to sell (MAULE, J.).—GRAHAM *v.* FURBER (1853), 14 C. B. 134 ; 23 L. J. C. P. 10 ; 22 L. T. O. S. 119 ; 18 Jur. 61 ; 2 W. R. 39 ; 2 C. L. R. 10 ; 139 E. R. 56.

Annotations :—**Mentd.** *Re* Jenvey (1854), 24 L. T. O. S. 192 ; Brewin *v.* Short (1855), 5 E. & B. 227 ; Krehl *v.* Great Central Gas Co. (1870), L. R. 5 Exch. 289 ; *Re* O'Shea's Settlmt., Courage *v.* O'Shea, [1895] 1 Ch. 325, C. A. ; *Re* Seaman, *Ex p.* Furness Finance Co., [1896] 1 Q. B. 412.

7911. —— Necessity for order authorising sale—Permission to sue for debt insufficient.]—R. contracted to supply meat to a lunatic asylum, but, being unable to carry out the contract, assigned it to H., who delivered his own meat, but in R.'s name, the governing body of the asylum having no notice of the assignment, & not being aware that the contract was not being performed by R. The contract having been put an end to by notice from the committee of visitors of the asylum, & R. having become bkpt., the assignee under the bkpcy. claimed the sum then due for meat supplied as being "goods & chattels" in the possession, order, or disposition of R., at the time of his bkpcy., as reputed owner, with the consent & permission of H., the true owner, within 1849 Act, s. 125 :—

7907 i. *Enforcement of payment or delivery—Jurisdiction.*]—The Insolvent Ct. has discretionary power under 11 & 12 Vict. c. 21, s. 26, to order any person who has possession or control of insolvent's property to deliver it to the official assignee.—*Re* DWARKANATH MITTER, RATANMANI DASI *v.* MILLER (1869), 4 B. L. R. 63.—**IND.**

7907 ii. *S. P.*—*Re* ADJUDHIA PRASAD, MOHANT JAIRAM GIR *v.* MILLER (1871), 7 B. L. R. 74 ; 15 W. R. 16.—**IND.**

7907 iii. —— —— *Writ of assistance—Order to deliver up premises.*]—The Ct. of Bkpcy. has power to grant a writ of assistance to enforce an order for delivery of possession of premises in the hands of bkpt.—*Re* BROWNRIGG (1886), 17 L. R. Ir. 589.—**IR.**

7907 iv. —— *Transfer to trustee—Costs.*]—On motion B. was ordered to transfer certain property to the official assignee & to pay the costs of & incidental to the motion :—*Held :* this included costs of transfer as being necessary costs occasioned by a transfer being requisite.—*Re* BLACK, *Ex p.* OFFICIAL ASSIGNEE, BLACK (1895), 16 N. S. W. B. 9.—**AUS.**

PART XX. SECT. 18, SUB-SECT. 2.

7911 i. *Goods in order & disposition—Necessity for order authorising sale.*]—The assignees of bkpt. are not entitled to avail themselves of the provisions of the reputed ownership clause of 1857 Irish Act, without an order by the Ct. of Bkpcy. for sale of the goods.—MERCHANT BANKING CO. OF LONDON *v.* SPOTTEN (1877), 11 I. L. T. 153.—**IR.**

7911 ii. —— —— *Permission to intervene not sufficient.*]—B. assigned a policy of insurance, effected on his life, to trustees. He was adjudged bkpt. & died. Upon his death the sum assured was claimed by J., the surviving trustee, & by the assignees in bkpcy. respectively. J. then brought an action against the insurance co., who obtained an order, directing the assignees to interplead. Prior to trial of the issue, the Ct. of Bkpcy. had made an order giving the assignees liberty to intervene in the action :—*Held :* the assignees could not avail themselves of their alleged right under the order & disposition clause of 1857 Irish Act, without an order from the

Held: the debt was within the sect., & passed to the assignee, but the latter could not avail himself of his right thereto without an order from the Ct. of Bkpcy. to sell, a permission to sue for the debt not being sufficient for that purpose.—COOKE *v.* HEMMING (1868), L. R. 3 C. P. 334; 37 L. J. C. P. 179; 18 L. T. 772; 16 W. R. 903.

Annotation:—**Mentd.** Semphill *v.* Queensland Sheep Investment Co. (1873), 29 L. T. 737.

7912. —— Form of order authorising sale—Necessity for primâ facie case.]—An order under 1849 Act, s. 125, authorising the sale of goods, which bkpt. has in his possession at the time of the bkpcy. as the reputed owner, with the consent of the true owner, must be specific, *i.e.*, must be so worded as to show what goods they are that in the Ct. of Bkpcy. ought to be dealt with by the assignees, & disposed of by them as bkpt.'s property in respect of reputed ownership. *Semble:* (1) such order may be made by the comr. on an *ex p.* application; (2) in some cases it would not be necessary that the owner of the goods should be specified, but only the goods themselves; (3) the comr., before making such order, ought to require a good *primâ facie* case to be made out by the assignees.—QUARTERMAINE *v.* BITTLESTON (1853), 13 C. B. 133; 22 L. J. C. P. 105; 20 L. T. O. S. 236; 17 Jur. 281; 1 W. R. 131; 138 E. R. 1147.

Annotations:—**Consd.** Fielding *v.* Lee (1865), 18 C. B. N. S. 499. **Refd.** Freshney *v.* Carrick (1857), 1 H. & N. 653. **Mentd.** Graham *v.* Furber (1853), 14 C. B. 134; *Re* Plimmer, *Ex p.* Speller (1853), 14 C. B. 159.

7913. —— —— Whether sufficiently specific.]—A county ct. judge, sitting as a comr. in bkpcy., made an order under 1849 Act, s. 125, "that the household goods, furniture, & effects being in or about messuage or dwelling-house & premises in the occupation of T., bkpt., in C. Street, M., & known as the Cross Keys, be sold & disposed of by the assignees, for the benefit of the creditors of T." There was a minute of the order in the ct. book, which was produced:—*Held:* the order was a valid order, & sufficiently specific.—FIELDING *v.* LEE (1865), 18 C. B. N. S. 499; 5 New Rep. 371; 34 L. J. C. P. 143; 11 Jur. N. S. 323; 13 W. R. 462; 144 E. R. 539.

Annotation:—**Refd.** Cooke *v.* Hemming (1868), L. R. 3 C. P. 334.

7914. —— Order confirming sale made retrospectively.]—A mtgee. of goods, under a power of sale, allowed the goods to remain in the order & disposition of the mtgor., until the latter committed an act of bkpcy., but took possession before any petition of adjudication was filed. On the mtgor. being found bkpt., the messenger took the goods out of the mtgee.'s possession & sold them. The mtgee. brought an action of trover & recovered, on the ground that, under 1849 Act, the assignees could not sell, without an express order of the comr., goods in the reputed ownership of bkpt. The assignees applied to the comr., who made an order retrospectively confirming the sale, & reciting, as a fact, that the goods were in the order & disposition of bkpt. at the time of the bkpcy., with the permission of the true owner:—*Held:* the mtgee. was not entitled to have the order discharged on his appeal, as being invalid on the face of it, & on applt. declining to enter into the question whether he had notice of the act of bkpcy., when he took possession, his appeal should be dismissed with costs.—*Re* ATKINSON, *Ex p.* HESLOP (1852), 1 De G. M. & G. 477; 20 L. T. O. S. 28; 42 E. R. 636, L. JJ.

Annotations:—**Mentd.** Quartermaine *v.* Bittleston (1853), 1 W. R. 131; *Re* Hopkins, *Ex p.* Dudley & West Bromwich Banking Co. (1863), 11 W. R. 576, C. A.; *Re* Webb's Policy (1867), 16 L. T. 89; Semphill *v.* Queensland Sheep Investment Co. (1873), 29 L. T. 737.

——.]—*See, generally*, Sect. 9, *ante*.

7915. Copyhold—Necessity for surrender.]—An assignee under a commission of bkpcy., must surrender a copyhold to a purchaser from him, notwithstanding the lord may exact two fines, for no person can make a common law conveyance of a copyhold.—DRURY *v.* MAN (1746), 1 Atk. 95; 26 E. R. 62.

Annotations:—**Refd.** Bristow *v.* Booth (1869), L. R. 5 C. P. 80. **Mentd.** *Re* Harvey, *Ex p.* Holland (1819), 4 Madd. 483.

7916. —— May be excepted from bargain & sale—& conveyed direct to purchaser.]—The comrs. may except the copyhold estates of bkpt. out of the bargain & sale, & convey them directly to the purchasers.—*Re* HUMPHREYS, *Ex p.* HARVEY (1819), Buck, 493.

7917. —— Order vesting same in purchaser—On affidavit as to "fair & adequate value."]—The ct. will make an order under 1861 Act, s. 114, to vest copyhold property belonging to bkpt., & sold by the assignees under the bkpcy., in the purchaser, upon an affidavit made by a competent person that the property had realised a "fair & adequate value."—*Re* ARCHER, *Ex p.* HITCHING (1864), 9 L. T. 615.

Leaseholds—Whether trustee bound by covenant not to assign without licence.]—*See* Sect. 16, subsect. 5, F., *ante*.

7918. Interest as tenant in tail—Passes by bargain & sale—Without special conveyance.]—*Held:* a bargain & sale by comrs. sufficed under 6 Geo. 4, c. 16, to pass bkpt.'s interest as tenant in tail of certain estates, without a special conveyance under s. 65 of that Act.—*Re* LOSCOMBE, *Ex p.* SOMERVILLE (1834), 1 Mont. & A. 408; 3 Deac. & Ch. 668, Ct. of R.

Annotation:—**Refd.** Hankey *v.* Martin (1883), 49 L. T. 560.

7919. Real estate in remainder—Enlargement of time for sale.]—Where, in consequence of insolvent's interest in real estate not falling into possession, nothing has been done for many years, & no steps taken for the sale of it, when it does fall in, upon motion the ct. will enlarge the time for sale, preparatory to the meeting of creditors to pass resolutions for the sale of the property.—*Re* HACKETT (1860), 1 L. T. 309.

Ct. of Bkpcy. to sell, the permission to intervene in the action not being sufficient for that purpose.—BRADLEY *v.* JAMES (1876), 10 I. L. T. 180.—IR.

7913 i. —— *Form of order authorising sale—Necessity for specifying goods.*]—An order for sale of goods is not sufficient, within the order & disposition clause of 1857 Irish Act, when the goods are not specified.—*Re* WALSHE, *Ex p.* BRUNKER (1878), 12 I. L. T. 87.—IR.

7914 i. —— *Order confirming sale made retrospectively.*]—Where the Ct. of Bkpcy. has not made an order under the reputed ownership clause of 1857 Irish Act, for the sale of goods in bkpt.'s possession; but, subsequently to a sale of the goods, has ordered the proceeds to be paid into ct. for distribution to the creditors, this adoption of the sale may be deemed equivalent, as a ratification & confirmation thereof, to a precedent order directing the sale—BLAKE & GOODYEAR BOOT & SHOE MACHINERY CO. *v.* MOORE & HARRISON (1881), 15 I. L. T. 60.—IR.

f. —— *Suspension of order for sale.*]—Goods remaining in possession of bkpt. "as reputed owner," were ordered by the ct. to be sold for the benefit of the estate. Bkpt.'s mother claimed to own them as a *bonâ fide* purchaser for value. The ct. ordered the sale to be suspended, claimant to be at liberty to come in & prove her claim either to the goods themselves, or as a general creditor.—*Re* BARR (1851), 3 Ir. Jur. 288.—IR.

g. —— *How long order for sale in force.*]—An order for sale of goods, as being in possession, order, or disposition of bkpt. at the time of his bkpcy., remains in force until rescinded.—EARL *v.* VERCOE (1890), 8 N. Z. L. R. 525.—N.Z.

h. *Real estate—Whether possession necessary.*]—Trustees of insolvent have a right to sell & convey his real estate of debtor, though they have never taken possession.—DOE d. MEWBURN *v.* MCGUIRE (1850), 6 N. B. R. (1 All.) 612.—CAN.

Sect 18.—*Realisation of property: Sub-sects.* 2 *&* 3.]

7920. Reversionary interests—Whether order required—Judgments Act, 1838 (c. 110).]—The provisional assignee of an insolvent debtor may sell his reversionary interests without an order of the ct., under s. 42 of the above Act.—STURGIS *v.* EVANS (1864), 2 H. & C. 964; 3 New Rep. 650; 9 L. T. 774; 12 W. R. 436; 159 E. R. 399.

7921. Book debts—What are—1861 Act, s. 137.]—*Held:* book debts within the above sect. were debts entered in books during the course of business, & where bkpt. carried on the business of a grocer, a bill of exchange was not to be a book debt, & so did not pass under a sale by the ct., of bkpt.'s book debts.—MCEVOY *v.* BENT (1863), 1 New Rep. 333; 11 W. R. 314.

7922. —— —— ——.]—A., who carried on the business of a sadler, & had also been in the habit of buying & selling copyrights of newspapers, having had seven or eight transactions of the kind within three years, became bkpt. He afterwards purchased from the assignees, under the above sect., all the outstanding "book-debts" due to his estate. Prior to his bkpcy. he had by an agreement in writing contracted to sell to B. the copyright of a certain newspaper & the back numbers, the purchase-money to be paid by instalments, of which £227 10*s.* remained unpaid at the time of A.'s bkpcy. The agreement contained a stipulation that the instalments should be secured by a mtge. of the copyright to A. No entry of that transaction appeared in A.'s ordinary trade books, but it was entered in his "diary":—*Held:* "book-debts" in the above sect. were such debts accruing in the ordinary course of a man's trade as were usually entered in the trade-books, & this was a debt which passed by the sale by the assignees of the "book-debts" due to bkpt., under the sect.—SHIPLEY *v.* MARSHALL (1863), 14 C. B. N. S. 566; 2 New Rep. 244; 32 L. J. C. P. 258; 8 L. T. 430; 9 Jur. N. S. 1060; 143 E. R. 567.

Annotation:—**Mentd.** Dawson *v.* Isle (1906), 54 W. R. 452.

7923. Solicitor's books—Cannot be sold.]—The books of a solr., who has been adjudicated a bkpt., cannot be sold, as they may be in the case of a trader.—*Re* HOLDEN, *Ex p.* ROBERTS (1863), 3 New Rep. 230; 33 L. J. Bcy. 8; 9 L. T. 469; 10 Jur. N. S. 28; 12 W. R. 183, L. C.

7924. Trade mark—Assignment need not be contemporaneous with that of goodwill.]—The trustee can make a valid assignment of a trade mark in connection with the goodwill of the business to which it relates. The assignment of the business & the trade mark need not be contemporaneous.—HAMMOND & CO. *v.* MALCOLM, BRUNKER & CO. & COLLYNS (1892), 8 T. L. R. 324; 9 R. P. C. 301.

Annotations:—**Mentd.** *Re* Clay & Bock (1892), 67 L. T. 614; *Re* Paine's Trade Mks., Paine *v.* Daniel Breweries (1893), 68 L. T. 801, C. A.

See, further, Sect. 4, sub-sect. 2, *ante*.

7925. Pledged shares—Bankruptcy of pledgee—Pledgor untraceable.]—Where certain share certificates had been pledged with a firm, which afterwards became bkpt., & the pledgor had disappeared without paying the loan, the trustee was given permission to sell the shares after advertising for the pledgor as directed by the ct.—*Re* HARRISON & INGRAM, *Ex p.* WHINNEY (1905), 54 W. R. 203; 14 Mans. 132.

7926. Manner of sale—Discretion of trustee.]—Subject to resolutions of the creditors, a trustee has a discretion as to when & how he will sell a contingent reversionary interest of bkpt., & the ct. will not interfere with the discretion, at the instance of a creditor, unless it is shown that the trustee is acting so very absurdly that no reasonable man would so act.—*Re* PETERS, *Ex p.* LLOYD (1882), 47 L. T. 64, C. A.

7927. —— —— **Liability for selling by auction after receipt of good offer.**]—If after a *bonâ fide* offer to purchase bkpt.'s estate at valuation by a disinterested party appointed by the manager chosen by the creditors, the assignee persist in selling by auction:—*Semble:* he will be held responsible for any deficiency or loss accruing thereby.—*Re* SMITH, *Ex p.* SMITH (1866), 15 L. T. 451.

—— —— **Powers & duties generally.**]—*See* Part VII., *ante*.

7928. Resale by trustee—After buying in at sale by mortgagee—Liability for loss.]—Petitioner, an equitable mtgee. of leasehold property, obtained an order for a sale, at which £590 was bid for the mortgaged premises. They were brought in by the direction of the assignees. Petitioner afterwards applied to the comrs. for another sale, but the order they made being unsatisfactory to him as to the time of sale, he declined to accept it. The assignees afterwards obtained another order, when the premises were again by their direction put up to auction, with a reserved bidding of £950. The highest bidding was only £650:—*Held:* petitioner by applying for a second sale waived any claim against the assignees for the difference in the amount of the biddings at the first & second sales, but he was entitled to be indemnified from the ground rent & all expenses incurred since the first sale.—*Re* MOORE, *Ex p.* BALDOCK (1832), 2 Deac. & Ch. 60, Ct. of R.

7929. Conduct of sale—Allowed to trustees—Order directing sale by commissioner.]—Creditors, trustees of a fund, were allowed the conduct of a sale of part of bkpt.'s estate, although an order directing it to be sold by the comr. had been drawn up.—*Re* TURNER, *Ex p.* CROSTHWAITE (1853), 20 L. T. O. S. 300, L. C. & L. JJ.

7930. Duty of trustee to make good title.]—A purchaser under a bkpcy. must take such title as bkpt. had, & cannot insist upon a title strictly free from objection, as in other cases.—POPE *v.* SIMPSON (1799), 5 Ves. 145; 31 E. R. 515.

7921 i. *Book debts—What are.*]—Moneys due from insurance cos. for loss by fire are not book debts, or *ejusdem generis* with book debts.—ROYAL BANK *v.* HEALEY (1916), 27 O. W. R. 428.—CAN.

7926 i. *Manner of sale—Duty of trustee—To follow terms of power of sale.*]—The rule of law which requires a mtgee. selling under a power of sale in his mtge. to observe the terms of such power applies to sales by an assignee of an insolvent estate.—JARVIS *v.* COOK (1881), 29 Gr. 303.—CAN.

7926 ii. —— *Of book debts.*]—Under 1875 Act, s. 67, all book debts exceeding $100 must be sold separately, unless where there is a sale of the whole estate *en bloc*.—FISKEN *v.* O'NEILL (1881), 6 A. R. 99.—CAN.

7926 iii. —— *Advertisement of sale.*]—Advertisements by assignees in insolvency for sale of property of insolvent should describe the property & state the title with distinctness.—O'RIELLY *v.* ROSE (1871), 18 Gr. 33.—CAN.

7926 iv. —— *Whether sale out of hand valid.*]—A sale of land out of hand in an insolvent estate is not *ipso facto* invalid. The creditors may authorise such sale; but in the absence of authority the trustee should sell by public auction or otherwise he will be liable for any damages caused by the fact that the sale is out of hand.—MEARS *v.* PRETORIA ESTATE & MARKET CO., LTD. (1906), T. S. 291.—S. AF.

7926 v. *S. P.*—ROSENBLATT & DE BEER *v.* JONES' TRUSTEES, 10 H. C. 109.—S. AF.

7930 i. *Duty of trustee to make good title.*]—A transfer by an assignee is invalid unless all the orders & proceedings constituting his title to dispose of bkpt.'s property have been recorded.—BARINDS *v.* GREEN (1911), 16 B. C. R. 433; 16 W. L. R. 422.—CAN.

7930 ii. ——.]—After the rehabilitation of an Insolvent it was sought to pass transfer of immovable property belonging to the estate which had been sold prior to the rehabilitation:—

Annotations :—**Dbtd.** White *v.* Foljambe (1805), 11 Ves. 337, L. C. I never knew the principle of *Pope* v. *Simpson*. If assignees of bkpt. agree to sell, they agree to sell with a good title; there may be special cases, as where they enter into a contract supposing they have a good title, the ct. would stand neutral & leave the parties at law according to the course of the late authorities (LORD ELDON, C.); M'Donald *v.* Hanson (1806), 12 Ves. 277. I never could conceive why Lord Rosslyn should have thrown out that opinion in *Pope* v. *Simpson* which was not necessary. If assignees advertise in the common way, there is no reason why they should not be bound as other persons (GRANT, M.R.). **Consd.** Deverell *v.* Bolton (1812), 18 Ves. 505, L. C. **Refd.** Shepherd *v.* Keatley (1834), 3 L. J. Ex. 288.

7931. ——.]—Assignees in bkpcy. are bound, as other persons, to make a good title, unless guarded by express stipulation.—M'DONALD *v.* HANSON (1806), 12 Ves. 277; 33 E. R. 106.

See, generally, SALE OF LAND.

7932. Duty of bankrupt to grant or join in conveyance when necessary.]—If bkpt. refuses to join in the conveyance of any part of his estate, the ct. will make an order for him to do so.—*Ex p.* JACKSON (1832), 2 Deac. & Ch. 458, Ct. of R.

7933. —— **Sale of reversionary interest.**]—Bkpts. took a reversionary interest in some property as residuary devisees under their father's will, of which also they were constituted exors. The testator had died more than forty years before, & upon the death of the last tenant for life, bkpt.'s assignees sold their interest in the property, & required bkpts. to join in a conveyance to the purchasers. It was objected, that some of testator's debts, which were charged on the property, might be still unpaid, & that the assignees had no power to dispose of it, as it was thus subject to a trust :—*Held :* in the absence of all evidence of any outstanding debts, the assignees had a full right to dispose of the property, & bkpts. were bound to join in the conveyance.

At a meeting of bkpt.'s creditors a resolution was entered into by the majority then present, that if certain claims of bkpts. for compensation in respect of seizures made by the Danish Government, should prove beneficial to the estate, the creditors would relinquish all right to the above reversionary property :—*Held :* this was only a conditional, & not a final, arrangement, & did not prevent the assignees from selling the reversionary property.—*Re* MOXON, *Ex p.* BOLTON (1841), 1 Mont. D. & De G. 667, Ct. of R.

7934. —— **Bankrupt trustee.**]—In the case of the bkpcy. of a trustee, the ct. will order him to execute any conveyance, without compelling his assignees to join.—*Re* ASSERETTI, *Ex p.* PAINTER (1833), 2 Deac. & Ch. 584; 2 L. J. Bcy. 39, Ct. of R.

7935. —— ——.]—The assignees of bkpt. are not necessary parties to the conveyance of an estate, of which bkpt. was seised as trustee.—*Re* ELFORD, *Ex p.* GENNYS (1829), 1 Mont. & M. 258.
Annotation :—**Consd.** *Re* Bridgman (1860), 1 Drew. & Sm. 164.

7936. Whether bankrupt bound to grant power of attorney to enable sale—Property abroad.]—Bkpt., whose only asset was land abroad, refused to execute a power of attorney to enable the trustee to sell same at a fair price, on the ground that the power of attorney was informal, & the price offered for the land too small :—*Held :* such refusal was unreasonable, & an order of committal must be made, but not enforced, if within fourteen days bkpt. executed a power of attorney in a form approved of by the registrar.—*Re* HARRIS (1896), 74 L. T. 221; 3 Mans. 46.

7937. Stamp duty—On contract of sale by trustee.]—A contract by assignees, for the sale of bkpt.'s real estate, is not liable to the stamp duty.—FLATHER *v.* STUBBS (1842), 2 Q. B. 614; 2 Gal. & Dav. 290; 11 L. J. Q. B. 92; 114 E. R. 241.
Annotation :—**Refd.** Wright *v.* Webb (1846), 7 L. T. O. S. 433.

See 1914 Act, s. 148.

7938. Costs of realisation.]—Where the property of bkpt. is sold subject to incumbrances, the solr. of the trustee in bkpcy. is entitled to a percentage on the gross amount of the purchase-money, & not merely on the amount realised from the equity of redemption.—*Re* GALLARD, *Ex p.* HARRIS (1888), 21 Q. B. D. 38; 57 L. J. Q. B. 528; 59 L. T. 147; 36 W. R. 592; 5 Morr. 123.
Annotation :—**Mentd.** *Re* Garner, *Ex p.* Pedley, [1906] 2 K. B. 213.

7939. ——.]—*Held :* the actual expenses of realising the assets within 1886 Rules, r. 125, meant strictly the costs of a sale of any of the assets, & did not extend to the trustee's solrs.' bill of costs.

Where more than a year elasped between the date of a receiving order & an application for a rehearing, & in the meantime the trustee had incurred considerable costs in tracing & getting in bkpt.'s assets & in successful litigation for that purpose, & the assets were insufficient to pay in full the bill of costs of the solrs. properly employed by the trustee in the above matters, & also petitioning creditor's costs of the rehearing in the ct. below and on appeal :—*Held :* no sufficient reason was shown for varying the order of priorities prescribed by the rule.—*Re* BRIGHT, *Ex p.* WINGFIELD & BLEW, [1903] 1 K. B. 735; 72 L. J. K. B. 287; 10 Mans. 31.

See, further, Part XVI., Sect. 5, *ante*, &, *generally,* SOLICITORS.

SUB-SECT. 3.—RESTRAINT OF SALE.

See 1914 Act, ss. 55, 56, 79, & 80.

7940. Application of creditor—Sale not properly advertised.]—Creditors applied for an order restraining the assignees from proceeding to a sale of bkpt.'s stock-in-trade & lease of his shop & premises, alleging that the sale had not been properly advertised, but only notified to a few of the assignees' friends :—*Held :* an order for stay should be made, on the creditors undertaking to indemnify the assignees against any loss in consequence of the sale not taking place.—*Re* RUSSELL, *Ex p.* MONTGOMERY (1822), 1 Gl. & J. 338, L. C.
Annotation :—**Apld.** *Re* Smith, *Ex p.* Smith (1866), 15 L. T. 451.

See, also, No. 7927, *ante.*

7941. Application of bankrupt—Proof that all dissenting creditors would be paid in full—Application to supersede commission.]—The ct. granted an injunction, on *ex p.* application by bkpt., to restrain the assignees from selling bkpt.'s effects, on proof that all creditors who did not consent to the application would be paid in full, & that bkpt. was applying to supersede the commission.—*Re* FIGES, *Ex p.* FIGES (1821), 1 Gl. & J. 122, L. C.
Annotation :—**Refd.** *Re* Barnett, *Ex p.* Reynolds (1885), 2 Morr. 147, C. A.

Held : as the property vested in the trustee prior to rehabilitation, he was the proper person to pass transfer.—DUFFY *v.* REGISTRAR OF DEEDS (1917), T. P. D. 97.—S. AF.

7932 i. *Duty of bankrupt to grant or join in conveyance when necessary.*]—An insolvent attached for not joining in, or signing a conveyance for the sale of his effects, counsel having advised his signing.—*Re* DOWLING (1818), Rowe, 729.—IR.

PART XX. SECT. 18, SUB-SECT. 3.

7940 i. *Application of creditor—Where trustees untrustworthy—Transfer of stock.*]—The assignees will not be restrained from transferring stock, unless it be shown that they are not trustworthy.—*Re* FRENCH & CO., *Ex p.* TOWNSEND (1828), 2 Mol. 242.—IR.

7941 i. *Application of bankrupt—Offer of composition.*]—The ct. will not restrain assignees of a bkpt. from selling his property, upon an offer of a composition above the amount which the assets would realise, unless satisfactory security is given that the offer will be carried out. Where the trading of

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7942. —— Application to annul adjudication.]—The ct. refused to make an order to stop the sale of bkpt.'s effects, on the ground that bkpt. had presented a petition to annul, without inspecting the proceedings, to see whether the fiat could be supported.—*Re* ATKINSON (1840), 1 Mont. D. & De G. 238 ; 4 Jur. 660, Ct. of R.

7943. —— Probability of injury to bankrupt.]—If a sale of bkpt.'s effects is likely to do irreparable injury to bkpt., the ct. will do all in its power to protect him.—*Re* ATKINSON (1840), 1 Mont. D. & De G. 238 ; 4 Jur. 660, Ct. of R.

7944. Application by cestui que trust—Property in reputed ownership of bankrupt—Breach of trust.]—A. assigned a leasehold house & furniture to B., upon trust for himself for life, with remainder to his wife for life, with remainder to his daughter. A. died & his widow married E., who took & retained possession of the house & furniture till his bkpcy. Before the bkpcy. B., in breach of trust, had assigned the house & furniture to E. E. had sold half of the original furniture & had substituted other furniture. His assignees, on the ground that the trustee had permitted bkpt. to be the reputed owner, claimed the furniture & advertised it for sale. On the petition of bkpt.'s wife & the daughter of testator :—*Held :* the sale must be restrained, but reserving the question as to the substituted furniture.—*Re* HORWOOD, *Ex p.* HENCLIFFE (1830), Mont. 24, L. C. ; *affg.* S. C. *sub nom. Re* HORWOOD, *Ex p.* HORWOOD (1828), Mont. & M. 169.

7945. Sale interfering with rights of third parties.]—Shipbuilders agreed to alter a vessel according to a specification, & it was provided that in case of their failing to execute the alterations according to the agreement, the owners of the vessel should be at liberty, with workmen, to enter on the shipbuilders' yard, & themselves complete the alterations. The shipbuilders were adjudicated bkpts. before the vessel was completed :—*Held :* the ct. could not specifically perform the whole agreement, & would not restrain the trustee from selling the dock in which the vessel was lying, although the owners might be thus prevented from completing the vessel pursuant to the agreement.—MERCHANTS' TRADING CO. *v.* BANNER (1871), L. R. 12 Eq. 18 ; 40 L. J. Ch. 515 ; 24 L. T. 861.

SUB-SECT. 4.—POSITION OF BANKRUPT AND PURCHASER AFTER SALE.

7946. Copyhold tenant—Whether guilty of forfeiture by disclaimer—After conveyance of interest by trustee.]—*Qu. :* whether a copyhold tenant, who has become bkpt., can be guilty of a forfeiture by disclaiming to be tenant of the manor, after a conveyance of his interest in the premises to a purchaser under the fiat.—CLARKE *v.* ARDEN (1855), 16 C. B. 227 ; 24 L. J. C. P. 162 ; 25 L. T. O. S. 83 ; 1 Jur. N. S. 710 ; 3 W. R. 444 ; 3 C. L. R. 781 ; 139 E. R. 744.

7947. Sale of goodwill—Right of bankrupt to set up similar trade—Represented as continuance of old trade.]—Under a commission the waggon trade from Bristol to London was sold with the goodwill. Another concern was purchased in trust for bkpt., & he, having obtained his certificate, commenced trade again to London ; soliciting customers by advertisement, & cards, stating generally that being reinstated by his friends in the carrying business his waggons set out at the usual hours, etc. :—*Held :* the sale by the assignees of the goodwill & interest of bkpt., did not prevent him, without his express covenant or fraud, from setting up a like trade, provided he did not represent it as a continuance of the old trade, & the advertisements were not a sufficient ground for granting an injunction.—CRUTTWELL *v.* LYE (1810), 17 Ves. 335 ; 1 Rose, 123 ; 34 E. R. 129.

Annotations :—**Consd.** Ginesi *v.* Cooper (1880), 14 Ch. D. 596. **Folld.** Walker *v.* Mottram (1881), 19 Ch. D. 355, C. A. **Mentd.** Bozon *v.* Farlow (1816), 1 Mer. 459 ; Harrison *v.* Gardner (1817), 2 Madd. 198 ; Churton *v.* Douglas (1859), John. 174 ; Pearson *v.* Pearson (1884), 27 Ch. D. 145, C. A. ; Trego *v.* Hunt, [1896] A. C. 7, H. L. ; Jennings *v.* Jennings (1898), 67 L. J. Ch. 190 ; Hill *v.* Fearis, [1905] 1 Ch. 466.

7948. —— —— ——.]—There is no substantial difference between the sale of the goodwill of a business by a trader himself, & a sale of it by his assignees in bkpcy.

A man has no right after the sale of the goodwill of his business by his assignees to represent himself as carrying on or continuing that identical business, although he has a right to set up again in business of the same kind next door to his old place of business.—HUDSON *v.* OSBORNE (1869), 39 L. J. Ch. 79 ; 21 L. T. 386.

Annotations :—**Refd.** Walker *v.* Mottram (1881), 19 Ch. D. 355, C. A. ; Hammond *v.* Malcolm Brunker & Collyns (1892), 8 T. L. R. 324.

7949. —— —— & to solicit old customers.]—The rule of *Labouchere* v. *Dawson* (1872), L. R. 13 Eq. 322, by which in the case of a voluntary sale the vendor of the goodwill of a business is precluded from afterwards soliciting the former customers of that business, cannot be extended to the case of a compulsory alienation. The obligation enforced by the rule is purely personal, & not a mere incident to the transfer of property. The purchaser of the goodwill of a business from a trustee in bkpcy. has no right to restrain bkpt. from setting up *bonâ fide* a fresh business & soliciting the customers of his former business, & it is immaterial whether bkpt. has or has not joined in the conveyance of the goodwill to the purchaser.

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bkpt. has been unsatisfactory, or bkpt. has had sufficient time since the bkpcy. to effect a composition, the ct. will not yield to an application to restrain the assignees.—*Re* WALSH (1859), 9 I. Ch. R. 16.—**IR.**

PART XX. SECT. 18, SUB-SECT. 4.

k. *Sale not sanctioned by Chief Commissioner.*]—An official assignee having sold an engine belonging to his insolvent, applied to the Chief Comr. of Insolvent Estates for his approval of the sale. The Chief Comr. made no direction :—*Held :* no interest passed to the purchaser by the sale.—SANDEMAN *v.* ROBINSON (1877), Knox, 382.—**AUS.**

l. *Sale subject to insolvent's debts—Insolvent's liability.*]—Debtor of a corpn. became insolvent, & his property, subject to the debt, was sold by insolvent's assignee :—*Held :* insolvent's liability extinguished.—BLAIN *v.* GRANBY CORPN. (1873), 5 R. L. O. S. 180.—**CAN.**

m. *Purchaser of book debts*—1875 *Act, s.* 67.]—The purchaser of a book debt sold otherwise than as directed by the above sect. cannot recover against debtor.—FISKEN *v.* O'NEILL (1881), 6 A. R. 99.—**CAN.**

n. *Vendee of purchaser—Objections to title—Invalid sale by assignee.*]—An assignee proceeded to sell the lands of insolvent without giving notice of such sale "for a period of two months" as prescribed by 1869 Act, s. 47, no sanction of the creditors thereto having been given :—*Held :* a good objection to the title by a vendee of the purchaser at such sale.—JARVIS *v.* COOK (1881), 29 Gr. 303.—**CAN.**

o. *Sale of promissory notes given to trustee by debtor of estate.*]—An assignee took negotiable notes payable to himself, from debtor of the estate, & after they fell due, sold & indorsed them to pltf., together with other notes, for much less than their nominal value, without any authority from the creditors or the inspector :—*Held :* no title vested in pltf. as indorsee.—ROSE *v.* SCHOFIELD (1885), 25 N. B. R. 127.—**CAN.**

p. *Sale of insurance—Right to produce of policy.*]—The assignee of an insolvent sold a policy of insurance on his life. He died, some creditors alleged that the sale had been made at an undervalue, by collusion between the assignee & the insolvent, & the produce of the policy was brought into the Insolvent Ct. The purchaser filed a petition against the creditors, praying that the produce might be paid to

—WALKER *v.* MOTTRAM (1881), 19 Ch. D. 355; 51 L. J. Ch. 108; 45 L. T. 659; 30 W. R. 165, C. A.

Annotations:—**Consd.** Jennings *v.* Jennings, [1898] 1 Ch. 378. **Apld.** Green *v.* Morris, [1914] 1 Ch. 562. **Refd.** Dawson *v.* Beeson (1882), 22 Ch. D. 504, C. A. **Mentd.** Pearson *v.* Pearson (1884), 27 Ch. D. 145, C. A.; Trego *v.* Hunt, [1896] A. C. 7, H. L.

7950. ——— ——— ———.]—The general principle affirmed by the House of Lords in *Trego* v. *Hunt*, [1896] A. C. 7, that a vendor, who sells the goodwill of his business & receives the purchase-money, cannot afterwards destroy that which he has sold by soliciting his former customers, does not apply to the case of a sale of debtor's business by the trustee of a deed of assignment executed by debtor for the benefit of creditors. In such a case the alienation being involuntary as in the case of a bkpcy. the exception established in *Walker* v. *Mottram*, No. 7949, *ante*, applies, & debtor is not precluded from soliciting the customers of his old firm.—GREEN & SONS (NORTHAMPTON), LTD. *v.* MORRIS, [1914] 1 Ch. 562; 83 L. J. Ch. 559; 110 L. T. 508; 30 T. L. R. 301; 58 Sol. Jo. 398.

7951. Sale of patent—Right of bankrupt to deny validity.]—Bkpt. is not estopped from denying the validity of a patent granted to himself, & assigned by his trustee in bkpcy.—SMITH *v.* CROPPER (1885), 10 A. C. 249; 55 L. J. Ch. 12; 53 L. T. 330; 33 W. R. 753, H. L.; *affg.* S. C. *sub nom.* CROPPER *v.* SMITH (1884), 26 Ch. D. 700, C. A.

Annotations:—**Mentd.** Shoe Machinery Co. *v.* Cutlan, [1896] 1 Ch. 108, C. A.; *Re* Crighton & Law Car & General Insce. Corpn., [1910] 2 K. B. 738.

See, generally, PATENTS & INVENTIONS.

7952. Purchaser not affected with trustee's negligence in selling.]—The purchaser of the estate of an insolvent debtor from his assignees, at a sale by auction, will not be affected by constructive notice of circumstances of negligence on the part of the assignees in conducting the sale, such circumstances being entirely collateral to any question of title.

A sale of the estate of an insolvent debtor, made *bonâ fide* at a public auction, is not, after conveyance to the purchaser, necessarily voidable in equity, only because the purchaser, after the sale but before the conveyance, had notice of circumstances attending the conduct of the sale by the assignees, amounting to negligence on their part.—BORELL *v.* DANN (1843), 2 Hare, 440; 67 E. R. 181.

7953. Impeachment of purchaser's title—Only by bill.]—Assignees of the estates of two partners sold their interest in the equity of redemption of a policy of assurance, which was the separate property of one of the partners, in consideration of the reduction of a debt proved against the joint estate:—*Held:* if trustees neglected their duty in selling property, the persons injured had no recourse but to file a bill to set aside the deed of which they complained, & the title of the purchaser could only be impeached by a bill to set aside the assignment.—*Re* UNITED KINGDOM LIFE ASSURANCE CO. (1865), 6 New Rep. 59; 34 L. J. Ch. 554; 12 L. T. 441; 13 W. R. 645.

Annotations:—**Refd.** *Re* Haycock's Policy (1876), 1 Ch. D. 611. **Mentd.** *Re* Webb's Policy (1866), L. R. 2 Eq. 456; *Re* Pettit's Estate (1876), 1 Ch. D. 478; Matthew *v.* Northern Assce. (1878), 9 Ch. D. 80.

Part XXI.—Actions, Arbitrations, and other Legal Proceedings by and against Trustee and Bankrupt.

SECT. 1.—WHAT CAUSES OF ACTION PASS TO TRUSTEE.

See, also, Sect. 5, sub-sect. 1, C., *post.*

7954. General rule.]—On general principles rights of action are not forfeitable, nor assignable, except in a particular mode, but that rule is founded on the policy of the common law, which is averse to encourage litigation; but the policy of the bkpt. laws requires that the right of action should be assignable & transferred to the assignees as much as any other species of property (EYRE, C.J.). —SMITH *v.* COFFIN (1795), 2 Hy. Bl. 444; 126 E. R. 641.

Annotations:—**Consd.** Clark *v.* Calvert (1819), 8 Taunt. 742; Michell *v.* Hughes (1830), 6 Bing. 689; Drake *v.* Beckham (1843), 11 M. & W. 315. **Apld.** Beckham *v.* Drake (1849), 2 H. L. Cas. 579, H. L. **Mentd.** Goodright *v.* Forrester (1807), 8 East, 552; Doe d. Penwarden *v.* Gilbert (1821), 3 Brod. & Bing. 85; Monk *v.* Mawdsley (1827), 1 Sim. 286; Kearsey *v.* Carstairs (1831), 2 B. & Ad. 716; Wilce *v.* Wilce (1831), 7 Bing. 664; Ackers *v.* Phipps (1835), 9 Bli. N. S. 430, H. L.

7955. ———.]—The proper & reasonable construction [of 6 Geo. 4, c. 16, s. 63] appears to be, that the statute transfers not all rights of action which would pass to exors., for rights incapable of being converted into money, such as the next presentation to a void benefice, pass to them, but all such as would be assets in their hands for the

him:—*Held:* petition must be dismissed, with costs.—O'REILLY *v.* FANNIN (1857), 6 I. Ch. R. 166.—**IR.**

q. *Sale of land—Interest on deposit.*]—A purchaser from the assignees of a bkpt. is entitled to receive interest upon his deposit, when lodged with the assignees or their solr., whether the purchase be proceeded with or not.—*Re* PAGE (1837), 1 Dr. & Wal. 31.—**IR.**

r. *Purchaser a person employed to manage estate—Laches of creditor bar to reduction of sale.*]—The trustee of a sequestrated estate duly advertised a sale of property. The property was purchased by J., who had been employed to manage the estate under a trust deed. Five years thereafter pursuer, a creditor, sought to reduce the sale on the ground that J. was disqualified from being a purchaser:—*Held:* defender assoilzied because so long a period had elapsed since the sale.—SMITH *v.* ROBERTON (1826), 4 Sh. (Ct. of Sess.) 442.—**SCOT.**

s. *Purchase by insolvent—Ratification by creditors.*]—Trustees of an insolvent at a meeting of creditors requested him to purchase land of his estate; the land was subsequently sold by auction to a third person in trust for insolvent; the creditors ratified the sale by authorising the trustee to bring an action against the insolvent to compel the performance of the contract:—*Held:* the sale was valid.—BEYER'S TRUSTEES *v.* PITON (1884), 3 S. C. 77.—**S. AF.**

7953 i. *Impeachment of purchaser's title.*]—In ejectment pltf. claimed title under a deed from an assignee in insolvency who advertised a sale of the property, the period of advertisement being shortened by the ct. & land was sold to F., who conveyed to pltf. The assignee was notified of the sale & requested to execute a conveyance to the purchaser: the assignee under instructions from the creditors, refused, whereupon an order was obtained directing him so to do. Under 1875 Act, s. 75, a sale should be sanctioned by creditors & the period of advertisement might be shortened "by the creditors with the approval of the judge.":—*Held:* pltf.'s title was good. —DONOVAN *v.* HERBERT (1885), 9 O. R. 89; 12 A. R. 298.—**CAN.**

PART XXI. SECT. 1.

7954 i. *General rule.*]—When the whole damage alleged by pltf. is an injury to his personal estate, his right of action, upon his bkpcy., passes to his assignees.—CUMING *v.* HARRISON (1895), 29 I. L. T. 126.—**IR.**

7954 ii. ———.]—As soon as an order is made under Insolvency Act, s. 7, any rights of property which insolvent may have possessed at the date of his petition in insolvency vest in the official assignee, & he alone is competent to sue for the purpose of enforcing these rights.—SADODIN *v.* SPIERS (1879), I. L. R. 3 Bom. 437.—**IND.**

Sect. 1.—*What causes of action pass to trustee.*]

payment of debts, & no others, all which could be turned into profit, for such rights of action are personal estate. Of such the exor. is assignee in law; & the nature of the office & duty of bkpt.'s assignee requires that he should have them also. But rights of action for torts which would die with testator, according to the rule *actio personalis moritur cum personâ*, & all actions of contract affecting the person only, would not pass. Of such the exor. is not assignee in law, & whatever may be the reason of the law which prohibits him from being so, seems equally to apply to bkpt.'s assignee (PARKE, B.).—BECKHAM *v.* DRAKE (1849), 2 H. L. Cas. 579; 13 Jur. 921; 9 E. R. 1213, H. L.; *affg.* S. C. *sub nom.* DRAKE *v.* BECKHAM (1843), 11 M. & W. 315, Ex. Ch.

Annotations:—**Consd.** Bell *v.* Carey (1849), 8 C. B. 887. **Apld.** Wetherell *v.* Julius (1850), 10 C. B. 267. **Folld.** Emden *v.* Carte (1881), 17 Ch. D. 169. **Consd.** Kellaway *v.* Bury (1892), 66 L. T. 599, C. A. **Apld.** Rose *v.* Buckett, [1901] 2 K. B. 449, C. A. **Folld.** Bailey *v.* Thurston, [1903] 1 K. B. 137, C. A. **Consd.** Wilson *v.* United Counties Bank (1919), 88 L. J. K. B. 1033, H. L. **Refd.** Stanton *v.* Collier (1854), 3 E. & B. 274; Richbell *v.* Alexander (1861), 30 L. J. C. P. 268; Wadling *v.* Oliphant (1875), 1 Q. B. D. 145; Formby *v.* Barker, [1903] 2 Ch. 539, C. A. **Mentd.** Williams *v.* Chambers (1847), 10 Q. B. 337; Elliot *v.* Clayton (1851), 16 Q. B. 581; Boddington *v.* Castelli (1853), 1 E. & B. 879, Ex. Ch.; Emmens *v.* Elderton (1853), 4 H. L. Cas. 624, H. L.; Betts *v.* Burch (1859), 4 H. & N. 506; *Re* Beyts & Craig, *Ex p.* Trustee (1894) 70 L. T. 561.

7956. Right to recover money lost at play.]—Assignees may recover from the winner money lost by bkpt. before his bkpcy. at play, in an action of debt on Gaming Act, 1710 (c. 19),—BRANDON *v.* PATE (1794), 2 Hy. Bl. 308; 126 E. R. 566.

Annotations:—**Consd.** Clark *v.* Calvert (1819), 3 Moore, C. P. 96; Wright *v.* Fairfield (1831), 2 B. & Ad. 727. **Refd.** Bristow *v.* James (1797), 7 Term Rep. 257.

7957. ——.]—The right to sue for money lost at play given by Gaming Act, 1710, to the loser is a vested interest, & upon his bkpcy. passes to the assignees.—BRANDON *v.* SANDS (1794), 2 Ves. 514; 30 E. R. 751, L. C.

Annotations:—**Mentd.** Allan *v.* Copeland (1820), 8 Price, 522; Angell *v.* Westcombe (1833), 6 Sim. 30.

7958. Real action—Writ of entry sur abatement.]—The right to bring a real action, *e.g.*, a writ of entry *sur* abatement, passes to the assignees.—SMITH *v.* COFFIN (1795), 2 Hy. Bl. 444; 126 E. R. 641.

Annotations:—**Consd.** Clark *v.* Calvert (1819), 8 Taunt. 742; Michell *v.* Hughes (1830), 6 Bing. 689; Drake *v.* Beckham (1843), 11 M. & W. 315. **Apld.** Beckham *v.* Drake (1849), 2 H. L. Cas. 579, H. L. **Mentd.** Goodright *v.* Forrester (1807), 8 East, 552; Doe d. Penwarden *v.* Gilbert (1821), 3 Brod. & Bing. 85; Monk *v.* Mawdsley (1827), 1 Sim. 286; Kearsey *v.* Carstairs (1831), 2 B. & Ad. 716; Wilce *v.* Wilce (1831), 7 Bing. 664; Ackers *v.* Phipps (1835), 9 Bli. N. S. 430, H. L.

7959. —— —— **Vested in husband & wife in right of wife.**]—A right of entry vested in husband & wife in right of the wife, passes to the assignees of the husband if he become bkpt.—MICHELL *v.* HUGHES (1830), 6 Bing. 689; 130 E. R. 1446; *sub nom.* MITCHELL *v.* HUGHES, 4 Moo. & P. 577; 8 L. J. O. S. C. P. 249.

Annotations:—**Refd.** Wright *v.* Fairfield (1831), 2 B. & Ad. 727; Richbell *v.* Alexander (1861), 10 C. B. N. S. 324. **Mentd.** Sherrington *v.* Yates (1844), 1 Dow. & L. 1032, Ex. Ch.

See, now, Married Women's Property Acts.

7960. Personal tort—Tort done to property.]—Supposing it to be quite clear, as we may, that in the case of a personal tort, the right of damages which bkpt. may have is not a right which the assignees could enforce, it is still an undecided question whether they could recover, in respect of a wrong or tort done to the property (LORD ELDON, C.).—*Re* BOURNE, *Ex p.* BOURNE (1826), 2 Gl. & J. 137, L. C.

Annotations:—**Mentd.** *Re* Christie, *Ex p.* Christie (1832), 2 Deac. & Ch. 465, Ct. of R.; *Re* Christie, *Ex p.* Saunders (1833), Coop. *temp.* Brough. 157, L. C.; *Re* Barber, *Ex p.* Abbott (1836), 5 L. J. Bcy. 33, Ct. of R.; Butler *v.* Hobson (1838), 5 Bing. N. C. 128; *Re* Bakewell, *Ex p.* Butler (1842), 11 L. J. Bcy. 51, Ct. of R.; *Re* Carter, *Ex p.* Jungmichel (1842), 2 Mont. D. & De G. 471, Ct. of R.; *Re* Coulson & Phipps, *Ex p.* Phipps (1844), 3 Mont. D. & De G. 505, Ct. of R.; Engleback *v.* Nixon (1875), L. R. 10 C. P. 645.

7961. —— ——.]—*Primâ facie* all causes of action relating in any way to the personal estate pass to the assignees; but that is subject to an exception, where the personal estate is injured only through the injury to the person or personal feelings of debtor (WIGHTMAN, J.).—STANTON *v.* COLLIER (1854), 3 E. & B. 274; 23 L. J. Q. B. 116; 18 Jur. 650; 2 W. R. 197; 2 C. L. R. 1151; 118 E. R. 1143, C. A.

Annotation:—**Mentd.** Cook *v.* Whellock (1890), 24 Q. B. D. 658, D. C.

7962. —— **Assault & battery—Slander—Seduction.**]—A right of action for an injury to the body or feelings of a trader, arising from a tort independent of contract, does not pass to his assignees, *e.g.*, for an assault & battery, or for slander, or for the seduction of a child or servant (LORD DENMAN, C.J.).—DRAKE *v.* BECKHAM (1843), 11 M. & W. 315; 12 L. J. Ex. 486; 7 Jur. 204; 152 E. R. 823, Ex. Ch.; *affd. sub nom.* BECKHAM *v.* DRAKE (1849), 2 H. L. Cas. 579, H. L.

Annotations:—**Consd.** Kellaway *v.* Bury (1892), 66 L. T. 599, C. A.; Rose *v.* Buckett, [1901] 2 K. B. 449, C. A.; Wilson *v.* United Counties Bank (1919), 88 L. J. K. B. 1033, H. L. **Refd.** Stanton *v.* Collier (1854) 3 E. & B. 274. **Mentd.** Williams *v.* Chambers (1847) 10 Q. B. 337; Bell *v.* Carey (1849), 8 C. B. 887; Wetherell *v.* Julius (1850), 10 C. B. 267; Elliot *v.* Clayton (1851), 16 Q. B. 581; Boddington *v.* Castelli (1853), 1 E. & B. 879, Ex. Ch.; Emmens *v.* Elderton (1853), 4 H. L. Cas. 624, H. L.; Betts *v.* Burch (1859), 4 H. & N. 506; Richbell *v.* Alexander (1861), 30 L. J. C. P. 268; Wadling *v.* Oliphant (1875), 1 Q. B. D. 145; Emden *v.* Carte (1881), 17 Ch. D. 169; *Re* Beyts & Craig, *Ex p.* Trustee (1894), 70 L. T. 561; Bailey *v.* Thurston, [1903] 1 K. B. 137, C. A.; Formby *v.* Barker, [1903] 2 Ch. 539, C. A.

7963. —— **Prejudicing bankrupt in his business—Trespass.**]—An action of trespass, for seizing & taking pltf.'s goods, under a false & unfounded claim of a debt, *per quod* pltf. was annoyed & prejudiced in his business, & believed by his customers to be insolvent, & certain lodgers left his house, does not pass to pltf.'s assignees on his bkpcy.

This is an allegation of special damage, in respect of which the jury might give vindictive damages, & not one for which the assignees could have a right of action, although the money when recovered might belong to them (ROLFE, B.).—BREWER *v.* DEW (1843), 11 M. & W. 625; 1 Dow. & L. 383; 12 L. J. Ex. 448; 1 L. T. O. S. 290; 7 Jur. 953; 152 E. R. 955.

Annotations:—**Consd.** Beckham *v.* Drake (1849), 2 H. L. Cas. 579, H. L.; **Distd.** Stanton *v.* Collier (1854), 3 E. & B. 274. **Consd.** Rose *v.* Buckett, [1901] 2 K. B. 449, C. A. **Refd.** Hill *v.* Smith (1844), 13 L. J. Ex. 243; Richbell *v.* Alexander (1861), 8 Jur. N. S. 13; Wilson *v.* United Counties Bank (1919), 88 L. J. K. B. 1033, H. L. **Mentd.** Smith *v.* Enright (1893), 63 L. J. Q. B. 220.

7964. —— **Principal & essential cause of action.**]—Trespass for breaking & entering the dwelling-house & garden of pltf., & making a great noise & disturbance therein, & damaging the doors, etc., of the house, & the trees, etc., of the garden, & seizing certain goods of pltf., & exposing them to sale on the premises without his leave, whereby pltf. & his family were greatly disturbed & annoyed

7962 i. *Personal tort—Slander—Seduction & assault of wife.*]—Pltf. sued deft. for slander, for enticing away & detaining his wife, & for assaulting her:—*Held:* the causes of action, being for purely personal wrongs, did not pass to the assignee.—WHITE *v.* ELLIOTT (1870), 30 U. C. R. 253. —CAN.

in the peaceable possession of the dwelling-house & garden, & pltf. was prevented from carrying on his lawful business. Plea, in bar of the further maintenance of the action, that pltf. became bkpt. after the action brought, & that an assignee had been appointed, who accepted the appointment, whereby, & by virtue of the statutes, etc., the causes of action became vested in the assignee: —*Held:* the plea was bad, & the primary personal injury to bkpt. being the principal & essential cause of action, it still remained in bkpt., & did not pass to his assignee.—ROGERS *v.* SPENCE (1846), 12 Cl. & Fin. 700; 8 E. R. 1586, H. L.; *affg.* S. C. (1844), 13 M. & W. 571, Ex. Ch.; S. C. *sub nom.* SPENCE *v.* ROGERS (1843), 11 M. & W. 191.

Annotations:—**Apld.** Beckham *v.* Drake (1849), 2 H. L. Cas. 579, H. L. **Consd.** Wetherell *v.* Julius (1850), 10 C. B. 267. **Refd.** Stanton *v.* Collier (1854), 3 E. & B. 274; Rose *v.* Buckett, [1901] 2 K. B. 449, C. A. **Mentd.** Hill *v.* Smith (1844), 13 L. J. Ex. 243; Cohen *v.* Mitchell (1890), 59 L. J. Q. B. 409, C. A.; Wilson *v.* United Counties Bank (1919), 88 L. J. K. B. 1033, H. L.

7965. —— Action for trespass & seizure—Annoyance to bankrupt—No damage done to goods.]—In an action for trespass & seizure of goods, pltf. alleged damage to the premises, damage to the goods, & personal annoyance to himself & family. It being admitted that no substantial damage was done to the premises or to the goods:—*Held:* upon the bkpcy. of pltf. the right of action did not pass to his trustee.—ROSE *v.* BUCKETT, [1901] 2 K. B. 449; 70 L. J. K. B. 736; 84 L. T. 670; 50 W. R. 8; 17 T. L. R. 544; 8 Mans. 259, C. A.

Annotations:—**Refd.** Lord *v.* G. E. Ry. Co., [1908] 1 K. B. 195; Wilson *v.* United Counties Bank (1919), 88 L. J. K. B. 1033, H. L.

7966. Action for seduction of servant.]—The right of action for the seduction of a servant does not pass to the master's assignees on his bkpcy.—HOWARD *v.* CROWTHER (1841), 8 M. & W. 601; 10 L. J. Ex. 355; 5 Jur. 914; 151 E. R. 1179.

Annotation:—**Refd.** Beckham *v.* Drake (1849), 2 H. L. Cas. 579, H. L.

See, also, No. 7962, *ante.*

7967. Action for negligence—Against solicitor.]—A., being sued by B., retained C., an attorney, to defend him. By C.'s negligence, a judgment was obtained against A., upon which he, being then in custody, was charged in execution for a large sum, & was put to expense in endeavouring to procure his release & to reverse the judgment by writ of error:—*Held:* this was not a cause of action which passed to A.'s assignees upon his insolvency.

A., a beneficed clergyman, brought case against his attorneys, for having, through their negligence & want of skill, permitted a writ of *sequestrari facias* to remain in force against him longer than was necessary, whereby A., during that time, lost the rent, tithes, & profits of his living:—*Held:* this was a cause of action which passed to A.'s assignees upon his insolvency.—WETHERELL *v.* JULIUS (1850), 10 C. B. 267; 19 L. J. C. P. 367; 15 L. T. O. S. 414; 14 Jur. 700; 138 E. R. 108.

Annotations:—**Refd.** *Re* Daines, *Ex p.* Assignees (1867), 16 L. T. 127. **Mentd.** Boddington *v.* Castelli (1854), 17 Jur. 781, Ex. Ch.; Stanton *v.* Collier (1854), 3 E. & B. 274; Hodgson *v.* Sidney (1866), 4 H. & C. 492; Cohen *v.* Mitchell (1890), 59 L. J. Q. B. 409, C. A.; Kellaway *v.* Bury (1892), 66 L. T. 599, C. A.

7968. —— ——.]—A right of action against a solr. for negligence in the preparation of an agreement on behalf of his client to take a farm, in omitting to make therein certain alterations agreed to by the landlord, reserving to the tenant compensation for tillage & dressings at the determination of his tenancy, & whereby the fund divisible amongst the creditors of the tenant upon his bkpcy. is diminished, passes to his assignees as part of his personal estate.—*Re* DAINES, *Ex p.* ASSIGNEES (1867), 16 L. T. 127.

7969. —— ——.]—In an action against attorneys for breach of duty in failing to procure the best price for the equity of redemption of pltf.'s premises, which had been entrusted to them for sale, the declaration alleged as special damage that defts. "well knew that if pltf. did not obtain a reasonable price, the bkpcy. of pltf. would be the necessary & inevitable consequence," & further that in consequence of the breach of duty alleged pltf. was adjudicated bkpt. Defts. pleaded pltf.'s bkpcy.:—*Held:* the cause of action passed to the assignees, & deft.'s knowledge that pltf.'s bkpcy. would follow from their breach of duty made no difference.—MORGAN *v.* STEBLE (1872), L. R. 7 Q. B. 611; 41 L. J. Q. B. 260; 26 L. T. 906.

Annotation:—**Refd.** Rose *v.* Buckett, [1901] 2 K. B. 449, C. A.

7970. —— ——.]—Pltf. alleged that, being desirous of getting his creditors to postpone payment of their claims, he instructed defts., his solrs., to call a meeting of his creditors, & to ask for time, that defts. advised him that he ought first to file his petition, that they forwarded a circular to his creditors which was not authorised by him stating untruly that he was compelled to suspend payment, that they attended the meeting by their clerk, who, purporting to act upon pltf.'s instructions, told his creditors that his estate would not pay more than 2*s.* in the pound, & that that information was untrue to their knowledge, or was made recklessly & negligently, & without any sufficient grounds. Pltf. also alleged that he instructed defts. to submit a scheme to avoid his being made a bkpt., but that they advised him not to do so, & eventually he was adjudicated a bkpt.:—*Held:* (1) pltf.'s statement of claim disclosed no reasonable cause of action; (2) even if the pltf. had any cause of action, it was one that passed to his trustee, & was not sustainable by pltf. personally.—KELLAWAY *v.* BURY (1892), 66 L. T. 599; 8 T. L. R. 433, C. A.

7965 i. —— *Action for trespass & seizure—Special damage.*]—SMITH *v.* COMMERCIAL UNION INSURANCE CO., *post.*—**CAN.**

a. *Action for damages for deceit.*]—Pltf. sued for damages for deceit upon the sale by deft. to him of a business fraudulently represented to be of much greater value than it was:—*Held:* pltf.'s claim did not pass to the assignee by virtue of Assignments Act, R. S. M., 1902 (c. 8).—MCGREGOR *v.* CAMPBELL (1909), 19 Man. L. R. 38; 11 W. L. R. 153.—**CAN.**

7967 i. *Action for negligence—Against solicitor.*]—Under 8 Vict. c. 48, the right to sue an attorney for negligence, vests in the assignee of insolvent.—ALEXANDER *v.* A. B. & C. D. (1849), 5 U. C. R. 329.—**CAN.**

7967 ii. —— ——.]—Plaint against an attorney for negligence. Deft. pleaded that the alleged cause of action was vested in pltf.'s assignees:—*Held:* the defence was good.—CRAUFORD *v.* CINNAMOND (1867), I. R. 1 C. L. 325.—**IR.**

b. *Action for special damage—Trover.*]—Pltf.'s declaration contained a count in trover, alleging as special damage that pltf.'s business was stopped, & he lost customers:—*Held:* the cause of action passed to the assignee, as the conversion, the primary cause of action, passed to the assignee, & the special damage dependent upon it could not be sued for by debtor.—SMITH *v.* COMMERCIAL UNION INSURANCE CO. (1873), 33 U. C. R. 529.—**CAN.**

c. —— *Trespass to goods.*]—Pltf.'s declaration contained a count in trespass to goods, alleging special damage:—*Held:* the cause of action did not pass to the assignee, being for a personal claim of debtor independent of his right of property.—SMITH *v.* COMMERCIAL UNION INSURANCE CO. (1873), 33 U. C. R. 529; *dbtd.* HUMPHRIES *v.* RAMSAY, 7 P. R. 188.—**CAN.**

d. *Action to enforce judgment for damages for malicious prosecution.*]—Where A. recovered judgment against B. for damages for malicious prosecution, & became insolvent:—*Held:* A. could not maintain a suit against B. to enforce his judgment, not having obtained his certificate.—SOLLY *v.* ATKINSON (1879), 5 V. L. R. 323.—**AUS.**

Sect. 1.—What causes of action pass to trustee.]

7971. —— Against banker—Damage for injury to credit.]—A banker agreed with a customer to supervise his business & see it carried on during his absence on military service, & to take all reasonable steps to maintain his credit & reputation. He was guilty of negligence in performing his duties under this agreement, & in consequence the customer became bkpt. :—*Held :* in addition to the damages to the estate caused by such negligence, the customer could recover damages for the injury to his credit & reputation caused by the bkpcy., without proof of special damage, & such cause of action did not pass to the trustee in the bkpcy.—WILSON *v.* UNITED COUNTIES BANK, LTD., [1920] A. C. 102 ; 88 L. J. K. B. 1033, H. L.

Annotation :—**Mentd.** North Staffordshire Ry. Co. *v.* Edge (1919), 64 Sol. Jo. 146, H. L.

7972. Action based on false representation resulting in bankruptcy.]—To a declaration for a false representation, whereby pltf. was induced to pay £2,000, & " sustained great loss, & became & was adjudicated bkpt., & suffered great personal annoyance, & was put to great trouble & inconvenience, & was greatly injured in character & credit," deft., except as to the claim in respect of the adjudication in bkpcy. & the remainder of the personal damage alleged, pleaded that before action pltf. had been adjudicated bkpt., that the loss sustained was a pecuniary loss, & that the right to sue for it passed to his assignees :—*Held :* the only damage recoverable was a direct pecuniary loss, the right to sue for which passed to the assignee, & the plea was a good answer to the whole declaration, & might have been so pleaded.

Assuming that there was special damage recoverable, I do not think that the cause of action can remain partly in bkpt. to recover such damage, & partly can pass to the assignees to recover the pecuniary & ordinary damage. If two several torts had been committed there would be no reason why bkpt. should not recover in respect of one, & the assignees in respect of the other. But where there is but one single cause of action resulting in direct pecuniary & in special damage bkpt. cannot say that enough of it remains in him to enable him to recover the special damage (BRAMWELL, B.).—HODGSON *v.* SIDNEY (1866), L. R. 1 Exch. 313 ; 4 H. & C. 492 ; 35 L. J. Ex. 182 ; 14 L. T. 624 ; 12 Jur. N. S. 694 ; 30 J. P. 615 ; 14 W. R. 923.

Annotations :—**Folld.** Morgan *v.* Steble (1872), L. R. 7 Q. B. 611. **Refd.** Rose *v.* Buckett, [1901] 2 K. B. 449, C. A.

See, also, Nos. 7975, 8165 *et seq., post.*

7973. Action for maintenance.]—Bkpt. cannot maintain an action for maintenance, on the ground that deft. incited & supported bkpcy. proceedings in which he had no common interest, since the cause of action, if any, passed to the trustee.—METROPOLITAN BANK, LTD. *v.* POOLEY (1885), 10 App. Cas. 210 ; 54 L. J. Q. B. 449 ; 53 L. T. 163 ; 49 J. P. 756 ; 33 W. R. 709, H. L.

Annotations :—**Refd.** Boaler *v.* Power, [1910] 2 K. B. 229, C. A. ; Neville *v.* London " Express " Newspaper, [1919] A. C. 368, H. L. **Mentd.** Tucker *v.* Collinson (1886), 54 L. T. 263, C. A. ; Magrath *v.* Reichel (1887), 57 L. T. 850, D. C. ; Lawrence *v.* Norreys (1888), 39 Ch. D. 213, C. A. ; Barrett *v.* Day, Day *v.* Foster (1890), 43 Ch. D. 435 ; Bruce *v.* Ailesbury, [1892] W. N. 149 ; Haggard *v.* Pélicier Frères, [1892] A. C. 61, P. C. ; Fletcher *v.* Bethom (1893), 68 L. T. 438 ; Logan *v.* Bank of Scotland (1905), 94 L. T. 153, C. A. ; British Cash & Parcel Conveyors *v.* Lamson Store Service Co., [1908] 1 K. B. 1006, C. A. ; Oram *v.* Hutt, [1914] 1 Ch. 98, C. A. ; Norman *v.* Matthews (1916), 85 L. J. K. B. 857 ; Neville *v.* London Express Newspaper (1917), 86 L. J. K. B. 1055, C. A.

7974. ——.]—An undischarged bkpt. is not entitled to bring an action for damages for maintenance in respect of proceedings brought against his trustee, the damage suffered, if any, being suffered by the estate which is vested in the trustee, by whom the claim should be made.—BOTTOMLEY *v.* BELL (1915), 31 T. L. R. 591 ; 59 Sol. Jo. 703, C. A.

7975. Claim for causing bankruptcy.]—A claim for causing bkpcy. is a wrong personal to bkpt., & does not pass to his trustee.—LORD'S TRUSTEE *v.* GREAT EASTERN RY., [1908] 1 K. B. 195 ; 77 L. J. K. B. 140 ; 97 L. T. 760 ; 24 T. L. R. 83 ; 52 Sol. Jo. 96 ; 15 Mans. 33 ; *revsd.* on another point, [1908] 2 K. B. 54, C. A. ; *revsd.* on such point, *sub nom.* GREAT EASTERN RY. *v.* LORD'S TRUSTEE, [1909] A. C. 109, H. L.

Annotation :—**Mentd.** Tilley *v.* Bowman, [1910] 1 K. B. 745.

See, also, No. 7972, *ante,* Nos. 8165 *et seq., post.*

7976. Action to set aside orders made in Chancery action.]—Pltf. brought an action to set aside, on the ground of fraud, certain orders made in two actions in the Ch. Div., in one of which he claimed on his own behalf shares in a co. & to have the register rectified by the insertion therein of his name as a holder of such shares, & in the other action he claimed as liquidator books belonging to the co., & that action was dismissed with costs. Subsequently to the commencement of this third action he was adjudicated bkpt. for non-payment of the taxed costs of the second action. The official receiver having refused to proceed with pltf.'s action, it was, on the application of defts. dismissed :—*Held :* as the claim in the first mentioned Chancery action was one in respect of property, which if recovered would belong to the trustee for the benefit of the creditors, &, as the Bkpcy. Ct. could, during the existence of the adjudication, which was conclusively binding on pltf. while it stood, allow pltf. to contest the validity of the judgment or order in the second Ch. action, which was the foundation of the adjudication in bkpcy., either on the ground of fraud or otherwise, the right to continue the three actions was a chose in action which vested in the trustee, pltf. having no *locus standi*, & the action to set aside the orders had been properly dismissed. —BOALER *v.* POWER, [1910] 2 K. B. 229 ; 79 L. J. K. B. 486 ; 102 L. T. 450 ; 26 T. L. R. 358 ; 54 Sol. Jo. 360 ; 17 Mans. 125, C. A.

7977. Action for injury done to goods—Conversion before bankruptcy.]—For any injury done to goods which pass to the assignees of bkpt., they have redress as owners, but they take also the rights of action which were vested in bkpt., in cases where a conversion has taken place before

7975 i. *Claim for causing bankruptcy—Judgment maliciously marked.*]—In an action to recover damages pltf. complained that deft., after pltf. had paid a debt to him, marked judgment & issued execution in respect of it, in consequence whereof pltf. had to obtain the protection of the Ct. of Bkpcy. The second count alleged that the judgment was maliciously marked. Deft. pleaded as a defence to all the causes of action, save as to the injury to pltf.'s credit, & his being obliged to obtain the protection of the Bkpcy. Ct., & the disturbance to him & his family, that the right of action vested in the assignees :—*Held :* the defence was good.—BYRNE *v.* LABREY (1878), 12 I. L. T. Jo. 46. —IR.

e. *Action on fire policy.*]—Pltf.'s declaration contained a count on a fire policy :—*Held :* the cause of action passed to the assignee.—SMITH *v.* COMMERCIAL UNION INSURANCE CO. (1873), 33 U. C. R. 529.—**CAN.**

f. *Action for breach of contract—Breach before bankruptcy.*]—Pltf. commenced an action against defts. claiming damages for the alleged breach of duty of defts., as bankers, to pay upon presentation certain cheques drawn by pltf. upon a certain account :—*Held :* the breach, if any, being prior to the bkpcy., the cause of action, if any, vested in the official assignee.—LENNOX *v.* NATIONAL BANK OF NEW ZEALAND (1909), 29 N. Z. L. R. 394.—**N.Z.**

the bkpcy. (LORD ABINGER, C.B.).—EDWARDS *v.* HOOPER (1843), 11 M. & W. 363; 12 L. J. Ex. 304; 7 Jur. 378; 152 E. R. 844.

7978. Conversion of wife's goods before marriage.]—Where a right of action of the wife of bkpt. is of such a nature that if vested in bkpt. it would pass to his assignees, the interest of bkpt. in such right of action passes to his assignees; & a right of action for the conversion, before marriage, of the wife's goods falls within such rule.—RICHBELL *v.* ALEXANDER (1861), 10 C. B. N. S. 324; 30 L. J. C. P. 268; 8 Jur. N. S. 13; 142 E. R. 477.

See, now, Married Women's Property Acts.

7979. Unliquidated damages accrued before bankruptcy.]—Assignees under 6 Geo. 4, c. 16, may maintain an action for unliquidated damages, which have accrued before the bkpcy. by non-performance of a contract.—WRIGHT *v.* FAIRFIELD (1831), 2 B. & Ad. 727; 9 L. J. O. S. K. B. 309; 109 E. R. 1314.

Annotations :—**Follo.** Porter *v.* Vorley (1832), 9 Bing. 93. **Consd.** Gibson *v.* Carruthers (1841), 8 M. & W. 321; Drake *v.* Beckham (1843), 11 M. & W. 315, Ex. Ch.; Beckham *v.* Drake (1849), 2 H. L. Cas. 579, H. L. **Refd.** Beckham *v.* Drake (1841), 8 M. & W. 846; Spence *v.* Rogers (1843), 12 L. J. Ex. 252; Hill *v.* Smith (1844), 12 M. & W. 618; Sayer *v.* Dufaur (1847), 11 Q. B. 325; Morgan *v.* Taylor (1859), 5 C. B. N. S. 653; Bailey *v.* Thurston, [1903] 1 K. B. 137, C. A.

7980. Damage incurred by distress.]—Deft., a lessee for a term, underlet to N., & put him in possession under an agreement to grant a lease when N. should have paid £1,200, which he was to do by instalments in three years, in the meantime paying rent at certain days to deft., subject to distress for non-payment. Deft. received rent from N., but omitted to pay the superior landlord, who distrained on N. for arrears due from deft. N. having become bkpt.:—*Held :* the damage incurred by such distress was a cause of action on which his assignees might sue.—HANCOCK *v.* CAFFYN (1832), 8 Bing. 358; 1 Moo. & S. 521; 1 L. J. C. P. 104; 131 E. R. 432.

Annotations :—**Refd.** Beckham *v.* Drake (1849), 2 H. L. Cas. 579, H. L. **Mentd.** Chapman *v.* Bluck (1838), 1 Arn. 27.

7981. Breach of covenant.]—Bkpt. & defts. were members of a society formed for the purpose of building a number of houses, the expenses of the undertaking to be defrayed by monthly subscriptions of the members. Bkpt. had agreed to let to the co. the ground, on which the houses were to be built, & the leases were to be made to & executed by defts., as trustees of the society, who were to be indemnified by the members for any loss or damage they might sustain in consequence of carrying the trusts into execution :—*Held :* in such circumstances, the assignees might sue the trustees, his co-partners, for breach of covenant in not paying rent.—BEDFORD *v.* BRUNTON (1834), 1 Bing. N. C. 399; 1 Scott, 245; 4 L. J. C. P. 97; 131 E. R. 1171.

Annotation :—**Mentd.** Wright *v.* Hickling (1866), L. R. 2 C. P. 199.

7982. Promissory note belonging to wife before marriage.]—Assignees cannot maintain an action in their own names alone on a promissory note, made to bkpt.'s wife before her marriage.—SHERRINGTON *v.* YATES (1844), 12 M. & W. 855; 1 Dow. & L. 1032; 13 L. J. Ex. 249; 152 E. R. 1446, Ex. Ch.; *revsg.* S. C. *sub nom.* YATES *v.* SHERRINGTON (1843), 11 M. & W. 42.

Annotation :—**Consd.** Richbell *v.* Alexander (1861), 10 C. B. N. S. 324.

See, now, Married Women's Property Acts.

7983. Action on I.O.U.]—Deft. was indebted to pltf. in £110, for which he gave an I.O.U. Before the title of pltf.'s assignee accrued, he deposited the I.O.U. with R., together with a patent, to secure a debt of £90 to R., & agreed that if the debt were not paid on or before Jan. 20, the I.O.U. & patent were to become the absolute property of R. & the debt extinguished. The title of the assignee accrued before Jan. 20. The jury found a debt of £90 due from pltf. to R. at the time of the assignment of the debt from deft. to pltf.:—*Held :* the right to sue for the debt due from deft. did not vest in the assignee, & pltf. was entitled to recover.—D'ARNAY *v.* CHESNEAU (1845), 13 M. & W. 796; 14 L. J. Ex. 190; 4 L. T. O. S. 433; 153 E. R. 334.

Annotations :—**Distd.** Castelli *v.* Boddington (1852), 1 E. & B. 66. **Consd.** Boddington *v.* Castelli (1853), 1 E. & B. 879, Ex. Ch. **Refd.** Milnes *v.* Robertson (1854), 3 C. L. R. 232; Desborough *v.* Harris (1855), 5 De G. M. & G. 439, L. C.

7984. Action for wrongful dismissal.]—A. entered into an agreement with B. & C. to serve them for seven years, at fixed wages, at the rate of three guineas weekly, "the party making default to pay to the other £500 by way or in nature of specific damages." A. was dismissed, & became bkpt., & after the bkpcy. brought an action of *assumpsit* on the agreement, to which deft. pleaded his bkpcy.:—*Held :* the plea was an answer to the action, for the right of action in respect of the breach of the agreement passed to his assignees.—BECKHAM *v.* DRAKE (1849), 2 H. L. Cas. 579; 13 Jur. 921; 9 E. R. 1213, H. L.; *affg.* S. C. *sub nom.* DRAKE *v.* BECKHAM (1843), 11 M. & W. 315, Ex. Ch.

Annotations :—**Consd.** Bell *v.* Carey (1849), 8 C. B. 887; Wetherell *v.* Julius (1850), 10 C. B. 267; Boddington *v.* Castelli (1853), 1 E. & B. 879, Ex. Ch. **Distd.** Robinson *v.* Rudkins (1856), 26 L. J. Ex. 56; Richbell *v.* Alexander (1861), 30 L. J. C. P. 268. **Consd.** *Re* Daines, *Ex p.* Assignees (1867), 16 L. T. 127; Wadling *v.* Oliphant (1875), 1 Q. B. D. 145; Emden *v.* Carte (1881), 17 Ch. D. 169; Kellaway *v.* Bury (1892), 66 L. T. 599, C. A.; *Re* Beyts & Craig, *Ex p.* Trustee (1894), 70 L. T. 561; Rose *v.* Buckett, [1901] 2 K. B. 449, C. A.; Bailey *v.* Thurston, [1903] 1 K. B. 137, C. A. **Refd.** Hill *v.* Smith (1844), 13 L. J. Ex. 243; Stanton *v.* Collier (1854), 3 E. & B. 274; Northampton Gaslight Co. *v.* Parnell (1855), 3 C. L. R. 409. **Mentd.** Denton *v.* Williams (1839), 8 Dowl. 123; Williams *v.* Chambers (1847), 10 Q. B. 337; Galsworthy *v.* Strutt (1848), 1 Exch. 659; Elliot *v.* Clayton (1851), 16 Q. B. 581; Emmens *v.* Elderton (1853), 13 C. B. 495. H. L.; Betts *v.* Burch (1859), 4 H. & N. 506; Bristow *v.* Whitemore (1859), 4 De G. & J. 325, L. C.; Spurr *v.* Cass, Cass *v.* Spurr (1870), L. R. 5 Q. B. 656; Calder *v.* Dobell (1871), L. R. 6 C. P. 486, Ex. Ch.; Formby *v.* Barker, [1903] 2 Ch. 539, C. A.

7985. —— & remuneration.]—Pltf., an architect, sued for remuneration in respect of employment under a contract made in 1877, & for damages for an alleged wrongful dismissal from such employment in 1880. Pltf. was adjudicated bkpt. in 1878, & had never obtained his discharge :—*Held :* the cause of action for remuneration & damages passed to the trustee, & the proper course was to add him as co-pltf. in the action, & give him the conduct of the action.—EMDEN *v.* CARTE (1881), 17 Ch. D. 768; 51 L. J. Ch. 41; 44 L. T. 636; 29 W. R. 600, C. A.

Annotations :—**Distd.** *Re* Hutton, *Ex p.* Benwell (1884), 14 Q. B. D. 301, C. A. **Consd.** *Re* Rogers, *Ex p.* Collins (1893), 1 Mans. 387; Bailey *v.* Thurston, [1902] 2 K. B. 397; Affleck *v.* Hammond, [1912] 3 K. B. 162, C. A.

g. —— —— *Contract for personal service.*]—A right of action for breach of contract for the personal service of bkpt., if the breach takes place before the bkpcy., vests upon bkpcy. in the official assignee, but if the breach does not take place until after the bkpcy., the right of action remains vested in bkpt., although the official assignee may intervene & claim the fruits of the judgment.—LENNOX *v.* NATIONAL BANK OF NEW ZEALAND (1909), 29 N. Z. L. R. 394. —N.Z.

h. —— —— *Trustee being person against whom right of action exists.*]—Insolvent's right of action arising before insolvency out of breach of contract vests upon insolvency in his trustee, though that trustee be the person, against whom the right of action exists.—VAIL *v.* GILMOUR (1885), 11 V. L. R. 381.—AUS.

Sect. 1.—*What causes of action pass to trustee. Sects.* 2 & 3: *Sub-sect.* 1.]

Wingfield *v.* Wingfield, [1919] 1 Ch. 462, C. A. **Refd.** Mercer *v.* Vans Colina (1897), [1900] 1 Q. B. 130, n.; *Re* Roberts, [1900] 1 Q. B. 122, C. A. **Mentd.** Luddy's Trustee *v.* Peard (1886), 33 Ch. D. 500.

7986. Action for return of premiums—Action for average loss.]—Debtor effected an insurance on goods, & by the policy part of the premiums was to be returned, if the risk ended at specified places. Before his bkpcy. debtor sold the goods & assigned the policy:—*Held:* the right to sue for the return of the premium passed on his bkpcy. to his assignees, but in an action for an average loss, bkpt. might sue as trustee for his vendee.—BODDINGTON *v.* CASTELLI (1853), 1 E. & B. 879; 23 L. J. Q. B. 31; 21 L. T. O. S. 197; 17 Jur. 781; 1 W. R. 359; 1 C. L. R. 281; 118 E. R. 665, Ex. Ch.

Annotations:—**Mentd.** Westoby *v.* Day (1853), 2 E. & B. 605; Johnson *v.* Diamond (1855), 11 Exch. 73; Rose *v.* Buckett (1901), 84 L. T. 670, C. A.

7987. Action on agreement to supply evidence.]—Where a person, after agreeing to supply evidence for the recovery of property in consideration of receiving a share, petitions the Insolvent Debtors Ct., & a vesting order is made, his right to sue on the agreement vests in the assignee, & insolvent is not entitled to sue, in the event of the assignee not interfering.—SPRYE *v.* PORTER (1856), 7 E. & B. 58; 26 L. J. Q. B. 64; 28 L. T. O. S. 229; 21 J. P. 35; 5 W. R. 81; 3 Jur. N. S. 330; 119 E. R. 1169.

Annotations:—**Mentd.** Earle *v.* Hopwood (1861), 9 C. B. N. S. 566; Hilton *v.* Woods (1867), L. R. 4 Eq. 432; Hutley *v.* Hutley (1873), L. R. 8 Q. B. 112; Ball *v.* Warwick (1881), 44 L. T. 218; Bradlaugh *v.* Newdegate (1883), 11 Q. B. D. 1; James *v.* Kerr (1889), 40 Ch. D. 449; Rees *v.* Bernardy, [1896] 2 Ch. 437; Savill *v.* Langman (1898), 79 L. T. 44, C. A.; Glegg *v.* Bromley, [1912] 3 K. B. 474, C. A.; Neville *v.* London Express Newspapers, [1919] A. C. 368, H. L.

Champertous agreements, *see, generally*, ACTION, Vol. I., pp. 70 *et seq.*

7988. Action for special damage—Refusal to allow debtor to redeem machinery.]—A declaration upon an agreement, whereby pltf. agreed with deft., his execution creditor, that deft. should take a printing-press, subject to pltf.'s right to redeem on payment of £150 & costs, alleged, as a breach, that though pltf. tendered the money, deft. would not accept it or replace the printing-press, whereby pltf. lost the profits of trade, & became insolvent. Deft. pleaded that after the cause of action accrued, & before action brought, pltf. petitioned the Insolvent Ct., & a vesting order was made:—*Held:* the cause of action & the special damages alleged passed to the assignees.—STANTON *v.* COLLIER (1854), 3 E. & B. 274; 23 L. J. Q. B. 116; 22 L. T. O. S. 240; 18 Jur. 650; 2 W. R. 197; 2 C. L. R. 1151; 118 E. R. 1143, C. A.

Annotation:—**Refd.** Cook *v.* Whellock (1890), 24 Q. B. D. 658, C. A.

7989. Action for Indemnity.]—Pltf. acted as next friend to an infant, & judgment was given against him with costs. He subsequently became bkpt., & brought an action against deft., a solr., who had given him an indemnity against the costs:—*Held:* the cause of action was in his trustee.—OSMAN *v.* RAPHAEL (1896), 12 T. L. R. 376, C. A.

SECT. 2.—ASSIGNMENTS BY TRUSTEE OF CAUSES OF ACTION.

7990. Assignment of right to sue—Assignee from trustee entitled to continue action.]—The trustee of a man, who had conveyed away some real property absolutely, commenced an action against the grantee to have it declared that the conveyance was a mtge., & that the deed ought to stand as a security only for the money advanced. The action had proceeded no further than the issue of the writ, when the trustee sold & assigned the subject-matter of the action to a purchaser for value:—*Held:* the assignee from the trustee was entitled to continue the action.—SEEAR *v.* LAWSON (1880), 15 Ch. D. 426; 49 L. J. Bcy. 69; 42 L. T. 893; 28 W. R. 929, C. A.; *subsequent proceedings*, 16 Ch. D. 121, C. A.

Annotations:—**Apld.** Guy *v.* Churchill (1888), 40 Ch. D. 481. **Refd.** Howard *v.* Fanshawe, [1895] 2 Ch. 581; *Re* Perkins, Poyser *v.* Beyfus, [1898] 2 Ch. 182, C. A. **Mentd.** Burr *v.* Wimbledon L. B. (1887), 56 L. T. 329; Defries *v.* Milne (1912), 82 L. J. Ch. 1, C. A.

7991. —— Covenant to repair.]—An agreement made between A. & D., not under seal, stipulated that until the lease of certain premises thereby agreed to be granted should be executed, D., his heirs, executors, administrators, & assigns should be bound by all the covenants set forth in the agreement, amongst which was a covenant that D., his heirs, exors., administrators, & assigns should leave the whole of the premises & fixtures then in & intended to be fixed in or about the messuage & premises in a perfect & tenantable state of repair at the expiration of the term therein mentioned, or sooner determination thereof. No lease by deed was ever granted in accordance with the agreement, but D. & his representatives entered into possession under the agreement, & continued therein until the expiration of the term for which it was intended the lease should be granted. During the currency of the term mentioned in the agreement A. was adjudicated a bkpt., & his trustee sold & assigned to pltf. all the property of bkpt. In an action for breach of the contract to repair:—*Held:* the right of action in respect of the breach of the contract was a chose in action of bkpt., which passed to pltf., & pltf. was not bound to have given notice of the assignment under Jud. Act, 1873 (c. 66), s. 25 (6).—GIBBON *v.* DUDGEON (1881), 45 J. P. 748.

7992. —— Bankrupt's right of indemnity against sub-tenant.]—A lessee assigned the lease to A., who assigned it to B., each assignment containing a covenant by the assignee to pay the rent, & keep his assignor indemnified against the covenants in the lease. A. became bkpt., B. died, & the lessee, who had been called upon to pay the rent, bought from bkpt.'s trustee, & took an assignment of, bkpt.'s right to indemnity, withdrawing a proof he, the lessee, had carried in, & releasing the estate of bkpt.:—*Held:* (1) the right of A.'s trustee to sue B.'s exors. upon his covenant to indemnify was assignable by the trustee, & damages in an action by the trustee against the exors. would not be confined to the dividend payable to the lessee in respect of his proof against A.'s estate, but extended to the whole amount of the obligation under the covenants to pay & indemnify entered into by such assignee; (2) upon the construction of the deed of assignment & release, the lessee had acquired the right of the trustee to sue the exors., & the release did not extend to all the estate of bkpt., but the asset assigned to the lessee must be excluded from it.—*Re* PERKINS, POYSER *v.* BEYFUS, [1898] 2 Ch. 182; 67 L. J. Ch. 454; 78 L. T. 666; 46 W. R. 595; 14 T. L. R. 464; 42 Sol. Jo. 591; 5 Mans. 193, C. A.

Annotations:—**Consd.** Ellis *v.* Torrington (1919), 35 T. L. R. 531. **Mentd.** *Re* Law Guarantee Trust & Accident Soc., Liverpool Mortgage Insce. Case, [1914] 2 Ch. 617, C. A.; British Union & National Insce. *v.* Rawson, [1916] 2 Ch. 152.

See, also, Nos. 8178 *et seq.*, *post.*

See, generally, Part XX., Sect. 16, *ante.*

SECT. 3.—ACTIONS, ETC., BY TRUSTEE.

SUB-SECT. 1.—IN GENERAL.

7993. What trustees may sue—One of two or more trustees—Equity suit.]—One of two or more assignees may sue in equity without the others joining in the suit.—WILKINS *v.* FRY (1816), 1 Mer. 244 ; 2 Rose, 371 ; 35 E. R. 665.

Annotations :—**Mentd.** Fenn *v.* Craig (1838), 3 Y. & C. Ex. 216 ; Levi *v.* Ayers (1878), 3 App. Cas. 842, P. C.

7994. —— Trustee under Irish commission—Debt contracted in England.]—Assignees under an Irish commission may maintain an action in England to recover a debt contracted with bkpt. in England.—FERGUSON *v.* SPENCER (1840), 1 Man. & G. 987 ; 2 Scott, N. R. 229 ; 10 L. J. C. P. 20 ; 133 E. R. 632.

Annotations :—**Refd.** Bartley *v.* Hodges (1861), 1 B. & S. 375; Ellis *v.* M'Henry (1871), L. R. 6 C. P. 228 ; *Re* Nelson, *Ex p.* Dare & Dolphin, [1918] 1 K. B. 459, C. A.

7995. —— Trustee under Scotch sequestration—For chose in action.]—*Held :* a trustee under 54 Geo. 3, c. 137, could not sue in his own name for a chose in action.—JEFFERY *v.* M'TAGGART (1817), 6 M. & S. 126 ; 105 E. R. 1190.

Annotations :—**Distd.** Sidaway *v.* Hay (1824), 3 B. & C. 12; Vertue *v.* East Anglian Rys. Co. (1850), 5 Exch. 280. **Mentd.** Ferguson *v.* Spencer (1840), 1 Man. & G. 987.

7996. —— Trustee under second bankruptcy—Trustee under first bankruptcy not interfering.]—The assignees under a second fiat against a trader, who has not obtained his certificate under the first, may maintain an action against a third person for the conversion of property acquired by bkpt. after the date of the first fiat, the assignees under the first fiat not intervening.—MORGAN *v.* KNIGHT (1864), 15 C. B. N. S. 669 ; 3 New Rep. 469 ; 33 L. J. C. P. 168 ; 9 L. T. 803 ; 12 W. R. 428 ; 143 E. R. 947.

Annotations :—**Consd.** *Re* Clark, *Ex p.* Beardmore, [1894] 2 Q. B. 393, C. A. **Refd.** *Re* Roberts, *Ex p.* Watson (1879), 12 Ch. D. 380, C. A. ; *Re* Clarke, *Ex p.* Dickenson (1894), 70 L. T. 284. **Mentd.** Barker *v.* Furlong, [1891] 2 Ch. 172.

7997. —— Official assignee—Before formal appointment.]—An official assignee filed a bill to impeach a settlement of part of bkpt.'s property. He was not formally appointed assignee until after the filing of the bill :—*Held :* the official assignee had an inchoate title before the filing of the bill, & it was sufficient if he produced the order appointing him assignee at the hearing of the cause.—BARNARD *v.* FORD, CARRICK *v.* FORD (1869), 4 Ch. App. 247 ; 20 L. T. 289 ; 17 W. R. 478, L. JJ.

Annotation :—**Mentd.** *Re* Lush's Trusts (1869), 4 Ch. App. 591, L. JJ.

7998. To what proceedings trustee necessary party—Bill in equity for delivery up of deed—& injunction to restrain proceedings thereon.]—The assignee of insolvent debtor is a necessary party to a bill in equity, praying that an instrument,

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PART XXI. SECT. 3, SUB-SECT. 1.

i. *What conditions must be satisfied—Existence of condition precedent which trustee unable to perform.*]—*Held :* 1867 Act, s. 166, would not enable a trustee to maintain an action where there was any condition precedent which he was not able to perform.—MCMANAWAY *v.* CLELAND (1870), 1 C. A. 343.— **N.Z.**

j. —— *Regard to interests of estate—Probability of success.*]—Though it is lawful for a trustee to commence actions on behalf of the insolvent estate he should only do so in due regard to the interests of the estate & when there is a probability that something will be recovered thereby.—MACKIE, DUNN & CO. *v.* REINACH'S TRUSTEE (1885), 2 Buch. A. C. 30. —**S. AF.**

k. —— *Under Bulk Sales Act.*]—NATIONAL TRUST CO. *v.* NADON (1915), 30 W. L. R. 588 ; 7 W. W. R. 1067 ; 24 D. L. R. 742 ; 8 Sask. L. R. 41.—**CAN.**

7993 i. *What trustees may sue—One of two or more trustees—Execution of power of attorney.*]—Where an action is brought by two or more trustees of an insolvent estate the power of attorney to sue must be signed by or on behalf of all the trustees.—MULLER BROTHERS *v.* LOMBARD, VAN AARDE & CO. (1904), 21 S. C. 657.—**S. AF.**

l. —— *Trustee under English bankruptcy.*]—Where property of an English bkpt. has become vested in his trustees in England, the title of such trustees may receive recognition in colonial cts., & no order or request from the English ct. is necessary to enable the trustees to sue in Victoria to recover the Victorian property of bkpt.—NIVEN *v.* GRANT (1903), 29 V. L. R. 102.—**AUS.**

Auxiliary jurisdiction of English & Colonial courts, *see, generally,* Part I., Sect. 7, *ante.*

m. —— *Trustee under Scotch sequestration.*]—The assignee of a Scotch bkpt. having brought trover for scrip certificates, & other securities for money, alleging a conversion before the bkpcy., it was objected that, under 2 & 3 Vict. c. 41, ss. 49, 78, such action was not maintainable in the absence of proof that the damages were attachable for debt, or would have passed by assignation intimated, according to the law of Scotland :—*Held :* ss. 3 & 49 were, in themselves, sufficient to entitle pltf. to recover in the action, & the ct. were not bound to put any construction upon s. 78.—MURRAY *v.* BOLTON (1852), 4 Ir. Jur. 338.—**IR.**

n. —— *Trustee in foreign bankruptcy.*]—A Scotsman, who carried on business in France, was declared bkpt. by the cts. of that country, & a syndic, who, by the law of France, had the exclusive right to sue on behalf of the creditors, was appointed to administer bkpt.'s estates :—*Held :* the syndic had a title to sue in the Scots Ct. for reduction of a deed, by which bkpt. gratuitously discharged his right to movable estate situated in Scotland.—OBERS *v.* GIBB (PATON'S TRUSTEES) (1897), 24 R. (Ct. of Sess.) 719.—**SCOT.**

o. —— *Assignee of insolvent debtor—Cannot sue in own name in like manner as assignee of bankrupt—3 & 4 Geo. 3, c. 5.*]—COLLINS *v.* REID (1866), 2 Old. 252.—**CAN.**

p. —— —— *Action to make liable property acquired after discharge.*]—The assignee of insolvent cannot maintain a suit to make the property of insolvent, acquired after his discharge, liable, unless he be a creditor, or has entered up judgment against insolvent, pursuant to Insolvent Act, ss. 78, 79.—GLENNY *v.* WOOLSEY (1856), 4 I. Ch. R. 636.—**IR.**

q. —— *Provisional assignee—Bankruptcy before 12 Vict. c. 43.*]—BEARDSLEY *v.* STEPHENSON (1850), 1 All. 631.—**CAN.**

r. —— *Trustee who has rendered relief sought useless.*]—A. mortgaged land to B., & then made an assignment under R. S. O., 1897 (c. 147), for creditors to C., who conveyed to B. the equity of redemption in the land. B. & C. brought an action to have a lease of the land made by mtgor. to D. declared void, & alleged that the lease was made voluntarily when the lessor was, to the knowledge of the lessee, in insolvent circumstances, & with intent to defraud creditors :—*Held :* the right to relief upon the latter ground could be claimed only by C., & his right terminated when he so dealt with the estate as to render the relief useless to it, & he was improperly joined as pltf.—BANK OF HAMILTON *v.* ANDERSON (1904), 24 C. L. T. 347 ; 8 O. L. R. 153 ; 3 O. W. R. 301, 380, 709.—**CAN.**

s. —— *Trustee claiming adversely to bankrupt.*]—A creditor, against whom a commission had issued, presented a petition, charging the assignees of his debtor with mismanagement, & the petition was ordered to stand over until the validity of the commission against him should be determined. Afterwards his assignee, before that question was determined, presented another petition praying that it might be deemed a supplement to & adoption of the former petition :—*Held :* two persons claiming adversely to one another being unable to unite to form a cumulative title, the petition should be dismissed.—*Re* FRENCH & CO., *Ex p.* SOMERS (1828), 1 Mol. 431. —**IR.**

t. —— *Trustees of joint estate—For debt due to separate estate.*]—Assignees under a joint commission against A. & B., may, as such, maintain an action for the use & occupation of premises which belonged to A., without describing themselves as the assignees of the separate estate of A., when the rent becomes due for occupation subsequent to the bkpcy., the assignment passing the reversion to the assignees by virtue of the joint commission.—PEPPER *v.* MOLONY (1832), Alc. & N. 62.—**IR.**

7997 i. —— *Official assignee—After withdrawal of petition.*]—On Oct. 14, 1903, a petition in insolvency was filed & a vesting order was made by the ct. On June 15, 1904, insolvents took out a rule *nisi* to withdraw their petition, & the rule was made absolute on Sept. 21, but the orders were not drawn up till Feb. 27, 1906. The official assignee filed a suit on Mar. 2, 1905, on behalf of insolvents to recover a sum of money alleged to be due in respect of certain mercantile transactions :—*Held :* the official assignee was competent to bring & continue the suit after the order of withdrawal.—HAJI SAJAN *v.* MACLEOD (1907), I. L. R. 32 Bom. 321.—**IND.**

7998 i. *To what proceedings assignee necessary party—Action on insurance policy absolutely assigned for creditors.*]

Sect. 3.—Actions, etc., by trustee: Sub-sect. 1.]

which belonged to insolvent prior to his insolvency, may be delivered up to him, & an injunction to restrain proceedings upon it.—BALLS *v.* STRUTT (1841), 1 Hare, 146; 66 E. R. 984.

7999. —— Action for conversion before marriage of wife's goods.]—An action brought to enforce a right of action for the conversion, before marriage, of the wife's goods must be brought in the names of the wife & of the assignees, who are necessary parties, & an action by husband & wife must fail.—RICHBELL *v.* ALEXANDER (1861), 10 C. B. N. S. 324; 30 L. J. C. P. 268; 8 Jur. N. S. 13; 142 E. R. 477.

See, now, Married Women's Property Acts.

8000. In what court—At law or in equity.]—Where a suit would, but for the fact of a bkpcy., be fit to be entertained by the Ct. of Ch., the jurisdiction is not taken away by 1869 Act; & when a trustee has, in respect of bkpt.'s estate, a claim against a third person, that claim may be prosecuted at law or in equity, & is not subject to the jurisdiction of the Ct. of Bkpcy.—ELLIS *v.* SILBER (1872), 8 Ch. App. 83; 42 L. J. Ch. 666; 28 L. T. 156; 21 W. R. 346, L. C.

Annotations:—**Refd.** Halliday *v.* Harris (1874), L. R. 9 C. P. 663; *Re* Wood, *Ex p.* Musgrave (1878), 10 Ch. D. 94; *Re* Barnett, *Ex p.* Reynolds (1885), 15 Q. B. D. 169, D. C. **Mentd.** *Re* England, *Ex p.* Pennell (1877), 47 L. J. Bcy. 21, C. A.; *Re* Pollard, *Ex p.* Dickin (1878), 8 Ch. D. 377, C. A.

8001. —— Chancery division—Action for foreclosure.]—The trustee of an equitable mtgee. by deposit may bring an action in the Ch. Div. for foreclosure against the trustee of the mtgor., & is not obliged to apply to the Ct. in Bkpcy.—WADDELL *v.* TOLEMAN (1878), 9 Ch. D. 212; 38 L. T. 910; 26 W. R. 802.

8002. —— Kings Bench Division—Order for payment by county court judge in bankruptcy.]—A county ct. judge in bkpcy. made an order for payment of money to the official receiver, who instituted an action in the K. B. Div. to recover the amount:—*Held:* the action was maintainable.—SAVILL *v.* DALTON, [1915] 3 K. B. 174; 84 L. J. K. B. 1583; 113 L. T. 477; 59 Sol. Jo. 562; [1915] H. B. R. 154, C. A.

Bankruptcy jurisdiction, *generally, see* Part I., *ante.*

8003. Within what time—Application to set aside proceedings—Irregularity.]—Assignees applying to set aside proceedings, on the ground of irregularity, must come to ct. within a reasonable time after notice of the irregularity.—BUTTERWORTH *v.* WILLIAMS (1846), 4 Dow. & L. 82; 1 Saund. & C. 168; 7 L. T. O. S. 235.

8004. —— —— ——.]—If assignees after a long interval apply to the ct. to set aside proceedings involving the estate of bkpt., they must give some satisfactory reason for the delay.—AMADIO *v.* SHOWELL (1847), 1 Saund. & C. 305; 8 L. T. O. S. 369.

8005. —— —— ——.]—A judgment against bkpt. will not be set aside for irregularity, unless the assignees apply within four days after they have notice of it.—ALCOCK *v.* SUTCLIFFE (1847), 16 L. J. Q. B. 129; 8 L. T. O. S. 321, 395; 11 Jur. 126.

8006. When proceedings by petition competent—Where creditor has proved— & success would give trustee lien on dividends.]—Where a creditor has proved a debt, & the assignees have a demand against him, which if determined in their favour would give them a lien upon the dividends, they may proceed by a petition in the bkpcy. to enforce that demand.—*Re* BROWN, *Ex p.* TIMBREL (1819), Buck, 305.

8007. —— —— Right to bring second action.]—Assignees not restrained from bringing a second action, having been non-suited in the first, for the recovery of certain sums from a creditor who had given credit for them in his account, & had proved for the balance; but the general rule is that they must proceed by petition, if the creditor has proved.—*Re* OLIVER, *Ex p.* HILTON (1820), 1 Jac. & W. 467; 37 E. R. 446, L. C.

Annotation:—**Mentd.** *Re* Morton, *Ex p.* Robertson (1875), L. R. 20 Eq. 733.

8008. Whether notice necessary—Motion against high bailiff to deliver goods taken in execution.]—A motion by a trustee against a high bailiff to deliver up to him goods of debtor taken in execution by him or their value,, is not an action within County Cts. Act, 1888 (c. 43), ss. 53, 54, so as to require notice in writing to be given to the high bailiff before commencing the same.—*Re* LOCK, *Ex p.* POPPLETON (1890), 63 L. T. 320; 39 W. R. 15; 7 Morr. 184, D. C.

8009. Joinder of actions—Trustees under separate commissions—Joint debt due to both bankrupts.]—The assignees of A., & also of B., under separate commissions, cannot recover in the same action a joint debt due from deft. to both bkpts., & also separate debts due to each; & if in such an action the jury have assessed the damages severally on the separate counts, the ct. will arrest the judgment on those counts, which demand the debts due to each bkpt. separately.—HANCOCK *v.* HAYWOOD (1789), 3 Term Rep. 433; 100 E. R. 661.

Annotations:—**Consd.** Graham *v.* Mulcaster (1827), 4 Bing. 115. **Refd.** Richardson *v.* Griffin (1816), 5 M. & S. 294. **Mentd.** De Cosson *v.* Vaughan (1808), 10 East, 61.

—An absolute assignment for the benefit of creditors of all interest in insurance policies precludes the assignor from suing the insurance cos. in his own name.—TAYLOR *v.* EQUITABLE FIRE & MARINE INSURANCE CO., [1918] 1 W. W. R. 277; 13 Alta. L. R. 58.—**CAN.**

a. *Joinder of parties—Not insolvent as co-plaintiff.*]—JOHNSON *v.* MONTREAL & THE CITY OF OTTAWA JUNCTION RY. CO. (1875), 22 Gr. 290.—**CAN.**

b. *S. P.* KERR *v.* READ (1875), 22 Gr. 529.—**CAN.**

c. *S. P.* MARRECO *v.* DAVIES (1910), 44 I. L. T. 208.—**IR.**

d. *S. P.* CASHELL *v.* KELLY (1842), 1 Con. & Law. 246; 2 Dr. & War. 181.—**IR.**

e. —— *Not creditors under trust deed—Action to recover debt due to insolvent.*]—O'CONNELL *v.* CHARLES (1851), 2 Gr. 489.—**CAN.**

f. *Venue.*]—In an action of *assumpsit* for money had & received, brought by assignees against the sheriff, to recover the proceeds of a sale of bkpt.'s effects, made by the sheriff pursuant to a writ of *fi. fa.*:—*Held:* the venue was local.—RUSSELL *v.* WHALEY (1843), 6 I. L. R. 334.—**IR.**

8000 i. *In what court—At law or in equity.*]—A. on going into business in 1823, obtained from B. a transfer of £500 of Bank of Ireland stock, & in 1825, a further transfer of £500 same stock, which continued in A.'s name, & he used every power over such stock until 1827, when he became embarrassed; he then retransferred all the stock to B. & shortly afterwards became bkpt. B. had besides these sums £150,000 in the same stock, the dividends of which were received for him by a regular power of attorney. A.'s assignee filed a bill against B. praying that the transfers made to him might be declared to have been made in trust for A., or that they were made in contemplation of bkpcy.:—*Held:* the proper remedy was at law, but the bill would be retained in order to give relief, if pltf. on issuing execution could not get any pecuniary fruits from it.—IZON *v.* MARSH (1830), 3 Ir. L. Rec. 1st ser. 219, 235, 310.—**IR.**

8000 ii. —— *Motion in nature of administration suit.*]—A motion in the nature of an administration suit may be brought by an official assignee in the Bkpcy. Ct. under 1887 Act, s. 130 (6).—*Re* TAYLOR, *Ex p.* OFFICIAL ASSIGNEE & HART (1893), 14 N. S. W. L. R. 58.—**AUS.**

h. *Joinder of actions.*]—*Semble:* where an action is brought by insolvent to set aside a judgment in a matrimonial suit, & a similar action is brought on behalf of the estate, the ct. will stay one of the actions or order a joinder of the two.—KILFOIL *v.* FISHER (1916), W. L. D. 1.—**S. AF.**

k. —— *Application by assignees to restrain creditors from selling under judgment refused—Payment by assignees under protest—Supplemental bill for repayment to assignees allowed.*]—JOHNS *v.* BARBOUR (1886), 7 R. & G. 121; 7 C. L. T. 172.—**CAN.**

8010. —— ——.]—A., B. & C. having been appointed assignees under three separate commissions cannot sue as joint assignees, but must state their several & respective interests in the declaration.—RAY *v.* DAVIES (1818), 2 Moore, C. P. 3; 8 Taunt. 134; 129 E. R. 333.

Annotation :—**Distd.** Graham *v.* Mulcaster (1827), 5 L. J. O. S. C. P. 118.

8011. —— Trustees of two jointly & one separately—Debt to three jointly.]—Pltfs. sued as assignees of A. & B. & also as assignees of C. for joint demand due to all bkpts. :—*Held :* such declaration was good.—STREATFIELD *v.* HALLIDAY (1790), 3 Term Rep. 779; 100 E. R. 855.

Annotation :—**Mentd.** *Re* Chambers, *Ex p.* Chambers (1835), 1 Deac. 197, Ct. of R.

8012. —— Trustee of two jointly—Recovery of share of one bankrupt in partnership goods seized.]—A. & B. were partners. A. committed an act of bkpcy., & afterwards, but before the bkpcy. of B., the sheriff seized goods, which had belonged to A. & B., under an execution against them :—*Held :* the assignee of A. & B., under a joint commission, could not, suing as such, recover A.'s share of the property therein.

If assignees under a joint commission declare for the separate property of one, they must declare to the assignees of that one (PARK, J.).—HOGG *v.* BRIDGES (1818), 8 Taunt. 200; 2 Moore, C. P. 122; 129 E. R. 360.

Annotation :—**Refd.** Smith *v.* Watson (1848), 11 L. T. O. S. 105.

8013. —— —— Debts due to each separately.]—Assignees under a joint commission against two partners may recover in the same action debts due to the partners jointly & debts due to them separately.—GRAHAM *v.* MULCASTER (1827), 4 Bing. 115; 12 Moore, C. P. 327; 5 L. J. O. S. C. P. 118; 130 E. R. 711.

8014. —— Trustees of two bankrupt partners & solvent partner—Debt due to firm.]—Two of three partners, affecting, but without authority, to bind the firm by deed, assigned a debt due to them from a correspondent abroad, without his privity, to a creditor at home, & afterwards by direction of such correspondent drew a bill of exchange in the name of the firm upon his agent in England, which was accepted, payable to their own order for the amount of the debt, the two partners, having in the meantime committed acts of bkpcy., indorsed such bill to the creditor of the firm in part satisfaction of his debt, & afterwards separate commissions were sued out against the two partners, who were declared bkpts., & their effects assigned, the other partner being all the time abroad :—*Held :* the solvent partner might join with the assignees of the other two in maintaining an action for money had & received to recover back from the creditor the amount of the bill received by him from the acceptor.—THOMASON *v.* FRERE (1809), 10 East, 418; 103 E. R. 834.

Annotations :—**Mentd.** Drayton *v.* Dale (1823), 3 Dow. & Ry. K. B. 534; Lacy *v.* Woolcott (1823), 2 Dow. & Ry. K. B. 458; Craven *v.* Edmondson (1830), 4 Moo. & P. 622; Burt *v.* Moult (1833), 1 Cr. & M. 525; *Re* Houghton, *Ex p.* Robinson (1833), 1 Mont. & A. 18; Goldsmid *v.* Raphael (1836), 5 L. J. C. P. 329.

8015. Assent of creditors—Whether necessary—Creditors having no interest in object of suit.]—To a suit instituted by assignees on behalf of bkpt., in the object of which the creditors have no interest, the assent of the creditors is not necessary.—WILKINS *v.* FRY (1816), 1 Mer. 244; 2 Rose, 371; 35 E. R. 665.

Annotations :—**Mentd.** Fenn *v.* Craig (1838), 3 Y. & C. Ex. 216; Levi *v.* Ayres (1878), 3 App. Cas. 842, P. C.

8016. —— Voting by creditors—Proxy.]—*Held :* the institution of a suit by assignees under 6 Geo. 4, c. 16, s. 88, might be authorised by creditors voting by attorney as effectively as by creditors voting in person.—BANNATYNE *v.* LEADER (1838), 3 My. & Cr. 379; 7 L. J. Ch. 87; 2 Jur. 91; 40 E. R. 972, L. C.

8017. Use of creditor's name—Trustee liable to return notes to creditor—Action to reclaim amount from party with whom notes left.]—M. & a bank mutually exchanged their notes at stated periods. M. became bkpt., his agent B. in Edinburgh having the notes of the bank in his hands. The assignees allowed B. to retain the notes in account with them, he having claims against M. :—*Held :* the bank could recover the notes against the assignees, but they must allow the assignees the use of their name, in order to enable them to reclaim what they might be able from B.—*Re* MABERLEY, *Ex p.* NATIONAL BANK OF SCOTLAND (1834), 1 Mont. & A. 644; 4 Deac. & Ch. 32, Ct. of R.

8018. Form of order giving leave—Trustee suing in his own name—& that of solvent partner—Whether general or special.]—Where one of two partners is bkpt., the order authorising the assignees to sue in their own names, & in that of the solvent partner, under 6 Geo. 4, c. 16, s. 89, may be a general order applicable to all actions & suits, & not a special order for each action or suit.—*Re* BRYANT, *Ex p.* WILSON (1837), 2 Deac. 387, Ct. of R.

8019. Stay of proceedings—Action brought without leave—Jurisdiction of court.]—*Held :* 1849 Act, s. 153, did not enable the ct., in which an action had been brought by the assignees without the leave of the Ct. of Bkpcy., to stay the proceedings.—LEE *v.* SANGSTER (1857), 2 C. B. N. S. 1; 26 L. J. C. P. 151; 29 L. T. O. S. 93; 3 Jur. N. S. 444; 5 W. R. 487; 140 E. R. 310.

Annotations :—**Extd.** Sturgis *v.* Evans (1864), 2 H. & C. 964. **Apld.** *Re* Branson, *Ex p.* Trustee, [1914] 2 K. B. 701. **Refd.** Dublin City Distillery *v.* Doherty, [1914] A. C. 823, H. L. **Mentd.** *Ex p.* Wyld (1860), 2 De G. F. & J. 642, L. C. & L. JJ.

8020. Change of parties—Original trustee removed—After decree nisi but before decree absolute—Supplemental bill.]—A bill was brought by the assignees of W., a bkpt.; the cause was heard, & two defts. not appearing, the decree pronounced was, as to them, to be unless cause. Before it was made absolute, the assignees were removed, & pltfs. being chosen assignees in their room, they filed a supplemental bill in nature of a bill of revivor, & prayed a *subpœna* for defts., the defaulters, to show cause against the decree, without

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8015 i. *Assent of creditors—Whether necessary.*]—The county judge may sanction a suit in the name of the assignee for the benefit of the estate, notwithstanding a majority, both in number & value, of the creditors pass a resolution forbidding further proceedings.—*Re* LAMBE (1867), 13 Gr. 391.—**CAN.**

8015 ii. —— ——.]—It is doubtful if the trustees of an insolvent estate have the right to appeal from the judgment of the ct., contrary to the wish of one class of creditors of the insolvent estate.—*Re* DOOLING & KELLY'S INSOLVENCY (1818), 1 Nfld. L. R. 73.—**NFLD.**

I. *Leave of court—Time for obtaining.*]—The official assignee should obtain leave before suing; it cannot be granted in the course of the suit *nunc pro tunc.*—COCHRANE *v.* OWEN (1864), 2 Hyde, 150.—**IND.**

8019 i. *Stay of proceedings—Garnishee proceedings pending.*]—In an action brought by an assignee in insolvency on a debt admitted to be due to insolvent, defts. applied for a stay of proceedings & for an interpleader to try the rights of the assignee as against various creditors, who had served attaching orders & garnishing summonses prior to the insolvency :—*Held :* defts. should have had the garnishment proceedings disposed of in the cts. in which they had been taken, instead of making the application, which was refused.—PICKEN *v.* VICTORIA RY. CO. (1879), 44 U. C. R. 372—**CAN.**

Sect. 3.—*Actions, etc., by trustee: Sub-sects.* 1 & 2.]

praying that they should do so. All defts. answered the new bill, & when the cause came on to be heard, one deft., who made default at the former hearing, again made default, but no *subpœna* to show cause against the former decree had been served, nor did pltfs. by the supplemental bill pray that defts. might show cause against the former decree. It was objected to pltfs. proceeding so as to pray, that the former decree might be carried into execution, its not having been made absolute:—*Held:* the objection was good & the former cause should be ordered to be carried on, & prosecuted, with liberty to pltfs. to serve defts., the defaulters, with a *subpœna* to show cause against the former decree. —BROWN *v.* HEATHCOTE (1745), Dick. 100; 21 E. R. 206, L. C.

8021. —— Substitution of new trustee—When permitted.]—*Held:* applied only to cases in which the assignee was pltf., & not where he was deft., & did not authorise the substitution of the name of the new provisional assignee in lieu of the former provisional assignee of the ct.—BAINBRIGGE *v.* BLAIR (1832), 1 You. 386; 159 E. R. 1043.

Annotation:—**Apprvd.** Mendham *v.* Robinson (1833), 1 My. & K. 217, L. C.

8022. —— Order to continue necessary—Notice must be given to parties.]—When a trustee suing in his official name is removed, & a new trustee appointed, the new trustee must obtain an order to continue the action, & give notice thereof to the parties.—POOLEY'S TRUSTEE *v.* WHETHAM (1884), 28 Ch. D. 38; 54 L. J. Ch. 182; 51 L. T. 608; 33 W. R. 423; 1 T. L. R. 37, C. A.; *subsequent proceedings* (1886), 33 Ch. D. 76, 111.

Annotations:—**Mentd.** Cowell *v.* Taylor (1885), 31 Ch. D. 34, C. A.; *Re* Clough, Bradford Commercial Banking Co. *v.* Cure (1887), 35 Ch. D. 7, C. A.

SUB-SECT. 2.—WHAT ACTIONS MAINTAINABLE.

8023. Against party inducing debtor to abuse credit—& purchasing from debtor at undervalue.]—A., at the instigation of B., procured credit for goods to a large amount, which he sold to B. at very inadequate prices, in fraud of his creditors:—*Held:* the assignees of A. after his bkpcy., could not recover the difference from B.—HOGG *v.* MITCHELL (1816), 1 Stark. 241, N. P.

8024. Against subtenant—For rent after bankruptcy.]—In 1840, A. being lessee of a warehouse & cellar under a demise from B., & also lessee under C. of other adjoining property, comprising (*inter alia*) a vault, D. became tenant from year to year to A. of the warehouse & cellar, & vault, at an annual rent of £185, made up of £140 for the warehouse & cellar, & £45 for the vault. On Oct. 27, 1845, A. became bkpt., £92 10*s.* being at that time due as rent from D. to bkpt. The assignees, upon being appointed, elected to take the property held under B., & on Feb. 26, 1846, elected not to take the property held under C. At Christmas, 1845, rent to the amount of £114 7*s.* 6*d.* became due from A. to C., for which amount, on Feb. 19, 1846, C. distrained upon the goods in the vault held by D., who, to relieve himself of that distress, paid that sum to C. An action having subsequently been brought by the assignees of A. against D. to recover the above sum of £92 10*s.* & £35 for a quarter's rent due at Christmas for the warehouse & cellar:—*Held:* pltfs. could well sue for the quarter's rent due since the bkpcy. in their representative character as assignees.—GRAHAM *v.* ALLSOPP (1848), 3 Exch. 186; 18 L. J. Ex. 85 12 L. T. O. S. 273; 154 E. R. 809.

Annotations:—**Mentd.** Jones *v.* Morris (1849), 3 Exch. 742; O'Donoghue *v.* Coalbrook & Broadoak Co. (1872), 26 L. T. 806, Ex. Ch.

8025. On contract—Part of work done before & part after fiat—Advances by petitioning creditor to enable work to be completed.]—Pltfs., as assignees of bkpts., brought action to recover the price of engravings struck off by bkpts. for deft. The order was given by deft. to bkpts. after the act of bkpcy., but before the issuing of the fiat. After the fiat, bkpts. applied to one of pltfs., who was then petitioning creditor, for money to complete the work, & received from him money, out of which the paper was bought for the completion of the order. Part of the work was performed before

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8021 i. *Change of parties—Substitution of new trustee—When permitted.*]—A bill was filed by the assignee of an insolvent mtgor., for an account, & to redeem a mtge. Two cause petitions, for the same purpose, were afterwards filed, which were dismissed, with costs. A new assignee moved, to be substituted by suggestion as pltf.:—*Held:* the costs of the dismissed petitions must be paid before the suggestion was entered.—M'CONKEY *v.* GWYNNE (1858), 10 I. Ch. R. 261. —**IR.**

8021 ii. —— —— ——.]—Judgment having been entered up against insolvent at the suit of the provisional assignee, & it appearing that, previously to the entry of the judgment, the propert of deft. was assigned in the usual way, by the provisional assignee, to a subsequent assignee, the ct. permitted the subsequent assignee to vacate the judgment, & enter up judgment against insolvent to the same amount in his own name.—MITCHELL *v.* —— (1838), Craw. & D. Abr. C. 166; *sub nom. Re* COOPER (1838), 1 Jebb. & S. 57. —**IR.**

8021 iii. ——————.]—The devisee of insolvent debtor filed a bill to renew, &, afterwards procured himself to be appointed assignee, & amended the bill, stating that fact:—*Held:* he could sustain the bill.—DOYLE *v.* CALLOW (1849), 12 I. Eq. R. 241.—**IR.**

8022 i. —— *Order to continue necessary.*]—When an assignee in bkpcy. or insolvency has been changed, the leave of the Ct. of Ch. must be obtained for filing the suggestion to revive.—M'CONKEY *v.* GWYNNE (1858), 8 I. Ch. R. 33,—**IR.**

n. *Pleading—Plaintiff's title as trustee.*]—Pltf., claiming as assignee of F., sought an account of the real & personal estate of F., to which he was entitled under his father's will, & alleged that F., trading in Australia, was duly adjudged an insolvent according to the laws there with respect to insolvent debtors, that all his estate, etc., thereupon became duly vested in pltf. "in manner as appears by the petition of pltf. to C., Chief Justice, the fiat of C., the adjudication & vesting order signed by C., & the other orders in the matter, to which pltf. refers," etc. F. was a minor at the time of the insolvency. His parents had previously resided & died in Ireland:—*Held:* pltf.'s title, as assignee, was sufficiently stated.—STEPHENS *v.* M'FARLAND (1845), 8 I. Eq. R. 444.—**IR.**

o. —— *Bill to administer after-acquired estate of deceased insolvent—Statement of debts unpaid.*]—When the assignee of a deceased insolvent files a bill to administer his after-acquired estate, on behalf of the dissatisfied creditors, he ought to specify in his bill the debts remaining unpaid.—BYRNE *v.* B. (1842), Fl. & K. 433; *affd.* 4 I. Eq. R. 621; 2 Dr. & War. 71; 1 Con. & Law. 189.—**IR.**

p. —— *Amendment—Action by trustees of bankrupt firm.*]—In an action by the assignees of bkpt. firm, the ct. allowed pltfs. to amend the declaration by striking out & adding to the names of the partners of the firm, & to make the writ conformable thereto, although more than two terms had elapsed since the declaration had been filed.—WRIGHT *v.* GOOLD (1842), 5 I. L. R. 98.—**IR.**

PART XXI. SECT. 3, SUB-SECT. 2.

q. *Against executors—Who have committed devastavit.*]—When exors. have committed a *devastavit* & afterwards sequestrate their testator's estates, the official assignee may sue in respect thereof, & recover the amount of such *devastavit* for the benefit of the creditors.—HASKER *v.* MCMILLAN (1879), 5 V. L. R. 217.—**AUS.**

r. *Against himself in private capacity.*]—One of two trustees ordered in his capacity as trustee to join in signing a power of attorney to institute proceedings against himself in his private capacity.—STEYTLER *v.* SCOTT, 11 C. T. R. 160.—**S. AF.**

s. *Against acceptor of bill of exchange—After dividend paid to holder.*]—Under a commission of bkpcy. against the drawer of a bill of exchange, the holder proved the bill, & was paid a dividend, & handed over the bill to the assignee:—*Held:* an action, by the assignee against the acceptor, to recover the amount of the bill, was maintainable.—BLACK *v.* O'KELLY (1839), Jo. & Car. 293.—**IR.**

t. *Action on promissory note indorsed by insolvent.*]—In a suit

the fiat, part after the fiat, & before the appointment of the creditors' assignee, & the remainder after the appointment of the creditors' assignee. The action having been brought by the official & the creditors' assignees :—*Held :* the assignees were entitled to recover the whole amount, the contract being entire, & the evidence showing the work to have been completed by bkpts. as their agents.—WHITMORE *v.* GILMOUR (1844), 12 M. & W. 808 ; 13 L. J. Ex. 201 ; 3 L. T. O. S. 104 ; 8 Jur. 672 ; 152 E. R. 1426.

Annotation :—**Distd.** Knight *v.* Burgess (1864), 10 L. T. 90.

8026. —— Action for commission—Earned during bankruptcy—Transaction completed after discharge.]—An agent employed to find a purchaser for property became bkpt., but succeeded in effecting the sale of the property before obtaining his discharge. The final contract of sale was not completed, nor the purchase-money paid, until after the date of discharge :—*Held :* as all the service rendered by the agent was rendered before his discharge, & nothing was done by him subsequent thereto which was essential to the completion of the contract, the cause of action had vested in his trustee, who was entitled to the commission.—*Re* BYRNE, *Ex p.* HENRY (1892), 67 L. T. 230 ; 8 T. L. R. 581 ; 9 Morr. 213.

8027. —— Work completed by surety for bankrupt.]—A. contracted with applt. for the performance of work at an agreed price, & W. became surety to applt. for the performance of the contract by A. The contract contained a provision that if the contractor should become bkpt., the employer might require the surety to proceed with the work. A. became bkpt. before completion, & applt. gave notice to W. to proceed with the work, which W. completed :—*Held :* the official assignee under the bkpcy. of A. was entitled to sue for the price of the work so completed by W. it being a substituted performance of the original contract by A.—COHEN *v.* SANDEMAN (1879), 40 L. T. 370, P. C.

8028. Breach of contract—To settle claim & pay over proceeds.]—Policies of insurance, on which a loss had occurred, belonging to A. had been deposited by him as security for a debt of £800 with a banker. B., who was acquainted with the circumstances, afterwards, at the desire of A., expressly undertook to take the policies & to settle an underwriter's claim, & to pay in the amount which he might receive to A.'s account at the banker's. Upon that undertaking the policies were given to him, & upon them he received £949. A. having become bkpt. & being then indebted to B. in a larger sum, the latter refused to pay over the money so received :—*Held :* the assignee of A. could not, even with the assent of the banker, maintain any action against B. for the breach of his undertaking.—CHALMERS *v.* PAGE (1820), 3 B. & Ald. 697 ; 106 E. R. 816.

Annotations :—**Apld.** M'Gillivray *v.* Simson (1826), 5 L. J. O. S. K. B. 53. **Distd.** Buchanan *v.* Findlay (1829), 9 B. & C. 738.

8029. —— Improper use of hired chattel—Measure of damages.]—A. hired a phaeton from B., & let it to deft., by whom it was damaged. B. repaired it, with the assent of A. & afterwards proved for the amount of the repairs under a commission issued against A. No dividend was paid under A.'s commission :—*Held :* the assignees of A. were entitled to maintain an action against deft. for the breach of his implied contract to use the carriage in a moderate & proper manner, but for nominal damages only, there being no proof that the estate of A. was ever likely to pay any dividend.—PORTER *v.* VORLEY (1832), 9 Bing. 93 ; 2 Moo. & S. 141 ; 1 L. J. C. P. 170 ; 131 E. R. 549.

Annotations :—**Consd.** Hill *v.* Smith (1844), 12 M. & W. 618 ; Beckham *v.* Drake (1849), 2 H. L. Cas. 579, H. L. **Dbtd.** Ashdown *v.* Ingamells (1880), 5 Ex. D. 280, C. A.

8030. —— To apply funds in meeting bill—Measure of damages.]—A. paid money to a banking co. for the specific purpose of providing for a bill of exchange, for that amount, drawn by A. upon the co.'s London bankers. A. was at that time indebted in a larger amount to the co., who, instead of applying the money according to his instructions, placed it to the credit of his account with them. The bill was refused acceptance, & while it remained unpaid in the hands of the holder, A. became bkpt. :—*Held :* his assignees were entitled to recover from the co., in a special action of *assumpsit*, the whole amount deposited.—HILL *v.* SMITH (1844), 12 M. & W. 618 ; 13 L. J. Ex. 243,; 2 L. T. O. S. 424 ; 8 Jur. 179 ; 152 E. R. 1346.

Annotations :—**Apld.** Bell *v.* Carey (1849), 8 C. B. 887. **Refd.** Alder *v.* Keighley (1846), 15 M. & W. 117 ; Valpy *v.* Oakeley (1851), 16 Q. B. 941 ; Ashdown *v.* Ingamells (1880), 5 Ex. D. 280, C. A. **Mentd.** Garnett *v.* M'Kewan (1872), L. R. 8 Exch. 10.

8031. —— To discount bill & pay over surplus proceeds—Measure of damages.]—B., owing deft. £500 for the price of goods sold to him, & being

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brought on a promissory note, made by deft. & payable to L., & indorsed by L. to pltf. for value, it appeared that L. had been insolvent, & that the note had been delivered to him & indorsed by him to pltf. between the dates of his obtaining his personal & his final discharge :—*Held :* the official assignee had a right to intervene, & an order should be made postponing the hearing of the suit for a month to enable him to institute a suit on the note.—KELLY *v.* HANLON (1873), 10 B. L. R. A. C. 23.—**IND.**

a. *On building contract—Work completed by surety for bankrupt.*]—Pltf., as official assignee of A., insolvent, sued for the balance of payments due for work performed under a building contract between A. & deft. Deft. pleaded that before the sequestration A. abandoned the works under the contract, & that they were completed by W. one of A.'s sureties under a bond, to whom deft. had given notice of A.'s default. Pltf. filed a replication setting out a bond, under which W. was surety for A. in £250, & one of its conditions which stipulated that in case of the insolvency of A. or any delay in or suspension of the work, "the employer, by the architect might give to the contractors or their sureties or their assignee or trustee, as the case might be notice requiring the work to be proceeded with," & in case of default deft. might employ other persons to complete the work & set off the expense against the money payable to A. under the contract. The replication went on to state that deft. gave notice to W., & that W. proceeded with & completed the works according to the specifications, etc., & that the right of action vested in pltf. & that he was suing partly for his own benefit & partly for the benefit of W. :—*Held :* the replication was good.—SANDEMAN *v.* COHEN (1877), KNOX, 371, 496.—**AUS.**

8028 i. *Breach of contract—Failure to complete—Measure of damages.*]—A merchant in Ontario purchased the assets of an insolvent trader in Quebec, but refused to accept delivery of same. The curator of the estate brought an action in Quebec to compel him to do so & obtained judgment, whereupon he accepted delivery & paid the purchase money. The curator subsequently brought another action in Ontario for special damages alleged to have been incurred in the care & preservation of the assets from the time of the purchase until the delivery :—*Held :* the curator was entitled to recover the expenses & disbursements which as a prudent administrator he was obliged to make for the safe-keeping of the property.—HYDE *v.* LINDSAY (1899), 29 S. C. R. 595.—**CAN.**

b. *Under will—To recover property devised to bankrupt.*]—Where a person, who has been discharged as an insolvent, claims as devisee, he cannot sue in his own right, but his assignees should sue.—GOUGH *v.* LA TOUCHE (1819), 2 Mol. 406.—**IR.**

c. *Money deposited in bank by insolvent—Non-production by assignee of deposit receipt.*]—M. deposited a sum with pltfs., & pltfs. gave him a receipt, stating the money was payable on the production of that document. M. absconded & L. was appointed official assignee. He demanded the money without producing the receipt, which never came into his possession, but pltfs. had notice of the attachment & of his appointment :—*Held :* pltfs. should pay over the money to L., with the costs occasioned to the

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pressed for part payment of the debt, handed to deft. a bill of exchange drawn by himself, for £600, which deft. agreed to discount, on the terms of retaining to his own use £100 & the discount, & paying over the difference to B., but deft. retained the bill, & paid no part of the proceeds over to B., who shortly afterwards became bkpt.: —*Held:* his assignees were entitled to recover from deft. the full amount of the bill, minus the £100, & such discount as the jury should find to be receivable by deft.—ALDER *v.* KEIGHLEY (1846), 15 M. & W. 117; 15 L. J. Ex. 100; 153 E. R. 785.

Annotations:—**Refd.** Valpy *v.* Oakeley (1851), 16 Q. B. 941. **Mentd.** Hadley *v.* Baxendale (1854), 9 Exch. 341; Fletcher *v.* Tayleur (1855), 17 C. B. 21; Peninsular Co. *v.* Fleming (1872), 27 L. T. 93.

8032. —— For non-delivery of goods—Measure of damages.]—A. contracted to deliver to B. certain quantities of iron, payment to be by bills at specified dates, which were accepted by B. & dishonoured at maturity. Afterwards B. became bkpt., & his assignees sued A. for non-delivery of a portion of the iron:—*Held:* the assignees were entitled to recover only such damages as could have been recovered by B. at the time of his bkpcy., *viz.*, the difference between the contract & the market price of the iron.—VALPY *v.* OAKELEY (1851), 16 Q. B. 941; 20 L. J. Q. B. 380; 17 L. T. O. S. 124; 16 Jur. 38; 117 E. R. 1142.

Annotations:—**Consd.** Griffiths *v.* Perry (1859), E. & E. 680. **Refd.** Erie County Natural Gas & Fuel Co. *v.* Carroll, [1911] A. C. 105, P. C. **Mentd.** *Re* Edwards, *Ex p.* Chalmers (1873), 8 Ch. App. 289, L. C. & L. JJ.

8033. —— Failure of purchaser to pay debts of business purchased from bankrupt.]—A. & B., traders in embarrassed circumstances, sold their business to deft., upon condition that he should pay certain debts owing by them. That he failed to do, & left a balance of £1,750 owing to the creditors of A. & B., who afterwards liquidated their affairs by arrangement under 1869 Act. Pltf. having been appointed trustee brought an action for breach of contract:—*Held:* he was entitled to recover £1,750, & not merely nominal damages.—ASHDOWN *v.* INGAMELLS (1880), 5 Ex. D. 280; 50 L. J. Q. B. 109; 43 L. T. 424, C. A.

Annotations:—**Foll.** *Re* Perkins, Poyser *v.* Beyfus, [1898] 2 Ch. 182, C. A. **Consd.** *Re* Law Guarantee Trust [& Accident Soc., Liverpool Mortgage Insce. Case, [1914] 2 Ch. 617, C. A. **Refd.** *Re* Richardson, *Ex p.* St. Thomas' Hospital Governors, [1911] 2 K. B. 705, C. A. **Mentd.** British Union & National Insce. *v.* Rawson, [1916] 2 Ch. 476, C. A.

8034. Money had & received—Proceeds of goods taken in execution.]—The sheriff in Mar. took in execution the goods of A., who was a bkpt. in Feb., at the suit of deft., & paid him the money for which they were sold:—*Held:* an action would lie against deft. for money had & received for the use of the assignees, as whoever had received the money for bkpt.'s goods was supposed, in justice, to have received same for the use of the assignees, in whom the property of those goods by law was vested, & to have promised to pay same to the assignees, there being a supposed privity of contract between the persons whose money it lawfully was, & the person who had got or received it.—KITCHEN *v.* CAMPBELL (1772), 3 Wils. 304; 2 Wm. Bl. 827; 95 E. R. 1069.

Annotations:—**Refd.** Feltham *v.* Terry (1773), Lofft, 207; Balme *v.* Hutton (1833), 9 Bing. 471, Ex. Ch.; Garland *v.* Carlisle (1833), 2 Cr. & M. 31, Ex. Ch. **Mentd.** Seddon *v.* Tutop (1796), 6 Term Rep. 607; Martin *v.* Kennedy (1800), 2 Bos. & P. 69; Buckland *v.* Johnson (1854), 15 C. B. 145; Brunsden *v.* Humphrey (1884), 14 Q. B. D. 141, C. A.; Furness, Withy *v.* Hall (1909), 25 T. L. R. 233.

8035. Work & labour—After making vesting order—Amount necessary for insolvent's maintenance.]—The assignee of an insolvent debtor cannot recover in respect of work & labour performed by insolvent, & necessary for his maintenance, after the making of the vesting order, & before insolvent's discharge, though it appear that deft. had not paid insolvent, before the assignee interfered.—WILLIAMS *v.* CHAMBERS (1847), 10 Q. B. 337; 16 L. J. Q. B. 230; 11 Jur. 798; 116 E. R. 130.

Annotations:—**Consd.** Wadling *v.* Oliphant (1876), 1 Q. B. D. 145; **Expld.** Emden *v.* Carte (1881), 44 L. T. 344. **Consd.** Affleck *v.* Hammond, [1912] 3 K. B. 162, C. A. **Refd.** *Re* Roberts, [1900] 1 Q. B. 122, C. A.

8036. Bill sent to be applied in particular way.]—A. & Co., merchants at Liverpool, remitted a bill to B. & Co., in London, with directions to get it discounted, & apply the proceeds in a particular way. B. & Co. did not get the bill discounted, but received the money when it became due. Before that time A. & Co. had stopped payment, & desired to have the bill returned to them. A commission having been issued against them before the money was received on the bill by B. & Co.:—*Held:* the latter were liable to be sued for the amount by the assignees of A. & Co., as money received to their use.—BUCHANAN *v.* FINDLAY (1829), 9 B. & C. 738; 4 Man. & Ry. K. B. 593; 7 L. J. O. S. K. B. 314; 109 E. R. 274.

Annotations:—**Distd.** Thorpe *v.* Thorpe (1832), 3 B. & Ad. 580. **Refd.** *Re* Douglas *Ex p.* Thompson (1838), 2 Jur. 734 L. C.; Russell *v.* Bell (1841) 8 M. & W. 277. **Mentd.** Clarke *v.* Fell (1833), 4 B. & Ad. 404; Groom *v.* West (1838), 8 Ad. & El. 758.

8037. Money sent to be applied in particular way—Received after bankruptcy—Or before bankruptcy as fraudulent preference.]—S. being indebted to defts., who had acted as his solrs., in a large sum of money, they, before his bkpcy., received certain sums belonging to S. from his agents, & applied

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estate by their refusal.—MONTREAL BANK *v.* LITTLE (1870), 17 Gr. 313, 685. —CAN.

d. *Money overpaid to creditor—By executor of deceased insolvent.*]—If, after an exor. has made an overpayment to a creditor of an estate, such estate is declared insolvent, the trustee in insolvency is entitled to sue for refund of such overpayment.—VAN WIJK'S TRUSTEE *v.* AFRICAN BANKING CORPN. (1912), T. P. D. 44. —S. AF.

8034 i. *Money had & received—Proceeds of goods taken in execution.*]—A. gave B. a warrant of attorney to confess judgment, which was not filed as required by 20 & 21 Vict. c. 60, s. 34, but within twenty-one days after the execution of the warrant, judgment was registered under 7 & 8 Vict. c. 90. The amount of the debt having been levied by sale of A.'s goods, under a writ of *fi. fa.*, issued on the judgment so marked, & A. having subsequently become bkpt.:—*Held:* (1) (HAYES & O'BRIEN, JJ.) an action would not lie against B., at the suit of A.'s assignees, by reason of the sale, in the form of money had & received; (2) (FITZGERALD, J.) it would lie in the form of money had & received to the use of the assignees. —MURPHY *v.* KEEFE (1863), 16 Ir. Jur. 123.—IR.

e. —— *Sale of partner's interest in insolvent firm—Recovery of purchase price on insolvency of new firm.*]—R. & T. were the only partners of a firm which they knew to be insolvent. R. sold his share to M. for £5,000 in 1877, & the £5,000 was to be paid by four promissory notes, made by M. in favour of T. & indorsed by him to R. falling due at six, twelve, eighteen, & twenty-four months. The notes were met by other similar notes, cheques, & cash payments out of the funds of the new firm. The new firm sequestrated its estate in 1880 having been insolvent from the first to the knowledge of R. The official assignee sued R. on a count for money received to his use:—*Held:* the official assignee could recover, as R. had sold what he knew belonged to the old firm's creditors, & received payment out of the assets of the new firm's creditors.—LYONS *v.* HARDY (1881), 2 N. S. W. L. R. 369.—AUS.

f. —— *Right of trustee to waive tort.*]—Circumstances (*post*) in which:—*Held:* the assignee might waive the tort, & bring an action for money had & received.—CARRICK *v.* ATKINSON (1863), 5 All. 515.—CAN.

g. *Trespass—Proceeds of goods taken in execution.*]—Circumstances (*supra*) in which:—*Held:* an action in the form of trespass would not lie. —MURPHY *v.* KEEFE, *ante*.—IR.

h. *Detinue—Proceeds of goods taken in execution.*]—Circumstances (*supra*) in which:—*Held:* an action in the form of detinue would not lie.—MURPHY *v.* KEEFE, *ante*.—IR.

them in discharge of their claims upon him. S. having afterwards become bkpt., & his assignees having brought an action against defts. to recover the money as money had & received to their use as assignees, the judge told the jury that, if defts. before the bkpcy. actually received the money to the use of bkpt., they held it after the bkpcy. to the use of the assignees, who were entitled to succeed on the issue of *non assumpserunt*:—*Held*: this was a misdirection, & there ought to be a new trial, unless it was clear that the jury were not misled, & that it was afterwards explained away.

The assignees could not sue for the money as had & received to their use, unless it was received by defts. after the bkpcy., or unless it was received before the bkpcy. by way of fraudulent preference (PARKE, B.).—PENNELL *v.* ASTON (1845), 14 M. & W. 415; 14 L. J. Ex. 309; 153 E. R. 536.

8038. Trover—Against creditor accompanying sheriff—Neither goods nor proceeds received.]—If a creditor accompany the sheriff's officer in levying an execution, which is afterwards avoided by a commission of bkpcy., trover may be maintained against him by the assignees, though he has never received either the goods or their value from the sheriff.—MENHAM *v.* EDMONSON (1799), 1 Bos. & P. 369; 126 E. R. 958.

Annotations:—**Expld.** Whitmore *v.* Greene (1844), 13 L. J. Ex. 311. **Refd.** Balme *v.* Hutton (1833), 9 Bing. 471, Ex. Ch.; Woollen *v.* Wright (1862), 1 H. & C. 554, Ex. Ch. **Mentd.** *Ex p.* Binmer (1816), 1 Madd. 250; Wilson *v.* Tummon (1843), 12 L. J. C. P. 306.

8039. —— Against creditor—For cheque paid by bankers after bankruptcy.]—Assignees cannot recover the amount of a cheque paid by bkpt.'s bankers after the bkpcy., in trover for the cheque against the creditor, to whom the cheque was delivered & the money paid.—MATHEW & COUSINS *v.* SHERWELL (1810), 2 Taunt. 439; 127 E. R. 1148.

8040. —— Against purchaser from bankrupt—Goods purchased on sale or return—Payment demanded as on a sale.]—Assignees may maintain trover against one, who has purchased goods from bkpt. in the usual course of his trade after a secret act of bkpcy., although the goods were purchased on sale or return, & although the assignees afterwards demanded payment from deft., as upon a sale of the goods.—HURST *v.* GWENNAP (1817), 2 Stark. 306, N. P.

Annotations:—**Expld.** Cash *v.* Young (1824), 2 B. & C. 413. **Refd.** Valpy *v.* Sanders (1848), 5 C. B. 886.

8041. —— Against bill broker—Only lending money on bills sent.]—Assignees may maintain trover, for bills of exchange sent by bkpt. to one of his creditors after committing an act of bkpcy., though he being a bill broker had merely lent money on them, & had not either discounted, or given the full value for them.—HALL *v.* BARNARD (1824), 1 C. & P. 382, N. P.

8042. —— Against execution creditor—Warrant of attorney not filed in time.]—Whether or not a judgment & execution on a warrant of attorney not filed within twenty-one days after its execution, pursuant to 3 Geo. 4, c. 39, be fraudulent & void as against the assignees under a fiat issued upon an act of bkpcy. committed after execution executed, at all events an action of trover, alleging a wrongful conversion before the bkpcy., cannot be maintained. *Semble*: the remedy, if any, would be by an action for money had & received, or by a special action on the case founded on the Act.—BROOK *v.* MITCHELL (1840), 6 Bing. N. C 349; 8 Scott, 739; 4 Jur. 486; 133 E. R. 134.

Annotations:—**Consd.** Billiter *v.* Young (1856), 6 E. & B. 1, Ex. Ch. **Refd.** Biffin *v.* Yorke (1843), 5 Man. & G. 428.

8043. —— Against wrongdoer—Mortgagee of ship taking possession of cargo—Bankruptcy of ship owner.]—H. & F., the owners of a ship, sent her to America, where a cargo of cotton was put on board, with which she returned to England. On her arrival deft., as mtgee. of the ship, took possession of the ship & cargo:—*Held*: as against a wrongdoer, the owner of a ship was *primâ facie* owner of the goods on board, & the assignees of H. & F., who had become bkpt. before the arrival of the vessel, were entitled to maintain trover against deft. for the cargo.—BRANCKER *v.* MOLYNEUX (1841), 3 Man. & G. 84; 3 Scott, N. R. 332; 10 L. J. C. P. 310; 5 Jur. 773; 133 E. R. 1067.

8044. —— Against holder of bill—Deposited as security to co-obligor of bond—Measure of damages.]—Trover by the assignee of R., a bkpt., to recover the amount of a bill of exchange for £1,600, which bill had been deposited with deft. by bkpt., as an indemnity to M. & L., against the consequences of a bond which they, jointly with bkpt., had executed to J., under Judgments Act, 1838 (c. 110), s. 8. The bond, having been cancelled, was shown by the assignees in its cancelled state to deft., & they at the same time demanded the bill, which deft. declined to part with, saying, that he should hold it for M. & L. Deft. afterwards obtained £800 on the bill:—*Held*: £1,600 was the proper measure of damages, notwithstanding only £800, remained due on the bill.—ALSAGER *v.* CLOSE (1842), 10 M. & W. 576; 12 L. J. Ex. 50; 152 E. R. 600.

Annotation:—**Mentd.** Heald *v.* Carey (1852), 21 L. J. C. P. 97.

8045. Specific performance—Of obligation to grant lease.]—Circumstances, in which a demurrer to a bill by assignees, for specific performance of an agreement, previous to the bkpcy., to grant a lease, was overruled.

It must be a very strong case that would induce the ct. to carry into execution an agreement between landlord & tenant, the estate not being executed at law, where the person who is to become the tenant has become a bkpt. (LORD LOUGHBOROUGH, C.).—BROOKE *v.* HEWITT (1796), 3 Ves. 253; 30 E. R. 997, L. C.

Annotations:—**Refd.** Crosbie *v.* Tooke (1833), 1 My. & K. 431, L. C.; Buckland *v.* Papillon (1866), 13 L. T. 736. **Mentd.** Weatherall *v.* Geering (1806), 12 Ves. 504.

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j. *Trover—Against vendor to bankrupt—Bill of lading returned to & goods sold by vendor.*]—Deft. agreed to deliver deals to H. on board a ship sent for the purpose, half the cargo to be paid for in cash. The deals were shipped, & H.'s agent paid deft. £20 on account. H. became bkpt. in England on June 10, & on June 17 information of the bkpcy. was received in Canada by H.'s agent, who refused to make any further payment to deft. but gave him the bill of lading of the cargo, which he sold for his own benefit:—*Held*: (1) the portion of the cargo shipped before June 10 vested in the assignee of H., & the sale thereof was a conversion, for which the assignee might maintain trover; (2) he might waive the tort & bring an action for money had & received.—CARRICK *v.* ATKINSON (1863), 5 All. 515.—**CAN.**

8042 i. —— *Against execution creditor—Warrant of attorney not filed.*]—Circumstances (*supra*) in which:—*Held*: an action in the form of trover would not lie.—MURPHY *v.* KEEFE, *ante*.—**IR.**

8043 i. —— *Against wrongdoer—Conversion of bankrupt's goods.*]—The trustees of an absconding debtor, duly appointed under 26 Geo. 3, c. 13, may maintain trover to recover the value of debtor's goods wrongfully converted by deft. before any proceedings taken under the Act, such right of action being transferred by the operation of the Act from debtor to the trustees.—RITCHIE *v.* BOYD (1841), 1 Kerr, 264.—**CAN.**

8045 i. *Specific performance—Of contract for sale of land.*]—*Qu.*: whether a trustee can maintain or continue an action for specific performance of a contract for the sale of land, entered into by bkpt. before his bkpcy.—MCMANAWAY *v.* CLELAND (1870), 1 C. A. 343.—**N.Z.**

k. *Proceedings to recover land which trustee has contracted to sell to third party.*]—An official assignee by

Sect. 3.—*Actions, etc., by trustee: Sub-sects.* 2, 3 & 4.]

8046. —— —— Agreement against assigning without licence.]—Though bkpcy. supersedes an agreement not to assign without licence, that has been held only in favour of general creditors, & where there is no actual lease, but it rests in agreement to grant a lease, an individual cannot have a specific performance in opposition to such provision, & it is very disputable, whether the general assignees could obtain it, even if there was no such provision.

The proposition that the assignee can compel a landlord specifically to perform an agreement to grant a lease to bkpt. has never been determined (GRANT, M.R.).—WEATHERALL *v.* GEERING (1806), 12 Ves. 504 ; 33 E. R. 191.

Annotations :—**Consd.** Powell *v.* Lloyd (1827), 2 Y. & J. 372, Ex. Ch. **Distd.** Crosbie *v.* Tooke (1833), 1 My. & K. 431, L. C. **Consd.** Bowser *v.* Colby (1841), 1 Hare, 109 ; Buckland *v.* Papillon (1866), L. R. 1 Eq. 477.

8047. —— Of obligation to accept lease.]—If the intended lessor & lessee both become bkpt., & the assignees agree to take a lease, the ct. has not jurisdiction to enforce specific performance.—*Re* OLDHAM, *Ex p.* LUCAS (1833), 3 Deac. & Ch. 144 ; 1 Mont. & A. 93 ; 3 L. J. Bcy. 66, Ct. of R.

Annotation :—**Refd.** *Re* Brettell, *Ex p.* Goren (1838), 7 L. J. Ch. 187, L. C.

8048. —— —— Right of trustee to clause of indemnity against covenants.]—A., lessee of ironworks, etc., subject to payment of rent & performance of covenants, assigned to B. as a security for sums advanced & to be advanced, reserving to himself a mere equity of redemption. A. became bkpt., & his assignees agreed to convey to B. the equity of redemption in the demised premises :—*Held :* the assignees had no right to enforce against B. a specific performance of that agreement by an assignment containing a covenant for indemnity against payment of the rent & performance of the covenants reserved by the original lease.

Assignees in bkpcy. take the property of bkpt. by the operation of law, & enter into no covenants to indemnify bkpt. against the covenants in his leases. They may take to his leases, subject only to such liability as attaches upon all assigns, *i.e.*, a liability to be sued on such covenants as binds assigns during the time they retain that character, but, when they cease to retain it, their liability ceases, the privity of estate which alone makes them liable to be sued being determined. The assignees of bkpt. after they have parted with the possession of their lease, are not liable to be sued at all ; they stand in no need of an indemnity, & there is no principle on which they can require it from the vendee of their estate (GRANT, M.R.).—WILKINS *v.* FRY (1816), 1 Mer. 244 ; 2 Rose 371; 35 E. R. 665.

Annotations :—**Refd.** Levi *v.* Ayers (1878), 3 App. Cas. 842, P. C. **Mentd.** Fenn *v.* Craig (1838), 3 Y. & C. Ex. 216.

8049. —— Of contract of purchase.]—The purchaser of bkpt.'s mortgaged estate, sold before the comrs. under the general order, was ordered, upon petition in the bkpcy., to complete his purchase.—*Re* HARVEY, *Ex p.* GOULD (1822), 1 Gl. & J. 231.

Annotations :—**Distd.** *Re* Oldham, *Ex p.* Lucas (1833), 3 Deac. & Ch. 144, Ct. of R. ; *Re* Holder, *Ex p.* Holder (1834), 3 L. J. Bcy. 78, Ct. of R. **Folld.** *Re* Barrington, *Ex p.* Barrington (1835), 4 Deac. & Ch. 461, L. C. **Consd.** *Re* Barrington, *Ex p.* Sidebotham (1835), 4 Deac. & Ch. 693, Ct. of R. **Dbtd.** *Re* Goren, *Ex p.* Cutts (1838), 3 Mont. & A. 549, L. C. I find this jurisdiction totally unknown in bkpcy. before Re *Harvey*, Ex p. *Gould*, which is not sufficient authority upon which to found jurisdiction (LORD COTTENHAM, C.). **Folld.** *Re* Green, *Ex p.* Brittel (1838), 2 Jur. 112, Ct. of R. **Refd.** *Re* Barrington, *Ex p.* Sidebotham (1834), 3 Deac. & Ch. 818, Ct. of R.

See, further, Part XX., Sect. 16, *ante*.

8050. —— —— To enforce acceptance of compensation provided in conditions of sale.]—The Ct. of Review has no jurisdiction to compel a specific performance of a contract by a purchaser from assignees, or to compel a purchaser to accept compensation according to conditions of sale, but the assignees must bring their action or file their bill.—*Re* GOREN, *Ex p.* CUTTS (1838), 3 Mont. & A. 549 ; 3 Deac. 242 ; 2 Jur. 391 ; *sub nom. Re* BRETTELL, *Ex p.* GOREN, 7 L. J. Ch. 187, L. C. ; *revsg.* S. C. *sub nom. Re* GOREN, *Ex p.* BRETTELL, 3 Mont. & A. 543, Ct. of R

Annotation :—**Refd.** *Re* Reay (1847), 8 L. T. O. S. 476.

8051. Account—Against retired partner—By trustees of bankrupt continuing partners.]—One partner having retired, the others continued in partnership, & failed, large sums in the interval having been paid to the partner who had retired, in respect of a balance due to him on account. Under the bill of the assignees of the last partnership upon circumstances of fraud an account was decreed against the partner, who had retired, with respect to the period of the last partnership, & refused as to the previous time.—ANDERSON *v.* MALTBY (1793), 2 Ves. 244 ; 4 Bro. C. C. 428 ; 30 E. R. 616.

Annotation :—**Expld. & Distd.** *Re* Lightoller, *Ex p.* Peake (1816), 1 Madd. 346.

SUB-SECT. 3.—POWER TO COMPROMISE.

8052. Discretion of trustee—Interference by court—Onus on creditor opposing proposed compromise.]—A trustee having ample power with the sanction of the committee of inspection to compromise all claims, the ct. will not, as a general rule, on an application by the trustee for directions, express any opinion upon a proposed compromise,

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contract in writing sold his right, title & interest in lands standing in the name of M., but it had previously been verbally agreed between the official assignee & the purchaser that the official assignee should recover the lands from M. On the official assignee filing a notice of motion under Bkpcy. Act, s. 134, to recover the lands, M. filed a notice of motion submitting that the official assignee had parted with the interest in the lands, & that he was not entitled to recover the lands :—*Held :* the official assignee was entitled to take the proceedings to recover the lands.—*Re* MACKEY, *Ex p.* OFFICIAL ASSIGNEE & MACKEY (1899), 20 N. S. W. L. R. 37.—**AUS.**

· l. *Proceedings to set aside compromise—Of claim under fire insurance policy.*]—The compromise of a claim under a fire policy is a transaction open to attack by the insured's trustee under Law 13 of 1895, s. 36, provided the existence of a lawful debt as between insurer & insured could be established.—CALDWELL'S TRUSTEE *v.* WESTERN ASSURANCE CO. (1918), W. L. D. 146.—**S. AF.**

m. *Action to declare partnership between insolvents void.*]—J. & D. entered into partnership, & the firm having become insolvent, B. was appointed assignee. The partnership creditors were paid in full, & a surplus remained. D. then having petitioned the county judge in insolvency to divide the surplus between him & J., B. commenced a suit against D. to have it declared that the partnership deed was not binding upon him as such assignee, but that the partnership deed might be declared fraudulent & void, & that the ct. might take an account of the partnership property & make division, & for an injunction restraining D. from further proceeding with his petition :—*Held :* the Insolvent Ct. was the proper tribunal to deal with the matter, & the ct. would not interfere.—BELL *v.* MCDOUGALL (1882), 2 O. R. 618. —**CAN.**

PART XXI. SECT. 3, SUB-SECT. 3.

8052 i. *Discretion of trustee—Interference by court—Onus on creditor opposing proposed settlement.*]—Pltf., a creditor, served a notice on an assignee for creditors, requiring him to take proceedings to set aside a bill of sale made by insolvent, & afterwards served on him a notice of motion for an order giving him, the creditor, permission to bring the action. After being served with the notice, the assignee, with the approval of a majority of the inspectors & creditors, made an advantageous settlement with the grantee of the bill of sale. Pltf. obtained an order, giving him leave to bring an action impeaching the bill of sale, without the settlement being brought to the notice of the judge :—*Held :* the settlement

however complicated the matter may be, nor interfere in any way.

Where the trustee & committee of inspection propose to accept a compromise, it is for the party objecting to satisfy the ct. that the proposed compromise is one which ought not to be entertained.—*Re* PILLING, *Ex p.* SALAMAN, [1906] 1 K. B. 644; 75 L. J. K. B. 739; 95 L. T. 362; 50 Sol. Jo. 617; 13 Mans. 229.

8053. —— —— Conflicting instructions from committee & creditors.]—The terms of a compromise agreed between the trustee & persons claiming against the estate were approved by a majority of the committee of inspection, but afterwards a resolution was passed at a meeting of creditors, refusing to sanction the compromise. On an application to the ct. by the trustee for leave to carry out the compromise, notwithstanding the above resolution:—*Held:* as the creditors had acted *bonâ fide* & for their own interests, the compromise must be abandoned.—*Re* RIDGWAY, *Ex p.* HURLBATT (1889), 61 L. T. 647; 6 T. L. R. 21; 38 W. R. 432; 6 Morr. 277.

Annotation:—**Mentd.** *Re* Oborne, *Ex p.* Marillier (1896), 3 Mans. 238.

8054. Effect of 1869 Act, s. 27—Actions instituted in capacity of trustee.]—A trustee in bkpcy. or liquidation, having power to sue either in his own name, or in his official name under 1869 Act, s. 83 (7), possesses all the rights of an ordinary litigant, including a power to compromise an action instituted by him, as, for instance, by consenting to an order being made in the action giving him less than he originally claimed, for the above sect., as to the trustee's general power to compromise with the sanction of the committee of inspection, does not control or affect his right to compromise actions which he has instituted in his capacity of trustee.—LEEMING *v.* MURRAY (LADY) (1879), 13 Ch. D. 123; 48 L. J. Ch. 737; 28 W. R. 338.

8055. Consent of court—When granted—Assent by separate creditors—Opposition of joint creditors.]—A compromise was assented to by separate creditors, who were the only persons having an interest in the matter. The ct. being of the opinion that the compromise would save the costs of litigation, & not being satisfied that it was unfair, gave leave to carry it out, notwithstanding the opposition of the joint creditors.—*Re* RIDGWAY, *Ex p.* CLARKE (1891), 8 Morr. 289.

8056. —— —— Acceptance of shares in settlement.]—The ct. authorised a compromise, by which the trustee received fully-paid shares in a limited co.—*Re* MACFAYDEN, *Ex p.* GLASS (1907), 98 L. T. 55; 52 Sol. Jo. 134.

SUB-SECT. 4.—POSITION OF DEFENDANT.

8057. Right to dispute bankruptcy—Necessity for & effect of notice.]—In an action by assignees, the notice under 49 Geo. 3, c. 121, s. 10, that deft. means to dispute the validity of the commission, is not to be considered as part of deft.'s regular evidence in the cause, but may be proved at the beginning of the trial, & immediately puts pltfs. upon strict proof of trading, petitioning creditor's debt & act of bkpcy. Although in an action by assignees, deft. has once pleaded without giving notice under 49 Geo. 3, c. 121, s. 10, yet if he has leave to withdraw his plea & plead *de novo*, such a notice given with the second plea is sufficient.—DECHARME *v.* LANE (1809), 2 Camp. 324.

8058. —— When lost—Advertising goods as those of bankrupt.]—In an action for goods of bkpt., against the person who sold them, an advertisement of deft., describing them as the goods of bkpt., precludes him from disputing the bkpcy.—MALTBY *v.* CHRISTIE (1795), 1 Esp. 340.

Annotation:—**Consd.** Rankin *v.* Horner (1812), 16 East, 191.

8059. —— —— Party having presented petition seeking benefit from commission.]—A party, who has presented a petition, seeking relief & benefit under a commission, in respect of a particular transaction, ought not to be permitted, as deft. to an action brought against him by the assignees, to dispute the validity of the commission under which he has so presented his petition for relief.—*Re* BARROW & GEDDES, *Ex p.* ANDERTON (1829), Mont. & M. 177, Ct. of R.

8060. —— —— Admission that party duly declared bankrupt—No notice of intention to dispute.]—In an action of trover by assignees, deft.'s attorney admitted that the party had been duly declared bkpt.:—*Held:* deft. was thereby precluded from objecting to any of the proceedings under the commission, unless he had given notice to dispute it.—PERRING *v.* TUCKER (1829), 3 Moo. & P. 557; 8 L. J. O. S. C. P. 2.

8061. Right to discovery & interrogatories—Trial by jury.]—In an action by a trustee, deft. applied for discovery & leave to deliver interrogatories, & that the action might be tried by a jury:—*Held:* (1) the trustee should make an affidavit of documents, & deft. should be allowed to deliver interrogatories; (2) an order for a jury should be made.

It is not intended that I should take away the right of having a jury except in special circumstances, as, for example, that it is solely a point of law or what not. In questions of disputed fact a jury should be called in. If there was a verbal contract, & the point is solely one of law, there can be no harm in a jury being present. I shall direct them

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was valid & binding.—KEYES *v.* KIRKPATRICK (1890), 19 O. R. 572.—**CAN.**

o. *Action by new trustee to vacate compromise made by previous trustee—Without reference to inspectors or creditors.*]—An assignee for creditors having brought an action for damages for breach of a contract made by his assignor with defts., made a compromise settlement with defts., without reference to the inspectors or creditors. A new assignee applied for an order directing the trial of an issue to determine whether the settlement was valid:—*Held:* it was not necessary to bring another action to vacate the settlement, but it was more convenient to revive the action in the name of the new assignee as pltf. & let him continue it, leaving defts. to move summarily to stay it, or to plead the settlement in bar.—DAVIDSON *v.* MERRITTON WOOD & PULP CO. (1898), 18 P. R. 139.—**CAN.**

PART XXI. SECT. 3, SUB-SECT. 4.

p. *Defences available—That debt sued for had been assigned by insolvent—Assignment alleged to be fraudulent preference.*]—Pltf., as assignee of M. & G., under an assignment for creditors, sued deft. to recover the amount of an account due by him to M. & G. Deft. pleaded that, prior to the assignment to pltf., M. & G. had assigned the accounts to S. by instrument in writing. Pltf. replied that the assignment to S. was void as a fraudulent preference:—*Held:* the replication was bad, because the assignment to S. could not be declared fraudulent & void in the action, S. not being a party to it.—BERTRAND *v.* HOOKER (1895), 10 Man. L. R. 445; *not follds.* CLAY *v.* GILL (1899), 12 Man. L. R. 465.—**CAN.**

q. —— *Statute of Frauds.*]—An assignee, under New Brunswick Assignments & Preferences Act (58 Vict. c. 6), sued in his own name for the value of certain goods sold:—*Held:* as the amount sued for was more than $40, pltf. must be nonsuited, Stat. Frauds (C. S. N. B. c. 97), s. 4, had not been complied with.—CLARKE *v.* WEBBER, 18 C. L. T. Occ. N. 314.—**CAN.**

r. —— *Payment.*]—*Assumpsit* by assignees on a promissory note made by deft., payable to W. & indorsed by W. to bkpt. before his bkpcy. Pleas that deft. paid the note when it became due, but not stating to whom, & of payment before action, to bkpt. before his bkpcy., in full satisfaction, etc., of all causes & rights of action, etc.:—*Held:* good.—MOORE *v.* COOK (1852), 9 U. C. R. 261.—**CAN.**

s. —— ——.]—To a count by assignees for money had & received, a traverse & a plea of payment, under 1857 Act, s. 328, allowed.—MURPHY *v.* CUFFE (1858), 8 I. C. L. R. Ap. xii.; 11 Ir. Jur. 83.—**IR.**

Sect. 3.—Actions, etc., by trustee: Sub-sect. 4.]

what verdict they must find (CAVE, J.).—*Re* CARVILL & MCKEAN (1884), 1 Morr. 150.

8062. Liability to examination under 1883 Act, s. 27—Limitation of.]—Where an action has been commenced by a trustee against a person, who is a stranger to the bkpcy., with respect to property alleged to be part of bkpt.'s estate, the ct. will not, in the absence of special circumstances, allow the trustee to examine such persons under the above sect., with a view of obtaining information in relation to the matter in dispute beyond such discovery as can be obtained under the ordinary procedure of the High Ct.—*Re* FRANKS, *Ex p.* GITTINS, [1892] 1 Q. B. 646.

Annotation:—**N.F.** *Re* Aarons (1914), 111 L. T. 411.

8063. Defences available—Statute of Limitations—When same pleadable against bankrupt.]—As the above Act might be pleaded against bkpt., by the same reason it is pleadable against his assignee.—SOUTH SEA CO. *v.* WYMONDSELL (1732), 3 P. Wms. 143; 2 Eq. Cas. Abr. 74, pl. 28; 24 E. R. 1004, L. C.

Annotations:—**Mentd.** *Re* Baillie & Jaffray, *Ex p.* Bolton (1832), 1 Deac. & Ch. 556, Ct. of R.; Brooksbank *v.* Smith (1836), 2 Y. & C. Ex. 58; Ecclesiastical Comrs. for England *v.* N. E. Ry. Co. (1877), 4 Ch. D. 845; Gibbs *v.* Guild (1882), 9 Q. B. D. 59 C. A.; *Re* Mansell, *Ex p.* Norton (1892), 66 L. T. 245, C. A.; Molloy *v.* Mutual Reserve Life Insce. (1906), 94 L. T. 756, C. A.

8064. —— Previous action on same cause of action.]—The sheriff having taken bkpt.'s goods in execution at the suit of deft., & paid him the money for which they were sold, his assignees brought trover against the sheriff to recover the value of the goods taken in execution:—*Held:* a subsequent action would not lie against deft. for money had & received for the use of the assignees, as there was a verdict & judgment upon record in the action of trover against pltfs., who were barred for ever from having any other action.—KITCHEN *v.* CAMPBELL (1772), 3 Wils. 304; 2 Wm. Bl. 827; 95 E. R. 1069.

Annotations:—**Consd.** Furness, Withy *v.* Hall (1909), 25 T. L. R. 233. **Refd.** Seddon *v.* Tutop (1796), 6 Term Rep. 607; Martin *v.* Kennedy (1800), 2 Bos. & P. 69; Garland *v.* Carlisle (1833), 2 Cr. & M. 31, Ex. Ch. **Mentd.** Feltham *v.* Terry (1773), Lofft. 207; Balme *v.* Hutton (1833), 9 Bing. 471, Ex. Ch.; Buckland *v.* Johnson (1854), 15 C. B. 145; Brunsden *v.* Humphrey (1884), 14 Q. B. D. 141, C. A.

8065. —— Same sum already recovered from party paying defendant.]—When assignees have recovered a sum of money from bkpt.'s banker, received by him & paid over to a creditor of bkpt. with knowledge of the bkpcy. they cannot recover the same sum from the creditor, though he received it after notice of the bkpcy.—VERNON *v.* HANSON (1788), 2 Term Rep. 287; 100 E. R. 156.

8066. —— Not that some trustees concurred in act of bankruptcy.]—*Held:* it was no objection to an action brought by assignees for the recovery of part of bkpt.'s estate, that some of them had concurred in a fraudulent deed set up as the act of bkpcy., for such estoppel applied not to assignees who were mere trustees for the creditors at large, but only to a petitioning creditor who originated the commission.—TAPPENDEN *v.* BURGESS (1803), 4 East, 230; 102 E. R. 818.

Annotations:—**Mentd.** Doe d. Pitcher *v.* Anderson (1816), 5 M. & S. 161; Fawcett *v.* Fearne (1844), 6 Q. B. 20; Lee *v.* Hart (1856), 11 Exch. 880.

8067. —— Action on bill discounted by bankrupt bankers—Not that no sum due from customer.]—Where bankers discount a bill of exchange for a customer, giving him credit for the amount of the bill, & debiting him with the discount, the bill becomes the property of the bankers, & upon their bkpcy. their assignees may maintain an action upon it, although there be no balance due to them from the customer.—CARSTAIRS *v.* BATES (1812), 3 Camp. 301.

8068. —— Release to bankrupt granted by all creditors—Action to recover money lost at play.]—In an action on Gaming Act, 1710 (c. 19), brought by assignees to recover money lost by bkpt. at play:—*Held:* a release signed by all those who had proved might be considered as a release by all the creditors, & such a release did not destroy the assignee's right of action.—CARTER *v.* ABBOTT (1823), 1 B. & C. 444; 2 Dow. & Ry. K. B. 575; 107 E. R. 165.

8069. —— Release granted after act of bankruptcy—Releasee knowing of insolvency.]—A release of a right of action executed by bkpt. after an act of bkpcy., to a releasee, who knows of bkpt.'s insolvency, although executed more than two months before the suing out of the commission, does not bar an action by the assignees.—MAYOR *v.* PYNE (1825), 3 Bing. 285; 11 Moore, C. P. 2; 4 L. J. O. S. C. P. 36; 130 E. R. 522.

8070. —— That action brought without necessary consent.]—To a bill by assignees against a creditor, a plea that the suit was not instituted with the consent of the creditors at a meeting, pursuant to 5 Geo. 2, c. 30, s. 38, was allowed.—OCKLESTONE *v.* BENSON (1825), 2 Sim. & St. 265; 3 L. J. O. S. Ch. 142; 57 E. R. 347.

Annotations:—**Consd.** King *v.* Tullock (1829), 2 Sim. 469; Gerothwohl *v.* Cochrane (1835), 5 L. J. Ch. 47. **Refd.** Bozon *v.* Williams (1828), 2 Y. & J. 475, Ex. Ch.; Casborne *v.* Barsham (1835), 6 Sim. 317.

8071. —— —— Consent obtained after action brought.]—Deft. in his answer to a bill filed by

t. —— *Set-off.*]—An attorney was sued by an assignee, & gave notice of set-off for a bill of costs, which he was not allowed to rely on, not having furnished his costs before the hearing. Insolvent had returned the attorney in his schedule as a creditor for an unascertained bill of costs for £4:—*Held:* under Insolvent Act, s. 84, it was open to deft. to show the true amount of the costs.—CASEY *v.* LYNCH (1851), 4 Ir. Jur. 44.—IR.

a. —— ——.]—To a count by assignees for money had & received, a plea of set-off under 1857 Act, s. 251, refused.—MURPHY *v.* CUFFE (1858), 8 I. C. L. R. App. xii.; 11 Ir. Jur. 83.—IR.

See, further, Part X., *ante.*

b. —— *That insolvent not trader—Form of plea.*]—In an action by an assignee in insolvency on the common counts, deft. pleaded that insolvent was not a trader within 1869 Act:—*Held:* the plea was good, though the more formal plea would have been one denying that pltf. was assignee of insolvent in manner & form, etc.—GROVES *v.* MCARDLE (1873), 33 U. C. R. 252; 9 C. L. J. N. S. 126.—CAN.

8070 i. —— *That action brought without necessary consent—Whether by plea or demurrer to bill.*]—A demurrer to a bill by an assignee is not the proper mode of objecting that pltf. had not the consent of insolvent's creditors to file the bill, & will be overruled. The proper mode of trying the question is by plea.—PEARSON *v.* LYNCH (1829), 1 Mol. 603.—IR.

8070 ii. —— —— ——.]—To a bill filed by an assignee, a plea that same was not filed with the consent of the creditors pursuant to 1 & 2 Geo. 4, c. 59, s. 16, will be overruled.—HORNIDGE *v.* MAXWELL (1831), 4 Ir. L. Rec. 1st ser. 148; 1 Mol. 606.—IR.

8070 iii. —— —— ——.]—Plea to a bill by an assignee that the suit was commenced without consent of creditors, had pursuant to 11 & 12 Geo. 3, c. 8, s. 58:—*Held:* good. *Semble:* such a plea will lie to a bill, though filed in compliance with an order of the Lord Chancellor sitting in bkpcy.—STOKES *v.* DEEY (1828), 1 Mol. 597; 2 Hog. 67; Beat. 152; 1 Ir. L. Rec. 1st ser. 474.—IR.

8070 iv. —— —— ——.]—*Semble:* such a plea to a supplemental bill by an assignee will not be allowed.—STOKES *v.* DEEY, *ante.*—IR.

c. —— *That creditors had resolved not to bring action.*]—To an action brought by trustees defts. pleaded that, at a duly convened meeting of creditors, it was resolved by a majority not to bring the action:—*Held:* the plea was bad.—WILSON & GLYNN'S TRUSTEES *v.* WILSON (1886), 4 S. C. 209.—S. AF.

the assignees of a bkpt., alleged that pltfs. had not obtained the necessary consent to the institution of the suit; upon which pltfs. filed a supplemental bill, stating that since the filing of the original bill they had obtained the necessary consent:—*Held:* the demurrer to the supplemental bill must be allowed.—KING *v.* TULLOCK (1829), 2 Sim. 469; 7 L. J. O. S. Ch. 122; 57 E. R. 863.

Annotations:—**Expld.** Casborne *v.* Barsham (1835), 6 Sim. 317. **Refd.** Gerothwohl *v.* Cochrane (1835), 5 L. J. Ch. 47; Major *v.* Aukland (1843), 3 Hare, 77; Horlock *v.* Patch (1845), 10 Jur. 108.

8072. —— ——.]—To a bill by assignees, a plea that the suit had been instituted without the consent of the creditors, or of the comrs., as required by 5 Geo. 2, c. 30, & 6 Geo. 4, c. 16, was allowed.—BOZON *v.* WILLIAMS (1828), 2 Y. & J. 475.

8073. —— ——.]—To a bill filed by assignees, deft. pleaded that the suit had been commenced without the consent of the creditors:—*Held:* such plea was bad.—GEROTHWOHL *v.* COCHRANE (1835), 5 L. J. Ch. 47.

8074. —— **That action brought without leave of court.**]—*Held:* 1849 Act, s. 153, intended the obtaining of leave to be a matter wholly between the assignees & the Ct. of Bkpcy., & the absence of leave could not be pleaded as a defence.—LEE *v.* SANGSTER (1857), 2 C. B. N. S. 1; 26 L. J. C. P. 151; 29 L. T. O. S. 93; 3 Jur. N. S. 444; 5 W. R. 487; 140 E. R. 310.

Annotations:—**Consd.** Sturgis *v.* Evans (1864), 2 H. & C. 964; Dublin City Distillery *v.* Doherty, [1914] A. C. 823, H. L. **Refd.** *Re* Wyld, *Ex p.* Wyld (1860), 2 De G. F. & J. 642, L. C. & L. JJ.; *Re* Branson, *Ex p.* Trustee, [1914] 2 K. B. 701.

8075. —— **That action brought without sanction of committee or Board of Trade.**]—*Held:* 1883 Act, ss. 22 (9), 57, & 1890 Act, s. 15, were provisions for the protection of the estate, as between the trustee & the estate, on matters relating to his costs, charges, & expenses, & afforded no defence to any proceeding which the trustee, without such sanction, might institute against other parties.—*Re* BRANSON, *Ex p.* TRUSTEE, [1914] 2 K. B. 701; 83 L. J. K. B. 1316; 110 L. T. 940; 58 Sol. Jo. 416; 21 Mans. 160.

8076. —— **Abandonment of contract—Delay in requiring performance.**]—A contract for the sale by deft. to bkpt. of railway shares was to be performed on July 1, 1835. To a declaration by the assignees for a breach of such contract in not delivering the shares, deft. pleaded that the assignees did not adopt the contract within a reasonable time after the bkpcy., & averred that the contract was abandoned by mutual consent:—*Held:* the circumstance of the assignees having suffered a considerable period to elapse without requiring the contract to be performed, was evidence whence the jury might infer an abandonment.—LAWRENCE *v.* KNOWLES (1839), 5 Bing. N. C. 399; 7 Scott, 381; 2 Arn. 43; 8 L. J. C. P. 210: 132 E. R. 1152.

Annotations:—**Consd.** Mackley *v.* Pattenden (1861), 1 B. & S. 178. **Mentd.** De Medina *v.* Norman (1842), 9 M. & W. 820; Morgan *v.* Bain (1874), 44 L. J. C. P. 47.

8077. —— **Failure to notify intention to adopt contract.**]—Bkpt. before his bkpcy. agreed to buy linseed from deft., f.o.b. at Odessa, shipment to be on the buyer's vessel, to be paid for on handing over the invoice & bill of lading to the buyer in London. The vessel arrived after the bkpcy., but deft. refused to deliver the linseed, although pltfs., as assignees of bkpt., tendered the price:—*Held:* the plea that pltfs. did not, within a reasonable time after the arrival of the vessel at Odessa, give notice to deft. of their intention to adopt the contract, was no answer to the action.—GIBSON *v.* CARRUTHERS (1841), 8 M. & W. 321; 11 L. J. Ex. 138; 151 E. R. 1061.

Annotations:—**Distd.** Knight *v.* Burgess (1864), 10 L. T. 90. **Mentd.** Beckham *v.* Drake (1849), 2 H. L. Cas. 579, H. L.; Griffiths *v.* Perry (1859), 5 Jur. N. S. 1076; Smith *v.* Hudson (1865), 6 New Rep. 103; Schotsmans *v.* L. & Y. Ry. Co. (1867), 2 Ch. App. 332, L. C. & L. J.; Berndtson *v.* Strang (1868), 3 Ch. App. 588, L. C.; Morgan *v.* Bain (1874), 44 L. J. C. P. 47; Leask *v.* Scott (1877), 46 L. J. Q. B. 576, C. A.; *Re* Cock, *Ex p.* Rosevear China Clay Co. (1879), 11 Ch. D. 560, C. A.; Cassaboglou *v.* Gibb (1883), 11 Q. B. D. 797, C. A.; Kendal *v.* Marshall Stevens (1883), 11 Q. B. D. 356, C. A.; Bailey *v.* Thurston, [1903] 1 K. B. 137, C. A.; Booth S.S. Co. *v.* Cargo Fleet Iron Co., [1916] 2 K. B. 570, C. A.

See, further, Part XX., Sect. 16, *ante*.

8078. —— **Jus tertii—Right of true owner of goods sold as debtor's.**]—M., the owner of goods, put C. into possession of them, who remained so until & after the death of the owner, who died intestate. After M.'s death, deft. sold the goods by the desire, & as the property of C., who had previously committed an act of bkpcy., of which deft. was cognisant. Intestate's goods had not been administered, & the ordinary had not claimed them. In an action by the assignees of C. for the conversion of the goods:—*Held:* deft. was not entitled to set up the right of the ordinary to the goods, & deft. could not insist that the property was not shown to have been in the order & disposition of bkpt. with the consent of the true owner.—WHITE *v.* MULLETT (1851), 6 Exch. 713; 20 L. J. Ex. 291; 17 L. T. O. S. 146; 155 E. R. 732.

8079. —— —— **Right of bill of sale holder—Reputed ownership.**]—In trover by assignees, deft., who claimed under an invalid bill of sale, was not allowed to set up a subsequent bill of sale to a third party, who himself had not set it up, & who, even if he were the "true owner," would be defeated by bkpt.'s reputed ownership.—NICHOLSON *v.* COOPER (1858), 3 H. & N. 384; 27 L. J. Ex. 393; 157 E. R. 519.

Annotations:—**Distd.** *Re* Barrand, *Ex p.* Cochrane (1876), 34 L. T. 950. **Mentd.** Bath *v.* Sutton (1858), 27 L. J. Ex. 388; Hollingworth *v.* White (1862), 6 L. T. 604.

8080. —— **Previous proceedings against defendant's client—Cause of action not identical.**]—A landlord distrained on a tenant's goods for rent due, & his solr. received the proceeds of the distress. On the tenant becoming bkpt. the trustee obtained an order against the landlord to pay over to the trustee the proceeds of the distress, less the amount which the landlord was entitled to retain under 1883 Act. The order was not obeyed, & the trustee moved the ct. for an order to the same effect against the solr.:—*Held:* the trustee might proceed against the solr., although he had originally elected to go against the landlord, as the trustee's cause of action against the solr., by whom the property was being retained without right, was not identical with that against his landlord.—*Re* CROOK, *Ex p.* COLLINS (1891), 66 L. T. 29.

8081. —— **Res judicata—Second attempt to set aside assignment on new grounds.**]—An assignee of book debts having sued one of debtors for a

8074 i. —— *That action brought without leave of court.*]—To an action brought by the official assignee, it cannot be objected that such action was brought, without leave first obtained from the ct.—COCHRANE *v.* OWEN (1864), 2 Hyde, 150.—**IND.**

8078 i. —— *Jus tertii.*]—In an action for goods sold & delivered by an assignee, it appeared that before suit a creditors' assignee had been appointed:—*Held:* defts. could not object to pltf.'s title on the ground of the estate being in the creditors' assignee, for such assignee had not questioned pltf.'s title, & defts. were not defending under him.—WILCOX *v.* PILLOW (1877), 28 C. P. 100.—**CAN.**

8081 i. —— *Res judicata.*]—Bkpt. under sequestration raised an action against certain defenders, the trustee declined to sist himself at that time, & intimated that if the creditors adopted any proceedings, it would be

Sect. 3.—*Actions, etc., by trustee: Sub-sects.* 4 & 5.]

debt of £27, the trustee of the assignor claimed the money, & on the trial of an issue ordered to decide as to the ownership of the debt, disputed the assignment on the ground that the assignee had at the time of the assignment notice of an act of bkpcy. committed by the assignor. The trustee, being unsuccessful, afterwards applied to set aside the assignment upon other grounds:—*Held:* as the trustee might have raised those other grounds at the trial of the issue, & did not do so, he could not set them up upon the later application.—*Re* HILTON, *Ex p.* MARCH (1892), 67 L. T. 594; 9 Morr. 286.

Annotation:—**Refd.** Humphries *v.* Humphries, [1910] 2 K. B. 531, C. A.

8082. —— —— Claim on cheques drawn by wife after receiving order—Previous order for payment of sums at wife's credit.]—An order having been made that money in a bank to the credit of bkpt.'s wife should be paid to the trustee, as money of bkpt., an application was afterwards made by the trustee for payment by the bank to him of sums which had been paid, on cheques drawn by the wife, between the date of the receiving order, & the date of the order above mentioned:—*Held:* as that point might have been raised on the previous motion, the matter was *res judicata.*—*Re* MONTAGUE, *Ex p.* WARD *v.* LONDON & SOUTH WESTERN BANK (1897), 76 L. T. 203; 45 W. R. 384; 41 Sol. Jo. 352; 4 Mans. 1.

Annotation:—**Consd.** *Re* Teale, *Ex p.* Blackburn, [1912] 2 K. B. 367.

SUB-SECT. 5.—EVIDENCE.

See, generally, EVIDENCE.

8083. What evidence admissible—Declarations of trustee before becoming such.]—The declarations of a party suing as assignee, made before he became such, are not admissible against him.—FENWICK *v.* THORNTON (1827), Mood. & M. 51, N. P.

Annotation:—**Mentd.** Metters *v.* Brown (1863), 1 H. & C. 686.

8084. —— Proceedings under commission—Some counts on which bankrupt might have sued.]—In an action by assignees, where there are some

in a different shape, defenders having been assoilzied, in respect that bkpt. had failed to find caution for expenses:—*Held:* this did not bar his trustee from afterwards bringing a multiple poinding in name of defenders in relation to the same question.—SHEPPERD *v.* MUNRO (1829), 7 Sh. (Ct. of Sess.) 680.—**SCOT.**

8081 ii. —— —— *Action against purchaser refusing delivery of goods—Subsequent action for damages for care of goods.*]—A merchant in Ontario purchased the assets of an insolvent trader in Quebec, but refused to accept delivery of same. The curator of the estate brought an action in Quebec to compel him to do so, & obtained judgment, whereupon he accepted delivery & paid the purchase money. The curator then brought another action in Ontario for special damages alleged to have been incurred in the care & preservation of the assets from the time of the purchase until the delivery:—*Held:* such special damages could not have been included in the action brought in the Quebec cts., & the right to recover them was not *res judicata* by the judgment in that action.—HYDE *v.* LINDSAY (1899), 29 S. C. R. 595.—**CAN.**

8081 iii. —— —— *Action by trustee for creditors to obtain transfer of property—Second action by trustee in bankruptcy.*]—Deft., a partner in a firm, by written agreement ceded all his rights in & to certain specific property to the creditors of the firm, & appointed H. to act as his agent to effect a sale of such property for the benefit of such creditors. Thereafter H. unsuccessfully sued deft. under the agreement for transfer of such property. Afterwards the firm was declared insolvent, & the trustee in the insolvent estate sued deft. for transfer of the property under the agreement:—*Held:* a plea of *res judicata* could not be sustained in answer to the action by the trustee in the insolvency.—PRAGJU BHIMBHAI & CO.'S TRUSTEE *v.* DESAI (1905), 25 N. L. R. 607.—**S. AF.**

g. —— *Action on building contract—Breach by insolvent of conditions of bond for proper completion of work.*]—In an action by the official assignee for the balance due under a building contract entered into with insolvent, a plea, by way of cross action, of damages sustained by deft., by reason of the breach by insolvent of the conditions of a bond binding him to the proper completion of his contract with deft.:—*Held:* good.—SANDEMAN *v.* BEDWELL (1880), 1 N. S. W. L. R. 10.—**AUS.**

h. —— —— *Work not done according to contract.*]—In an action by an official assignee on a building contract, according to which insolvent undertook to build a house for deft., deft. pleaded, in a plea of cross action by way of set-off, that the work was not done according to the terms of the contract:—*Held:* the plea was good.—HUMPHREY *v.* HOWES (1876), 14 N. S. W. S. C. R. 411.—**AUS.**

k. —— *Action on fire insurance policy—That trustee did not pay premiums.*]—In an action by an assignee on a fire policy, defts. pleaded that pltf. did not renew by paying premiums. An equitable replication that insolvent, under whom pltf. claimed, duly paid the premiums, which were accepted by defts.:—*Held:* good.—DICKSON *v.* PROVINCIAL INSURANCE CO. (1874), 24 C. P. 157.—**CAN.**

l. —— *Action to foreclose mortgage—That mortgage was void under Insolvent Act.*]—Defts. resisted a proceeding taken by pltf., as assignee of a mtge., to foreclose same, on the ground that the mtge. was made in contemplation of insolvency, & was void under Insolvent Act, the mtgee. having afterwards become insolvent & assigned under the Act:—*Held:* defts. should have called on the assignee to take proceedings to set it aside, & upon his refusal, should have applied to the judge for leave to proceed in his name, & defts. should have proved their claims in order to entitle them so to proceed.—GRANT *v.* WHEELER (1880), R. E. D. 388.—**CAN.**

m. —— *That action was premature.*]—The creditors of insolvent consented, by an agreement, that pltf., as guardian of the estate, & deft. should sell certain timber manufactured by insolvent, & pay deft. out of the proceeds, $5,500, which he claimed, upon deft. giving to the guardian his bond to repay same, or so much as deft. might not be entitled to. The bond recited the agreement, & the condition was that deft. should repay such portion of the $5,500 as he should not be entitled to. Pltf. sued on the bond, averring payment to deft. of the $5,500; & that deft. was not entitled to same, but had not repaid it. Deft. pleaded that he duly established his right to the $5,500 by filing particulars of his claim thereto, & alleged that such claim had not been placed on any dividend sheet, nor in any manner adjudicated or awarded upon. Deft. rejoined, that it had not been contested or objected to, & that pltf., as assignee, had not prepared any dividend sheet of the estate:—*Held:* the meaning of the bond was, that deft. should repay what, after a contestation of his claim, it might appear that he was not entitled to rank for, & the action was premature.—HALL *v.* DUNSFORD (1871), 32 U. C. R. 1.—**CAN.**

n. —— *As regards power to one trustee to sue—Signed by one trustee "for self & co-trustees."*]—Where one trustee produces a power signed by his co-trustee or co-trustees to sign the power to sue on his or their behalf, it is not a sufficient objection to such power to sue that it is signed by only one trustee for "self & co-trustees."—MULLER BROTHERS *v.* LOMBARD, VAN AARDE & CO. (1904), 21 S. C. 657.—**S. AF.**

o. —— *Equitable defence — Lien—Estoppel.*]—In an action of trover by the assignee in insolvency of H., the first count alleging a conversion previous to, & the second count a like conversion subsequent to, H.'s insolvency:—*Held:* a plea which alleged some of the goods seized to belong to A. & Co., was bad, as they could not be the goods of H., of whom pltf. was assignee & as to the remainder the plea was bad, as it averred a sale impeachable by the assignee, & probably in itself an act of bkpcy., & the matters set up showed no estoppel in pais.—MACKENZIE *v.* DAVIDSON (1876), 27 C. P. 188; 3 Ont. Dig. 7054.—**CAN.**

p. *Effect of plea—Denying plaintiff was assignee.*]—In an action by an assignee under 1875 Act for trespass, deft. pleaded that pltf. "was not, nor is such assignee as alleged":—*Held:* deft. put in issue the fact implied in the averment that pltf. was assignee.—CREIGHTON *v.* CHITTICK (1882), 7 S. C. R. 348.—**CAN.**

q. —— *Denying goods belonged to plaintiff as assignee.*]—In an action by pltf., describing himself as "the official assignee of the estate & effects of M. according to the statute in force concerning insolvents," against deft., for a wrongful sale of goods seized by him under a distress warrant:—*Held:* a plea denying the goods to be the goods of pltf. as such assignee, did not put in issue pltf.'s official character as assignee.—MCEDWARDS *v.* MCLEAN (1878), 43 U. C. R. 454.—**CAN.**

PART XXI. SECT. 3, SUB-SECT. 5.

r. *What evidence admissible—Evidence of insolvent.*]—The evidence of insolvent is admissible to prove a

counts or causes of action on which bkpt. might have sued, & others on which he could not, the proceedings under the commission are admissible in evidence, if pltfs. elect to proceed only on those counts, which bkpt. might have sustained.—JONES *v.* FORT (1828), Mood. & M. 196, N. P.; *subsequent proceedings* (1829), 9 B. & C. 764.

Annotations :—**Refd.** Kitchener *v.* Power (1835), 3 Ad. & El. 232. **Mentd.** Robson *v.* Rolls (1832), 1 Mood. & R. 239, N. P.; Boyle *v.* Wiseman (1855), 11 Exch. 360; Billiter *v.* Young (1856), 6 E. & B. 1; Heinekey *v.* Earle (1858), 4 Jur. N. S. 848, Ex. Ch.; Exley *v.* Inglis (1868), L. R. 3 Exch. 247.

8085. —— —— **Order made by Lord Chancellor.**]—In an action by the assignees, of B., a bkpt., in order to prove petitioning creditor's debt, they proved that B. was indebted to R., that a commission afterwards issued against R., & that his assignees were petitioning creditors against B., & in order to support the commission against R., produced the proceedings under it :—*Held :* they were not admissible in evidence, & pltfs. were bound to prove by other evidence R.'s trading, act of bkpcy., etc.

Pltfs. also produced an order, made by the Lord Chancellor under 6 Geo. 4, c. 16, s. 18, whereby, after reciting a petition to him by N., he ordered that, if the comrs. should be satisfied that M. had proved under the commission against B. a debt sufficient to support the commission, contracted not anterior to the petitioning creditor's debt, the commission should be proceeded in :—*Held :* this was not a valid order, inasmuch as it did not find, or call upon the comrs. to find, that the original petitioning creditor's debt was insufficient.—MUSKETT *v.* DRUMMOND (1829), 10 B. & C. 153; 5 Man. & Ry. K. B. 210; 109 E. R. 408.

Annotations :—**Refd.** Aireton *v.* Davis (1833), 3 Moo. & S. 138; Christie *v.* Unwin (1840), 11 Ad. & El. 373. **Mentd.** Brancker *v.* Molyneux (1842), 4 Scott, N. R. 753; Marsh *v.* Wooley (1843), 6 Scott, N. R. 555; Harrison *v.* Wright (1845), 13 M. & W. 816.

—— **Bankrupt's admissions, etc., generally.**]—*See* Part XVI., Sect. 3, sub-sect. 3, *ante*.

8086. —— **Examination of defendant before commissioner.**]—In *assumpsit* by assignees for goods sold and delivered by bkpt., & on an account stated, if pltfs. put in evidence an examination of deft. before the comrs., his admissions against himself are evidence against him, but his statements in his own favour are not evidence for him.—GROOM *v.* RICHARDSON (1841), 5 Jur. 1061.

8087. What evidence conclusive—Depositions—Demand on which bankrupt could have sued.]—In an action by assignees for a demand, for which bkpt., if solvent, might sue, the depositions are conclusive evidence of the matters contained in them, unless bkpt., within the time prescribed by 6 Geo. 4, c. 16, s. 92, gives notice of his intention to dispute the commission, although the action was commenced, & notice given by deft. that he would dispute the act of bkpcy., etc. within the time allowed to bkpt. to give such notice, if the cause be not brought to trial till after that time is elapsed.—EARITH *v.* SCHRODER (1827), Mood. & M. 24, N. P.

8088. —— —— ——.]—The depositions are conclusive evidence under 6 Geo. 4, c. 16, s. 92, in a case, where bkpt. might have sued, if no bkpcy. had ensued, though the conversion which gave the right of action took place after the act of bkpcy.—FOX *v.* MAHONEY (1832), 2 Cr. & J. 325; 2 Tyr. 285; 1 L. J. Ex. 106; 149 E. R. 139.

Annotations :—**Refd.** Kitchener *v.* Power (1835), 3 Ad. & El. 232. **Mentd.** Hare *v.* Waring (1838), 3 M. & W. 362.

8089. —— —— ——.]—Trover by the assignees of R., a bkpt., to recover the amount of a bill of exchange for £1,600, which bill had been deposited with deft. by bkpt., as an indemnity to M. & L., against the consequences of a bond which they, jointly with bkpt., had executed to J., under Judgments Act, 1838 (c. 110), s. 8. The bond, having been cancelled, was shown by the assignees in its cancelled state to deft., & they at the same time demanded the bill, which deft. declined to part with, saying, that he should hold it for M. & L. Deft. afterwards obtained £800 on the bill :—*Held :* this was a demand & refusal, on which bkpt. might have maintained the action, & the depositions, taken under the fiat, of petitioning creditor's debt, the trading, & act of bkpcy., were conclusive evidence of those facts, by virtue of 6 Geo. 4, c. 16, s. 92.—ALSAGER *v.* CLOSE (1842), 10 M. & W. 576; 12 L. J. Ex. 50; 152 E. R. 600.

Annotation :—**Mentd.** Heald *v.* Carey (1852), 21 L. J. C. P. 97.

8090. —— —— —— **Whether bankrupt could have sued.**]—In all actions by assignees, which bkpt. himself might have maintained, if no bkpcy. had occurred, the depositions taken before the comrs. are conclusive evidence of the trading, etc., although at the time of the bkpcy. the cause of action may not have been complete; & the question whether the action is of such a nature, must be decided by a reference to the facts of the case, which the judge may collect from the opening of pltf.'s counsel, & not from a strict reference to the cause of action appearing on the record.

Where in trover by assignees the conversion was laid after the bkpcy. :—*Held :* pltf.'s were not precluded by the form of the record from having the depositions admitted as conclusive evidence.—KITCHENER *v.* POWER (1835), 3 Ad. & El. 232; 1 Har. & W. 174; 4 Nev. & M. K. B. 710; 4 L. J. K. B. 190; 111 E. R. 401.

8091. —— **Account signed by bankrupt before bankruptcy—Conclusive as to date.**]—An account signed by bkpt., & bearing date before his bkpcy., is to be presumed, as against his assignees, to have been made when dated.—SINCLAIR *v.* BAGGALEY

debt due to his assignee.—REYNOLDS *v.* TULLY (1851), 3 Ir. Jur. 83.—**IR.**

8086 i. —— —— *Before commissioner.*]—In an action by trustees against insolvent & third parties claiming to have acquired from insolvent, for good consideration & *bonâ fide*, assets obtained by insolvent after sequestration & before confirmation of his account :—*Held :* the evidence of insolvent before a comr. could not be put in through the comr. in order to show, as against other deft., that the assets acquired by him were not the earnings of his work & labour.—SIEG'S TRUSTEES *v.* SPILHAUS & CO. & SIEG (1911), C. P. D. 750.—**S. AF.**

—— *Bankrupt's admissions, etc., generally.*]—*See* Part XVI., sect. 3, sub-sect. 3, *ante*.

s. —— *Evidence of defendant's servant in another case.*]—In an action by trustees against insolvent & third parties claiming to have acquired from insolvent, for good consideration & *bonâ fide*, assets obtained by insolvent after sequestration & before confirmation of his account :—*Held :* the evidence of a manager of deft. firm, given in the course of another case between insolvent & a stranger to the action, was not admissible.—SIEG'S TRUSTEES *v.* SPILHAUS & CO. & SIEG (1911), C. P. D. 750.—**S. AF.**

t. —— *Practice of master's office.*]—Action (*supra*) in which :—*Held :* evidence of the practice of the master's office as to the filing of accounts by trustees was not admissible.—SIEG'S TRUSTEES *v.* SPILHAUS & CO. & SIEG (1911), C. P. D. 750.—**S. AF.**

8087 i. *What evidence conclusive—Proceedings & attachment in insolvency—Subject to question by court.*]—Declaration by pltf. as assignee of M., on the common counts. Plea that M. was not a trader within 1869 Act. Replication, setting out in full the proceedings & adjudication in the insolvent ct., showing that an attachment in insolvency issued against M., that he petitioned the judge to set it aside on the ground, that he was not a trader within the Act, that the judge decided that he was a trader, & that such decision was affirmed on appeal :—*Held :* replication was bad, as such adjudication & proceedings were not conclusive, at all events as against a debtor of M., but were subject to question by the ct.—GROVES *v.* MCARDLE (1873), 33 U. C. R. 252; 9 C. L. J. N. S. 126.—**CAN.**

Sect. 3.—Actions, etc., by trustee: Sub-sects. 5 & 6.]

(1838), 4 M. & W. 312; 1 Horn. & H. 194; 7 L. J. Ex. 305; 2 Jur. 683.

Annotations:—**Refd.** Gibson *v.* King (1842), Car. & M. 458. **Mentd.** Doe d. Clarke *v.* Stillwell (1838), 8 Ad. & El. 645; Anderson *v.* Weston (1840), 6 Bing. N. C. 296; Potez *v.* Glossop (1848), 2 Exch. 191; Angell *v.* Worsley (1849), 12 L. T. O. S. 428.

8092. —— Statement of bankrupt that goods belonged to third parties—Subsequent statement that goods were his own.]—In trover by assignees, deft.'s counsel contended that false statements made by bkpt., as to whose property the goods were, operated as conclusive evidence against bkpt. & pltfs., who claimed through him, that the property was not that of bkpt. The statements were to the effect that the goods were the property of bkpt.'s brothers, but after deft. had in consequence of his belief in the statements altered his position by seizing the goods bkpt. confessed that the goods were his own:—*Held:* estoppel operated to prevent the last statement made from being made use of, to prove that the property really was bkpt.'s—FREEMAN *v.* COOKE (1848), 2 Exch. 654; 6 Dow. & L. 187; 18 L. J. Ex. 114; 12 L. T. O. S. 66; 12 Jur. 777.

Annotations:—**Mentd.** Halifax *v.* Lyle (1849), 3 Exch. 446; Howard *v.* Hudson (1853), 2 E. & B. 1; Foster *v.* Mentor Life Assce. (1854), 3 E. & B. 48; Jorden *v.* Money (1854), 5 H. L. Cas. 185, H. L.; Lewis *v.* Clifton (1854), 2 C. L. R. 1350; A.-G. *v.* Stephens (1855), 1 K. & J. 724; Kent *v.* Thomas (1856), 1 H. & N. 473; Bigg *v.* Strong (1857), 3 Sm. & G. 592; Bill *v.* Richards (1857), 26 L. J. Ex. 409; Dunston *v.* Paterson (1857), 2 C. B. N. S. 495; Simpson *v.* Accident Death Insce. Co. (1857), 2 C. B. N. S. 257; Clarke & Chapman *v.* Hart (1858), 6 H. L. Cas. 633, H. L.; Cornish *v.* Abington (1859), 4 H. & N. 549; Fletcher *v.* Fletcher (1859), 1 E. & E. 420; Richards *v.* Johnson (1859), 5 Jur. N. S. 520; Sweeting *v.* Pearce (1859), 6 Jur. N. S. 753; Ward *v.* S. E. Ry. Co. (1860), 2 E. & E. 812; Cave *v.* Mills (1861), 8 Jur. N. S. 363; Greenish *v.* White (1861), 31 L. J. C. P. 93; M'Cance *v.* L. & N. W. Ry. Co. (1861), 7 Jur. N. S. 1304; White *v.* Greenish (1861), 11 C. B. N. S. 209; Betts *v.* Menzies (1862), 10 H. L. Cas. 118, H. L.; Ashpitel *v.* Bryan (1863), 3 B. & S. 474; Swan *v.* North British Australasian Co. (1863), 2 H. & C. 175, Ex. Ch.; Harding *v.* Hall (1866), 14 L. T. 410; *Re* Bahia & San Francisco Ry. Co. (1868), L. R. 3 Q. B. 584; Webb *v.* Herne Bay Comrs. (1870), L. R. 5 Q. B. 642; Brook *v.* Hook (1871), L. R. 6 Exch. 89; Maxted *v.* Paine (1871), L. R. 6 Exch. 132, Ex. Ch.; Smith *v.* Hughes (1871), L. R. 6 Q. B. 597; Stimson *v.* Farnham (1871), L. R. 7 Q. B. 175; Citizens' Bank of Louisiana *v.* National Bank of New Orleans (1873), L. R. 6 H. L. 352, H. L.; Wallis *v.* Biddick (1873), 22 W. R. 76; Arnold *v.* Cheque Bank, Arnold *v.* City Bank (1876), 1 C. P. D. 578; Harris *v.* G. W. Ry. Co. (1876), 1 Q. B. D. 515; Polak *v.* Everett (1876), 1 Q. B. D. 669; Roden *v.* London Small Arms Co. (1876), 46 L. J. Q. B. 213; Angus *v.* Dalton (1877), 3 Q. B. D. 85; Johnson *v.* Credit Lyonnais Co., Johnson *v.* Blumenthal (1877), 3 C. P. D. 32, C. A.; Burkinshaw *v.* Nicolls (1879), 39 L. T. 308, H. L.; McKenzie *v.* British Linen Co. (1881), 6 App. Cas. 82, H. L.; Scarf *v.* Jardine (1882), 7 App. Cas. 345, H. L.; Hall *v.* West End Advance Co. (1883), Cab. & El. 161; Joseph *v.* Webb, Joseph *v.* Lyons, Joseph *v.* Pidcock, Joseph *v.* Jones (1883), Cab. & El. 262; Manchester & Oldham Bank *v.* Cook (1883), 49 L. T. 674, D. C.; Miles *v.* McIlwraith (1883), 8 App. Cas. 120, P. C.; Russell *v.* Watts (1885), 10 App. Cas. 590; Roe *v.* Mutual Loan Fund Assocn. (1887), 56 L. T. 631; Bank of England *v.* Vagliano, [1891] A. C. 107, H. L.; Low *v.* Bouverie, [1891] 3 Ch. 82, C. A.; Tomkinson *v.* Balkis Consolidated Co., [1891] 2 Q. B. 614, C. A.; Sarat Chunder Dey *v.* Chunder Lala (1892), 56 J. P. 741, P. C.; Balkis Consolidated Co. *v.* Tomkinson, [1893] A. C. 396, H. L.; *Re* Bentley & Yorkshire Breweries, *Ex p.* Harrison (1893), 69 L. T. 204, C. A.; Henderson *v.* Williams, [1895] 1 Q. B. 521, C. A.; Scholfield *v.* Londesborough, [1895] 1 Q. B. 536, C. A.; Bloomenthal *v.* Ford, [1897] A. C. 156, H. L.; Palmer *v.* Moore, [1900] A. C. 293, P. C.; Farquharson *v.* King, [1901] 2 K. B. 697, C. A.; Bell *v.* Marsh, [1903] 1 Ch. 528, C. A.; Sheffield Corpn. *v.* Barclay, [1903] 2 K. B. 580, C. A.; Morison *v.* London, County & Westminster Bank (1913), 108 L. T. 379; Pierson *v.* Altrincham (1917), 86 L. J. K. B. 969; London Joint Stock Bank *v.* Macmillan & Arthur, [1918] A. C. 777, H. L.

8093. Right of trustee to cross-examine bankrupt.]—On a motion by a trustee in bkpcy. against a stranger to the bkpcy., the trustee can cross-examine bkpt., although called as his witness, & can put to him the notes of his public examination. The rules relating to a common law action are not to be strictly applied, because in bkpcy. bkpt. is often the only person who can be called to give evidence.—*Re* OSBORNE, *Ex p.* LOVELL (1899), 43 Sol. Jo. 480.

8094. Objection to admissibility of evidence—How taken.]—In an action by assignees a party tendered evidence *primâ facie* admissible:—*Held:* the other party ought not to be allowed to interpose with evidence for the purpose of excluding it, but it should be received, & expunged, if afterwards shown not to be properly receivable.—JONES *v.* FORT (1828), Mood. & M. 196, N. P.; *subsequent proceedings* (1829), 9 B. & C. 764.

Annotations:—**Refd.** Kitchener *v.* Power (1835), 3 Ad. & El. 232; Boyle *v.* Wiseman (1855), 11 Exch. 360. **Mentd.** Robson *v.* Rolls (1832), 1 Mood. & R. 239, N. P.; Billiter *v.* Young (1856), 5 E. & B. 1, Ex. Ch.; Heinekey *v.* Earle (1858), 4 Jur. N. S. 848, Ex. Ch.; Exley *v.* Englis (1868), L. R. 3 Exch. 247.

SUB-SECT. 6.—COSTS.

8095. Security for costs—When ordered—Trustee suing as such insolvent.]—The ct. will not require security for costs to be given by pltf., who sues as assignee for the benefit of the estate, although he is in insolvent circumstances.—DENSTON *v.* ASHTON (1869), L. R. 4 Q. B. 590; 10 B. & S. 768; 38 L. J. Q. B. 254; 21 L. T. 20; 17 W. R. 968.

Annotations:—**Consd.** Pooley's Trustee in Bkpcy. *v.* Whetham (1884), 28 Ch. D. 38, C. A. **Apprvd.** Cowell *v.* Taylor (1885), 31 Ch. D. 34, C. A. **Refd.** United Ports Insce. *v.* Hill (1870), L. R. 5 Q. B. 395.

8096. —— —— ——.]—A trustee brought an action in his official name, his own name not being mentioned. Defts., moved for security for costs, on the ground of his insolvency, & of his suing solely in his official name. Evidence was given that he had been bkpt. ten years previously & had also compounded with his creditors four years before the action was brought:—*Held:* the evidence of the insolvency of pltf. was insufficient, & the fact of his suing solely in his official name

a. *Whether petitioning creditor's debt, trading & act of bankruptcy must be proved—In action by trustees under English commission.*]—Assignees acting under an English commission, who bring an action in Ireland must prove their case fully, & cannot avail themselves of 6 Geo. 4, c. 16, s. 90.—BARBER *v.* BRADSHAW (1837), Hayes & Jo. Ap. xlvii.—**IR.**

b. —— *In ejectment.*]—*Held:* 6 Will. 4, c. 14, s. 104, was applicable to ejectments.—O'BRIEN *v.* BERNARD (1843), 6 I. L. R. 6.—**IR.**

PART XXI. SECT. 3, SUB-SECT. 6.

c. *Security for costs—Power of court to order.*]—MONCK *v.* NORTHWOOD, 2 C. L. J. N. S. 268.—**CAN.**

8095 i. —— *When ordered—Trustee suing as such insolvent.*]—An assignee *bonâ fide* suing in discharge of his duty as such assignee, will not be required to give security for costs, on the ground that he is without means, & not beneficially interested in the suit.—VARS *v.* GOULD (1879), 8 P. R. 31.—**CAN.**

8095 ii. —— —— —— *Action for trustee's benefit.*]—Where a bill was filed by an assignee against B. for the indemnification of the estate in respect of a claim by C., which it was alleged B. should pay, & pltf. was himself an insolvent, & there were no assets, & the suit was brought at his instigation, risk, & expense, & for his benefit:—*Held:* pltf. must give security for costs.—MASON *v.* JEFFREY (1865), 1 Ch. Ch. 379.—**CAN.**

8095 iii. —— —— *Trustee suing for insolvent & others.*]—Where the assignee of one of pltfs., who had obtained his discharge in insolvency, brought an action in the name of pltfs. on an old judgment which had been assigned to insolvent by other pltfs., & to the benefit of which the assignee was entitled:—*Held:* he should give security for costs.—BOICE *v.* O'LOANE (1878), 7 P. R. 359.—**CAN.**

e. *Liability for costs.—Action brought without leave of court.*]—Should the official assignee bring any action without leave first obtained from the ct. he will do so at his own risk in regard to the matter of costs.—COCHRANE *v.* OWEN (1864), 2 Hyde, 150.—**IND.**

was not a ground for ordering him to give security for costs. *Qu.:* whether a trustee suing in his official name would, if insolvent, be ordered to give security for costs.—POOLEY'S TRUSTEE *v.* WHETHAM (1884), 28 Ch. D. 38; 54 L. J. Ch. 182; 51 L. T. 608; 33 W. R. 423; 1 T. L. R. 37, C. A.; *subsequent proceedings* (1886), 33 Ch. D. 76, 111, C. A.

Annotations:—**Consd.** Cowell *v.* Taylor (1885), 31 Ch. D. 34, C. A. **Refd.** *Re* Clough, Bradford Commercial Banking Co. *v.* Cure (1887), 35 Ch. D. 7, C. A.

8097. —— —— ——.]—The ct. will not require security for costs to be given by pltf., who sues as trustee, even where he is in insolvent circumstances.—COWELL *v.* TAYLOR (1885), 31 Ch. D. 34; 55 L. J. Ch. 92; 53 L. T. 483; 34 W. R. 24, C. A.

Annotations:—**Consd.** Greener *v.* Kahn, [1906] 2 K. B. 374, C. A. **Refd.** Lloyd *v.* Hathern Station Brick Co. (1901), 85 L. T. 158, C. A.; *Re* Strand Wool Co., [1904] 2 Ch. 1, C. A. **Mentd.** Rhodes *v.* Dawson (1886), 16 Q. B. D. 548, C. A.; Swain *v.* Follows (1887), 18 Q. B. D. 585, D. C.; B. *v.* B. & F. (1902), 18 T. L. R. 380; Blackett *v.* Blackett & Frail, [1902] P. 170, C. A.; Nelson Line (Liverpool), [1906] 2 K. B. 217, C. A.; White *v.* Butt, [1909] 1 K. B. 50, C. A.; Rainbow *v.* Kittoe, [1916] 1 Ch. 313.

8098. Liability for costs—When new trustee does not continue—Action begun by retiring trustee.]—If a new assignee does not continue any legal proceedings already commenced, the retiring assignee must pay the costs incurred by them, unless the master report such costs were properly incurred.—*Re* ROBERTS (1818), Buck, 465.

8099. —— Unsuccessful proceedings—Estate insufficient.]—If a trustee makes an unsuccessful application to the ct., he will, in the absence of special circumstances, be ordered to pay the costs, & if the estate is insufficient for payment of the costs, the trustee must bear them personally.

Where the estate is insufficient to pay the costs of a suit, the trustee must get an indemnity from the creditors before commencing the suit, or pay the costs himself.—*Re* ANGERSTEIN, *Ex p.* ANGERSTEIN (1874), 9 Ch. App. 479; 43 L. J. Bcy. 131; 30 L. T. 446; 22 W. R. 581, L. JJ.

Annotations:—**Apprvd.** Pitts *v.* La Fontaine (1880), 6 App. Cas. 482, P. C. **Refd.** *Re* Pettit's Estate (1876), 1 Ch. D. 478; *Re* Branson, *Ex p.* Trustee, [1914] 2 K. B. 701. **Mentd.** Marbella Iron Ore Co. *v.* Allen (1878), 47 L. J. Q. B. 601; Fraser *v.* Province of Breccia Steam Tram. Co. (1887), 56 L. T. 771.

8100. —— Trustee respondent—Appeal successful.]—A trustee, who is respondent to a successful appeal will not be ordered to pay costs personally.—*Re* NATHAN, *Ex p.* STAPLETON (1879), 10 Ch. D. 586, C. A.

Annotations:—**Consd.** Pitts *v.* La Fontaine (1880), 6 App. Cas. 482, P. C. **N.F.** *Re* Mackenzie, *Ex p.* Hertfordshire, [1899] 2 Q. B. 566, C. A. **Mentd.** Tolhurst *v.* Associated Portland Cement Manufacturers (1900), Ltd.; Associated Portland Cement Manufacturers (1900), Ltd. *v.* Tolhurst, [1902] 2 K. B. 660, C. A.

8101. —— Trustee appellant—Respondent's costs.]—Applt. trustee ordered to pay resp.'s

f. —— *Unsuccessful proceedings.*]—In an action the writ of summons described pltf. as "trustee of the estate of H. & F., bkpts.," followed by the name of the trustee, "A. T., of etc." On judgment being entered for deft.:—*Held:* A. T., was personally liable for the costs.—HENDERSON & FARRAR'S TRUSTEE *v.* EVANS (1879), O. B. & F. 173.—**N.Z.**

g. —— ——.]—Where a trustee, on the instructions of the creditors, M. protesting, brought an action against M. to have a general mtge. bond in favour of M. over the property of insolvent set aside, & was unsuccessful:—*Held:* the trustee was entitled to charge the costs of the action against the estate, he having acted *bonâ fide* under instructions from the meeting of creditors.—MEURANT *v.* SMIT'S TRUSTEE (1880), F. 70.—**S. AF.**

See, further, Part VII., sect. 5, subsect. 2, B (*a*), *ante.*

h. —— ——.]—A trustee should not be ordered to pay *de bonis propriis* the cost of unsuccessful litigation instituted by him, unless he has acted *malâ fide*, negligently or unreasonably.—*Re* POTGIETER'S ESTATE (1908), T. S. 982.—**S. AF.**

k. —— ——.]—Where a trustee has incurred costs in bringing an application on behalf of an insolvent estate, but the matter is a fair & proper one to have been brought before the ct., & the trustee has acted *bonâ fide*, costs will not be granted against him personally.—NATAL BANK *v.* KURANDA'S TRUSTEE (1904), T. S. 586.—**S. AF.**

8099 i. —— —— *Estate insufficient.*]—An official assignee brought an action to recover a sum of money alleged to be the property of bkpt. There were no assets in the estate, & the official assignee had neglected to obtain an indemnity from the creditors for costs. At the trial judgment was given for defts., with costs:—*Held:* the official assignee was personally liable for the costs of the action.—BANKS' OFFICIAL ASSIGNEE *v.* BANKS (1893), 12 N. Z. L. R. 298.—**N.Z.**

8099 ii. —— —— ——.]—A. was the preferent creditor in an insolvent estate, the assets of which were barely sufficient to pay his debt. The trustees, acting on legal advice, but without A.'s knowledge, instituted an action in which they succeeded. They also instituted two other actions, in which they also succeeded. All the judgments were reversed on appeal:—*Held:* as the trustees had acted *bonâ fide* & with due caution in instituting the actions, they could not be made personally liable for the costs.—VAN HEERDEN *v.* GOOSEN'S TRUSTEES (1885), 4 S. C. 41.—**S. AF.**

8099 iii. —— —— —— *Negligence proved.*]—A., the trustee of an insolvent estate, the assets in which to his knowledge did not exceed £20, acting on counsel's advice, brought an action against B. The action was unsuccessful, & the estate was inadequate to meet B.'s costs:—*Held:* as there was proof of some negligence on the part of A., he was personally liable for the costs.—LAMB *v.* PIETERS (1900), 17 S. C. 427.—**S. AF.**

8099 iv. —— —— —— *No good grounds for action—Laches.*]—Where trustees had, without good grounds, entered into litigation twelve years after the estate had been wound up:—*Held:* they should pay costs *ex officio*, failing which *de bonis propriis.*—LLOYD *v.* ANDERTON BROTHERS' TRUSTEES (1901), 18 S. C. 104.—**S. AF.**

m. —— —— *Opportunity of previous investigation in Insolvent Court.*]—Where the official assignee had a full opportunity of investigating suspicious facts in the Insolvent Ct., there is no reason why he should not pay costs if unsuccessful in a suit in equity.—STEPHEN *v.* DOYLE (1882), 3 N. S. W. Eq. 1.—**AUS.**

n. —— *Of interpleader — Lien.*]—A writ of attachment issued, under which the assignee seized goods, which were claimed by a person to whom it was alleged debtor had transferred them. The assignee filed a bill of interpleader against claimant & the creditors who had sued out the writ; & claimant was ordered to be debarred of all interest in the goods, & to pay the costs of suit, & the assignee was given a lien on the goods in his hands for his costs.—WELLS *v.* HEWS (1876), 24 Gr. 131.—**CAN.**

o. —— *Of obtaining order for directions—In conflict between two sets of creditors.*]—Where a contest between two sets of creditors as to the proper disposition of money in the hands of an assignee for creditors results in costs being incurred, the only costs the estate should be called upon to bear are such costs as are necessarily incurred in obtaining the order for directions by the assignee.—*Re* WILSON'S ESTATE (1915), 33 W. L. R. 13; 9 W. W. R. 582; 25 D. L. R. 758; 8 Sask. L. R. 401.—**CAN.**

p. —— *Of examination of defendant improperly joined.*]—A fiat will not be granted to tax to pltf. trustee the costs of the examination of deft., who was not a necessary or proper party to the action, although no objection on that ground was taken prior to the application for the fiat.—SCHWARTZ *v.* WINKLER (1901), 14 Man. L. R. 197.—**CAN.**

q. —— *Of action continued by agent—Without consent of creditors.*]—*Held:* an assignee could not bind the creditors for the costs of an action which he had caused to be continued in his quality.—CREPEAU *v.* GLOVER (1879), 5 Q. L. R. 235.—**CAN.**

r. —— *Of administration action by trustees of administrator—Administrator indebted to estate.*]—The assignees in bkpcy. of an administratrix are not entitled to their costs of an action to administer the assets of deceased when the administratrix is found indebted to the estate.—JAMES *v.* RICHARDSON (1882), 9 L. R. Ir. 383.—**IR.**

s. —— *Of bill for conveyance of legal estate for insolvent's life.*]—Where an assignee was obliged to file a bill to have the legal estate for insolvent's life conveyed to him, & for a sale, & obtained a decree, he was entitled to his costs out of the fund.—SPUNNER *v.* SPUNNER (1824), 2 Mol. 473.—**IR.**

t. —— *Trustee not filing affidavit or attempting to adjust claim.*]—In an action brought by an assignee on a debt admitted to be due to insolvent, the assignee having given no assistance to the ct. by affidavit, & having made no attempt to adjust the claims, was refused his costs.—PICKEN *v.* VICTORIA RY. CO. (1879), 44 U. C. R. 372.—**CAN.**

8101 i. —— *Trustee appellant—Respondent's costs.*]—Where an assignee

Sect. 3.—*Actions, etc., by trustee: Sub-sect.* 6. *Sect.* 4.]

cost personally.—*Re* JOHNSTONE, *Ex p.* SINGLETON (1885), 2 Morr. 206, D. C.

Annotations :—**Mentd.** *Re* Duncan, *Ex p.* Duncan, [1892] 1 Q. B. 331 ; *Re* Duncan, *Ex p.* Official Receiver, [1892] 1 Q. B. 879.

8102. —— Every assistance given to trustee.]—Bkpt., on the eve of his bkpcy., possessed himself of money belonging to his estate, which he paid into a banking account opened by him for that purpose, & a cheque was drawn by bkpt. on that account in favour of his housekeeper, in payment of which she received a Bank of England note for £500. The note, payment of which had been stopped by the trustee, was subsequently presented by the N. Bank, it having been paid in by a customer, who stated that he had merely passed same through his account as a matter of convenience for the person to whom the note was originally given. A motion having been launched by the trustee to declare the note to be his property, an arrangement was come to, by which the claim of bkpt.'s housekeeper was withdrawn, & the person, through whose account the note had passed, also made no claim to retain it, but he applied to have paid thereout the costs to which he had been put, & to get such a receipt for the balance of the money as would be an answer to any action in connection with the note which might thereafter be brought against him :—*Held :* even assuming every assistance had been afforded to the trustee, no ground had been shown why the trustee should pay costs, & the only order the ct. could make was an order in the terms of the trustee's notice of motion, no order being made as to costs.—*Re* BATES, *Ex p.* HOBBS (1892), 8 T. L. R. 228 ; 9 Morr. 25.

8103. —— Motion to set aside settlement dismissed.]—A motion by a trustee to set aside a post-nuptial settlement for value was dismissed by the ct., but without costs against the trustee, who would have failed in his duty, if he had not brought the motion.—*Re* TETLEY, *Ex p.* JEFFREY (1896), 66 L. J. Q. B. 111 ; 75 L. T. 166 ; 3 Mans. 226 ; *affd.* on another point, 3 Mans. 321, C. A.

Annotation :—**Mentd.** Denny *v.* Denny & Warr, [1919] 1 K. B. 583.

See, further, Part VII., Sect. 5, sub-sect. 2, B. (*a*), Part XVI., Sect. 5, & Part XVII., Sect. 9.

8104. What costs allowed—Costs of producing evidence.]—In an action of trover for goods by an assignee, pltf., in order to establish insolvent's title to the goods at a certain time, gave in evidence a bill of sale, by which insolvent, in consideration of £499, sold absolutely the goods to deft. & other persons, & pltf. then produced evidence to impeach the validity of the bill of sale, by showing that it was wholly void on the ground of fraud. Pltf. having obtained a verdict :—*Held :* he was entitled to the costs incurred in the production of that evidence.—HARDY *v.* TINGEY (1850), 5 Exch. 294 ; 19 L. J. Ex. 233 ; 155 E. R. 126.

Annotation :—**Mentd.** Simpson *v.* Wood (1852), 7 Exch. 349.

SECT. 4.—ACTIONS, ETC., AGAINST TRUSTEE.

8105. In what court—Court of Chancery.]—Where a trustee has been appointed under a liquidation of the affairs of an equitable mtgor., the mtgee. may, instead of applying in bkpcy., proceed in Ch. against the trustee for the purpose of having the security realised, the jurisdiction in Ch. not being taken away by 1869 Act.—WHITE *v.* SIMMONS (1871), 6 Ch. App. 555 ; 40 L. J. Ch. 689 ; 19 W. R. 939, L. C.

Annotations :—**Folld.** Coulthurst *v.* Smith (1873), 29 L. T. 243. **Consd.** Jenney *v.* Bell (1876), 2 Ch. D. 547 ; *Re* Hart, *Ex p.* Fletcher (1878), 9 Ch. D. 381, C. A.

Jurisdiction of court.]—*See* Nos. 8123, 8124, 8127, 8130, *post.*

8106. Action by Crown—For unpaid malt duties—Malt sold before notice of claim.]—Assignees sold malt, without notice of the claim of the Crown for unpaid duty. They refused to pay, on the ground that the property had legally vested in them before the Crown had taken any step to affect the property, or to render bkpt.'s effects liable to its demands :—*Held :* an account must be taken of what was due for unpaid duty at the time the assignees took possession.—A.-G. *v.* SENIOR (1739), 2 Doug. K. B. 416, n. ; 99 E. R. 267.

Annotations :—**Apld.** Stracy *v.* Hulse (1780), 2 Doug. K. B. 411. **Mentd.** R. *v.* Tregoning (1828), 2 Y. & J. 132.

8107. Money had & received—Landlord succeeding in action of replevin.]—If goods are distrained for rent, & replevied by the tenant, & afterwards, the tenant becoming bkpt., they are sold by the assignees, the landlord succeeding in the action of replevin, & obtaining a *retorno habendo*, cannot recover the amount of the rent against the assignees in an action for money had & received.—BRADDYLL *v.* JONES (1784), 4 Doug. K. B. 52 ; 99 E. R. 763.

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appealed from an order, which it was not his duty to appeal from at the expense of the estate, the appeal was dismissed with costs.—*Re* LAMBE (1867), 13 Gr. 391.—**CAN.**

a. —— *Trustee made party to suit for adjusting partnership accounts—Actively asserting claims in suit.*]—Where trustees or assignees of bkpt. partners are made parties to a suit for adjusting the relations & accounts of the partners, & they take active measures in the assertion of claims made by them, they are to be regarded for the purposes of the costs of the suit as standing in no better position than the partners whom they represent. Each party ordered to bear his own costs of taking accounts.—MCKAY *v.* BURKE, Mac. 674.—**N.Z.**

PART XXI. SECT. 4.

8105 i. *In what court—Court of Chancery.*]—Action to enforce a trust for creditors :—*Held :* not a proper case in which to proceed at law under Administration of Justice Act, 1873 (c. 8), s. 2, & suit transferred under s. 9 to the Ct. of Ch.—LEYS *v.* WITHROW (1876), 38 U. C. R. 601.—**CAN.**

8105 ii. —— —— *Bill of sale holder seeking to enforce claim.*]—Pltf. who, held a bill of sale on insolvents' goods, prayed that it should be declared that pltf. was entitled to hold the goods as security for the debt due to him by insolvents & that deft. should be decreed to deliver up the goods to him & should be enjoined from selling or interfering with them, etc. :—*Held :* pltf.'s remedy was by Insolvent Act, 1875, s. 125, & not by a suit in the Ct. of Equity.—VASSIE *v.* VASSIE (1882), 22 N. B. R. 76.—**CAN.**

8105 iii. —— —— *Bankrupt administrator—Continuing deceased's business—Goods seized by trustee.*]—On M.'s death intestate J. continued M.'s business & took out administration. Subsequently J. was adjudicated bkpt., on the petition of a creditor who had sold him goods for the purpose of carrying on the business, & the official assignee seized all the property in his possession. Ten days afterwards an order was made for the administration of M.'s estate. The property seized was acquired or came into possession of J. in the course of carrying on the trading. On an application for an injunction to restrain the assignee from realising or intermeddling with the property seized :—*Held :* an injunction should be granted, as the proper *forum* for deciding any question in relation to the assets was the ct. where orders had been made for the administration of the estate of M., & not in the ct. where J.'s bkpcy. matter was being dealt with.—*Re* HICKEY, PROVINCIAL BANK *v.* HICKEY (1891), 27 L. R. Ir. 65.—**IR.**

c. *Money had & received—Acknowledgement of receipt & apportionment of money.*]—F. transferred a schooner to deft., as trustee, to sell & pay certain creditors debts due by him to them. A memorandum of deft. was proved, admitting the receipt of money on such account, & appropriating it proportionately to the creditors :—*Held :* an action at law would lie to recover the amount so admitted.—PARK *v.* BERCZY (1859), 8 C. P. 173.—**CAN.**

8108. —— Money received on bill procured by bankrupt fraudulently.]—If A. fraudulently procure a bill of exchange from B. & afterwards become bkpt., & his assignees receive the money for the bill, B. may recover it from them in an action for money had & received.—HARRISON *v.* WALKER (1792), Peake, 150.

8109. Action for work done—Solicitor—After delivery of bill but before taxation.]—*Qu.:* whether an attorney can maintain an action for business done under a commission against the assignees, one month after he has delivered a copy of his bill, but before it has been taxed by a master in Ch.—FINCHETT *v.* HOW (1809), 2 Camp. 275.

Annotations:—**Distd.** Pocock *v.* Russen (1829), Mood. & M. 357. **Mentd.** Oxenham *v.* Lemon (1823), 2 Dow. & Ry. K. B. 461.

8110. Use & occupation—Trustee continuing possession—For performing bankrupt's business.]—Assignees, who make use of bkpt.'s premises for the benefit of the estate, by continuing his contracts, are liable, in the same manner as bkpt., for use & occupation.

The assignees of a coachmaker continued, after the bkpcy., to use his premises for performing his contracts for the letting & keeping in repair of coaches:—*Held:* they were liable, in an action for use & occupation, for rent accruing after they had ceased to occupy.—ANSELL *v.* ROBSON (1832), 2 Cr. & J. 610; 1 L. J. Ex. 216; 149 E. R. 256.

See, further, Nos. 1975 *et seq.*, & Part XX., Sect. 16, sub-sects. 4 & 5, E., *ante.*

8111. Specific performance—Agreement to accept lease—Form of lease.]—A., before his bkpcy., agreed to take a lease of a cotton mill & entered into possession. After his bkpcy., one of his assignees took possession & agreed to accept the lease, a draft of which was sent to the assignees containing covenants personally binding on them during the whole of the term, & one, in particular, to prevent them from assigning without the licence of the lessor:—*Held:* the assignees were not bound to accept such a lease, & even if they were, the Ct. of Review had no jurisdiction to compel a specific performance of the agreement.—*Re* OLDHAM, *Ex p.* LUCAS (1833), 3 Deac. & Ch. 144; 1 Mont. & A. 93; 3 L. J. Bcy. 66, Ct. of R.

Annotations:—**Mentd.** *Re* Oldham, *Ex p.* Lucas (1834), 3 Deac. & Ch. 664; *Re* Brettell, *Ex p.* Goren (1838), 7 L. J. Ch. 187, L. C.

8112. —— Obligation to give security.]—S. & Co., merchants in London & Shanghai, applied to applts., merchants in Prussia, to open a credit on their behalf for £5,000, & offered to deposit with them as a security the title-deeds of a house at Shanghai. The negotiations were commenced verbally, when all parties were in Prussia, but were concluded by a letter written by S. & Co. to applts. from London, enclosing the title-deeds of the house in Shanghai. Applts. accepted bills drawn by S. & Co. & payable in London. S. & Co. became liquidating debtors, a considerable sum being due to applts. on the bills. No conveyance or memorandum of the deposit was made at the British Consulate at Shanghai, but the house remained registered in the name of S. & Co. Applts. having applied for an order that the trustee should convey the house to them, the contract was personally binding on S. & Co., & could be enforced against their trustee in exactly the same way as against debtors.—*Re* SCHEIBLER, *Ex p.* HOLTHAUSEN (1874), 9 Ch. App. 722; 44 L. J. Bcy. 26; 31 L. T. 13, L. JJ.

Annotations:—**Expld.** Mercer *v.* Vans Colina (1897), 4 Mans. 363. **Consd.** Powell *v.* Marshall, Parkes, [1899] 1 Q. B. 710, C. A. **Distd.** Bank of Africa *v.* Cohen, [1909] 2 Ch. 129, C. A. **Refd.** *Re* Bastable, *Ex p.* Trustee, [1901] 2 K. B. 518, C. A. **Mentd.** British South Africa Co. *v.* De Beers Consolidated Mines, [1910] 1 Ch. 354.

8113. —— Without trustee's consent.]—Specific performance of a liquidating debtor's contract will not be decreed against his trustee without the latter's consent.

You cannot get specific performance against assignees, & never could unless they consented to bind themselves (JESSEL, M.R.).—HOLLOWAY *v.* YORK (1877), 25 W. R. 627.

Annotations:—**Expld.** Pearce *v.* Bastable's Trustee in Bkpcy., [1901] 2 Ch. 122. *Holloway* v. *York* has no application to a case in which the vendor's trustee is deft. (COZENS-HARDY, J.). **Mentd.** Crowe *v.* Barnicot (1877), 6 Ch. D. 748; Birmingham Estates Co. *v.* Smith (1880), 13 Ch. D. 506.

8114. —— Sale of property.]—Specific performance may be enforced against the trustee of a vendor of property.—PEARCE *v.* BASTABLE'S TRUSTEE IN BANKRUPTCY, [1901] 2 Ch. 122; 70 L. J. Ch. 446; 84 L. T. 525; 17 T. L. R. 366; 8 Mans. 287.

8115. Special damage—Wrongfully taking possession of ship.]—Assignees wrongfully took possession of a ship in course of construction:—*Held:*

d. *Action for work done—Accountant—Investigation of books on prosecution of bankrupt.*]—The trustee of H.'s insolvent estate employed pltfs., accountants, to examine & report upon H.'s books. The result of such examination was to cause the Crown to institute a prosecution against H. The trustee instructed pltfs. to proceed with the investigation of the books in order to assist the prosecution, which pltfs. did in great detail, subsequently attending at the prosecution, & doing additional work during the course of the trial. The trustee, at the third meeting of creditors, had specially asked for instructions to be given to him as to the course to be pursued in connection with the unsatisfactory state of the books, but no specific instructions were given by the creditors, the future management of the estate generally being left to the trustee. In an action by pltfs. against the trustee as such for their fees for the investigation in connection with the prosecution:—*Held:* as the trustee had no authority statutory or express to employ pltfs. to assist the prosecution, the estate could not be held liable.—FEW *v.* HARTLEY'S TRUSTEE (1887), 5 S. C. 255.—**S. AF.**

e. *Action to determine validity of disputed claim—S.* 31 *of the Assignments Act.*]—Where an assignment has been made for creditors under Assignments Act, any action to determine the validity of a claim disputed by the assignee must be commenced & carried on according to the procedure laid down in s. 31 of that Act, such procedure being intended to supersede the action by way of a writ of summons.—WEST *v.* SASKATCHEWAN GENERAL TRUST CORPN. (1915), 8 W. W. R. 232; 32 W. L. R. 189.—**CAN.**

See, further, Part XXIII., *post.*

f. *Action for declaration to dividend in estate—Creditor not proving.*]—The whole estates of an English bkpt., including his interest in an entailed estate in Scotland, to which he succeeded after his bkpcy., were vested in assignees for behoof of the creditors who should prove their debts in the bkpcy. A creditor, who had not claimed or proved his debt in England, raised an action in the Ct. of Session to have it declared that he was entitled to a dividend from bkpt.'s estate, equal to the dividend drawn or to be drawn by the other creditors:—*Held:* the action was incompetent.—ROY *v.* CAMPBELL'S ASSIGNEES (1853), 16 Dunl. (Ct. of Sess.) 51.—**SCOT.**

See, further, Part XIII., pp. 485 *et seq., ante.*

g. *Replevin—Not barred by C. S. U. C. c.* 29, *s.* 2.]—JAMESON *v.* KERR (1872), 6 P. R. 3.—**CAN.**

h. —— *Not barred by Insolvent Act,* 1869, *s.* 50—*Goods seized & handed over by sheriff to assignee—Plaintiff neither creditor nor interested in estate.*]—BURKE *v.* MCWHIRTER (1874), 35 U. C. R. 1.—**CAN.**

k. —— *Not barred by Insolvent Act,* 1875, *s.* 125.]—ROBINSON *v.* ELLIS (1879), 19 N. B. R. 6.—**CAN.**

l. —— —— *Goods conveyed under bill of sale.*]—PINEO *v.* GAVAZA (1885), 6 R. & G. 487.—**CAN.**

m. *Specific performance — Agreement to mortgage.*]—The Ct. of Bkpcy. cannot order the official assignee to execute a mtge. of freehold land, in respect of which bkpt. has given an agreement to mtge., but in such a case the ct. can order a sale of the land, without requiring the person in whose favour the agreement was made to commence an action in the Supreme Ct.—*Re* RICKMAN, *Ex p.* BANK OF NEW ZEALAND (1890), 8 N. Z. L. R. 381.—**N.Z.**

n. —— *Contract for sale of land.*]—*Semble:* a solvent purchaser may call on the trustee to perform a contract for the sale of land entered into by bkpt. before his bkpcy.—MCMANAWAY *v.* CLELAND (1870), 1 C. A. 343.—**N.Z.**

Sect. 4.—Actions, etc., against trustee.]

the owner might claim special damage for its detention.—WOOD *v.* BELL (1856), 6 E. & B. 355; 25 L. J. Q. B. 321; 2 Jur. N. S. 664; 4 W. R. 553, 602; 119 E. R. 897, Ex. Ch.

Annotations:—**Mentd.** British Columbia Saw Mill Co. *v.* Nettleship (1868), L. R. 3 C. P. 499; France *v.* Gaudet (1871), 40 L. J. Q. B. 121; Anglo-Egyptian Navigation Co. *v.* Rennie (1875), L. R. 10 C. P. 271; Banbury & Cheltenham Direct Ry. Co. *v.* Daniel (1884), 54 L. J. Ch. 265; Seath *v.* Moore (1886), 11 App. Cas. 350, H. L.

8116. Action against liquidating debtors & trustee—Debt incurred by fraud.]—In an action against A. & B., liquidating debtors, & C., their trustee, pltfs. claimed, as against A. & B., judgment for the amount of certain advances made by pltfs. to those defts., & a declaration that those advances were obtained by fraud, &, as against the trustee, a declaration that pltfs. were entitled to prove for the amount of such advances, either against the joint or the separate estates of debtors as they might elect. The trustee demurred, on the ground that the claim disclosed no ground of action against him:—*Held:* the demurrer was bad, as pltfs. might obtain in the action some relief against the trustee.—HALE *v.* BOUSTEAD (1881), 8 Q. B. D. 453; 51 L. J. Q. B. 255; 46 L. T. 533; 30 W. R. 677.

8117. Production of documents—Examination of plaintiff before court of bankruptcy.]—Assignees, who were defts. in a suit, had caused pltf. to be summoned & examined before the Ct. of Bkpcy. on the subject of the suit:—*Held:* they ought not to be ordered to produce, on a summons for production of documents, a copy of the examination.—GANDEE *v.* STANSFIELD (1859), 4 De G. & J. 1; 28 L. J. Ch. 436; 33 L. T. O. S. 5; 5 Jur. N. S. 778; 7 W. R. 321; 45 E. R. 1, L. JJ.

Annotations:—**Apprvd.** Fenton *v.* Queen's Ferry Wire Rope Co. (1869), 38 L. J. Ch. 263. **Refd.** Bell *v.* Johnson (1861), 9 W. R. 549.

8118. Right to apply under 7 Geo. 2, c. 20, s. 2—To have sum due on mortgage ascertained.]—A bill of foreclosure was filed by a mtgee., against a bkpt. mtgor., & his assignees:—*Held:* the assignees could not, without the concurrence or consent of bkpt., apply under the above sect. in order that the sum due on the mtge. might be ascertained & paid off.—GARTH *v.* THOMAS (1825), 2 Sim. & St. 188; 3 L. J. O. S. Ch. 94; 57 E. R. 317.

8119. Defences available—Want of assets—Action by solicitor for bill of costs.]—If a solr. brings an action against assignees on his bill, want of assets in the bkpcy. will not be an answer.—*Re* FRIEDMAN, *Ex p.* ADAMS (1836), 2 Mont. & A. 706, Ct. of R.

8120. —— Delay—Action by auctioneer against new assignees—Work done for previous assignees.]—After the lapse of ten years, & the death of the assignees, who employed an auctioneer to sell bkpt.'s property, the ct. refused to make any order on the new assignees for the payment of his demand.—*Re* GOODWIN, *Ex p.* HENDRIE (1836), 2 Deac. 76; 3 Mont. & A. 20; 6 L. J. Bcy. 1, Ct. of R.

8121. —— Creditor having given notice to dispute bankruptcy—Petition against trustee as such.]—Where a creditor has given notice to dispute the bkpcy. in a pending action brought against him by the assignees, he cannot afterwards petition against them in their character of assignees.—*Re* STRUTTON, *Ex p.* HALL (1837), 2 Deac. 263, Ct. of R.

8122. Addition of trustee—Notice of motion given before trustee appointed.]—At the time when notice of motion was given no trustee of the debtor's estate had been appointed, & the official receiver was acting as trustee, upon whom the notice was

o. *Trespass—To goods — Sheriff seizing goods under attachment—Custody & sale by trustee—Form of pleading.*]—ARCHIBALD *v.* HALDAN (1870), 30 U. C. R. 30.—**CAN.**

p. —— *To person—Action by person removed from land by sheriff under writ of habere.*]—The Supreme Ct. in its bkpcy. jurisdiction having made an order under the authority of 1898 Act, s. 134 (4), directing delivery of possession of certain land to the official assignee of bkpt., the fact that a writ of *habere facias* is issued without a special order under Consolidated Equity Rules, 1902, r. 210, having been first obtained does not render the writ a nullity, but it is merely an irregularity, & the person, by whose authority the writ was issued may justify under it in an action for assault by a person removed from the land by the sheriff acting pursuant to the writ.—PLOWMAN *v.* PALMER (1914), 18 C. L. R. 339. —**AUS.**

q. *Trover—By grantor of bill of sale in possession—Seizure by official assignee—Previous demand for return of goods not necessary.*]—BROWN *v.* MACKENZIE (1871), 10 N. S. W. S. C. R. 302.—**AUS.**

r. —— *Alleged sale by bankrupt—Assignee may object to absence of bill of sale.*]—SNARR *v.* SMITH (1880), 45 U. C. R. 156.—**CAN.**

s. *Petition to recover return of deposit on sale of insolvent's estate.*]—The Insolvent Ct. has no jurisdiction to entertain a petition by a purchaser, who is not a creditor, to recover from the assignee a deposit paid upon a purchase at auction of insolvent's estate.—*Re* PARSONS (1879), 4 A. R. 179.—**CAN.**

8116 i. *Action against insolvent & assignee—Ejectment.*]—The lessor has an action in ejectment against insolvent & his assignee to obtain possession of premises, the lease of which expired before the assignment.—FRASER INSTITUTE *v.* MOORE (1875), 19 L. C. J. 133.—**CAN.**

8117 i. *Production of documents—Bill to enforce indemnity in previous insolvency.*]—Upon an arrangement made by P. with his creditors, by way of composition, M. held the estate of P. in trust to secure the reimbursement or indemnity of pltfs. & H., who became sureties for the payment of the composition. Some time afterwards P. became again insolvent, & M. was appointed his assignee. A bill being filed to enforce the arrangement for indemnity, charging that M., in breach of the arrangement, had suffered the estate to remain in the hands of P.:—*Held:* documents held by M. as assignee were liable to production.—WAGNER *v.* MASON (1874), 6 P. R. 187.—**CAN.**

8119 i. *Defences available—Want of assets—Trustee's conditional acceptance of bill of exchange—Onus of proof.*]—C. & Co. made an assignment of their estate for creditors, giving power to the trustees to carry on the business. The trustees carried on the business for a time, but were finally obliged to place it in insolvency, & deft. was appointed assignee. At the time of the assignment to the trustees, C. & Co. were indebted in a large sum to H., & between the date of the assignment & the insolvency, that amount was increased for goods supplied for the purpose of carrying on the business. After the insolvency deft., as assignee of the estate, accepted an order drawn by H. in favour of pltfs., in the words: "Accepted: payable when in funds as a first preference out of the estate of C. & Co." Deft. received $18,000 out of the estate, & applied the amount to satisfy the claim of the trustees for advances made in carrying on the business of the estate, which it was insufficient to meet:—*Held:* (1) the evidence did not show such a fulfilment of the condition upon which the acceptance was made, as to make deft. liable upon it to pltfs.; (2) deft. was not bound to show to whom, & when, & in what circumstances, the money was paid by him, but the burden was on pltfs. of showing misappropriation of the funds.—POTTERS *v.* TAYLOR (1888), 20 N. S. R. 362; 7 C. L. T. 434.—**CAN.**

t. —— *Assignment under Insolvent Act, 1869—Action for trespass & conversion.*]—Declaration for entering a mill & taking & converting pltf.'s goods. Plea that pltf.'s claim to the goods & mill was under a mtge. made by W., who, before the grievances complained of, made an assignment under Insolvent Act, 1869, to deft. of all his estate & effects, & that except as assignee deft. had in no way interfered with the mill or goods:—*Held:* good, pltf. being restricted by Insolvent Act, 1869, s. 50, to the remedy there given.—CROMBIE *v.* JACKSON (1874), 34 U. C. R. 575.—**CAN.**

a. —— *Estoppel—Creditor with full knowledge dealing with person acting as trustee without being formally appointed.*]—NATAL BANK *v.* LANGERMAN (1895), 2 O. R. 59.—**S. AF.**

b. —— *How raised.*]—A claim made by the trustees in a bkpt.'s marriage settlement, cannot be set aside upon a petition, but a bill must be filed.—*Ex p.* BACON (1810), 2 Mol. 441.—**IR.**

c. *Joinder of parties—Not bankrupt mortgagor—Foreclosure action.*]—TORRANCE *v.* WINTERBOTTOM (1851), 2 Gr. 487.—**CAN.**

d. —— *Not insolvent—Merely for*

served, but before the motion came on for hearing, a trustee having been appointed, application was made to add his name to the notice. Leave was given to add the name of the trustee as a party to the motion, the representation of the estate being continuous.—*Re* HALLETT & Co., *Ex p.* BLANE (1893), 10 Morr. 250.

8123. Restraint of actions—Jurisdiction of county court—Action in high court.]—Under 1883 Act, a county ct. sitting in bkpcy. has no power to restrain proceedings against a trustee in an action in the High Ct.—*Re* BARNETT, *Ex p.* REYNOLDS (1885), 15 Q. B. D. 169; 54 L. J. Q. B. 354; 53 L. T. 448; 33 W. R. 715; 1 T. L. R. 433; 2 Morr. 147, C. A.

Annotations:—**Followed.** Sharp *v.* McHenry, Sharp *v.* Brown (1886), 55 L. T. 747. **Refd.** *Re* Richardson & Cook, *Ex p.* Grimes' Exors. (1902), 86 L. T. 690, D. C. **Mentd.** *Re* Bassett's Plaster Co., *Ex p.* Bassett (1894), 1 Mans. 297.

8124. —— Jurisdiction of bankruptcy court—Foreclosure suit.]—Proceedings in a foreclosure suit by an equitable mtgee. against a trustee in bkpcy. may be restrained by the Bkpcy. Ct.; but the mtgee. ought not to be ordered to deliver up his title-deeds to enable the trustee to complete a sale until payment into ct. of the amount claimed.—*Re* WOODS, *Ex p.* DITTON (1876), 1 Ch. D. 557; 45 L. J. Bcy. 87; 34 L. T. 109; 24 W. R. 289; 2 Char. Pr. Cas. 66, C. A.

Annotations:—**Explained.** *Re* England, *Ex p.* Pannell (1877), 6 Ch. D. 335, C. A. **Applied.** *Re* Wood, *Ex p.* Musgrave (1878), 10 Ch. D. 94, C. A. **Considered.** *Re* Barnett, *Ex p.* Reynolds (1885), 15 Q. B. D. 169, C. A.

See, now, 1914 Act, s. 9 (1).

8125. —— Application by receiver under petition for adjudication—Action of ejectment.]—The ct. will, upon the motion of the receiver under a petition for adjudication, restrain an action of ejectment brought against him since the presentation of the petition with the view of saving expense to the estate.—*Re* FIGULS, *Ex p.* BETTS (1870), 22 L. T. 245.

8126. —— To recover proceeds of sale—By trustee under liquidation.]—A., the holder of a bill of sale, took possession of the goods of debtor, who, a day or two afterwards, filed his petition under 1869 Act. A. was subsequently appointed receiver under the petition, & upon his appointment withdrew his man from possession, whereupon the trustee entered, & sold the goods as part of debtor's estate. A. then commenced an action against the trustee to recover the proceeds of the sale:—*Held:* the trustee was right, & that the ct. was justified in restraining the further proceedings in the action.—*Re* BEVERIDGE, *Ex p.* MACDONALD (1871), 24 L. T. 475; 19 W. R. 717.

8127. —— On bill of sale disputed by trustee.]—The Bkpcy. Ct. has jurisdiction to restrain a creditor from bringing an action against a trustee upon a bill of sale given by debtor, the validity of which is disputed by the trustee.—*Re* SPARKE, *Ex p.* COHEN (1871), 7 Ch. App. 20; 41 L. J. Bcy. 17; 25 L. T. 473; 20 W. R. 69, L. JJ.

Annotations:—**Extd.** Halliday *v.* Harris (1874), L. R. 9 C. P. 668. **Distd.** *Re* Jackson, *Ex p.* Hall (1877), 4 Ch. D. 682. **Refd.** *Re* Wood, *Ex p.* Musgrave (1878), 10 Ch. D. 94; *Re* Barnett, *Ex p.* Reynolds (1885), 15 Q. B. D. 169; C. A. **Mentd.** *Re* Couston, *Ex p.* Ward (1872), 27 L. T. 502, L. JJ.; *Re* Bent, *Ex p.* Mackenzie (1873), 42 L. J. Bcy. 25; Ramsden *v.* Lupton (1873), L. R. 9 Q. B. 17, Ex. Ch.; *Re* Cook, *Ex p.* Izard (1874), 9 Ch. App. 271, L. JJ.; *Re* Stevens, *Ex p.* Stevens (1875), L. R. 20 Eq. 786.

8128. —— Action of equitable second mortgagee—Against trustee of mortgagor & first mortgagees.]—An equitable second mtgee. commenced an action against the trustee of the mtgor. & the first mtgees., claiming an equitable charge on the property, redemption against the first mtgees., & foreclosure:—*Held:* the action should not be restrained.—*Re* WHERLY, *Ex p.* HIRST (1879), 11 Ch. D. 278; 27 W. R. 788.

Annotation:—**Considered.** Sharp *v.* McHenry, Sharp *v.* Brown (1886), 55 L. T. 747.

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discovery.]—KERR *v.* READ (1875), 22 Gr. 529.—**CAN.**

e. —— *Insolvent—Suit charging fraud against insolvent — Insolvent alleged to have interest in surplus.*]—CLARE *v.* HEWITT (1838), 6 Ir. L. Rec. N. S. 201.—**IR.**

f. —— *Insolvent not being trader—Action by assignee of mortgage against assignee in insolvency.*]—JOSEPH *v.* HAFFNER (1881), 29 Gr. 421.—**CAN.**

g. —— *Not creditors under trust deed—Action by alleged creditors to rank on estate.*]—WEBSTER *v.* RAE (1893), 19 V. L. R. 717.—**AUS.**

h. —— *Action by creditor for account against insolvent & trustee for creditors.*]—WOOD *v.* BRETT (1862), 9 Gr. 78.—**CAN.**

k. —— —— *Action in respect of debt due to insolvent.*]—O'CONNELL *v.* CHARLES (1851), 2 Gr. 489.—**CAN.**

l. —— —— *Non-substituted trustees—Suit by execution creditors for appointment of receiver.*]—DILLON *v.* PLASKETT (1828), 2 Bli. N. S. 239.—**IR.**

m. —— *Creditors with substantial interest—On claim of lien under unregistered chattel mortgage.*]—KITCHING *v.* HICKS (1883), 9 P. R. 518.—**CAN.**

n. —— *Execution creditors—In master's office in action against assignee of mortgagor.*]—CANADA LANDED CREDIT CO. *v.* MCALLISTER (1874), 21 Gr. 593.—**CAN.**

o. *Jurisdiction of court to join trustee in interpleader proceedings—Trustee not party to original proceedings.*]—Where an action was brought against an insurance co. by the assignee of a policy of life insurance, deriving under an assignment from F., who had subsequently been adjudicated bkpt., the ct., although no order for sale of the policy had been made by the Ct. of Bkpcy. under the reputed ownership clause, directed an interpleader issue to be tried between the assignee of the policy, as pltf., & F. & his assignee in bkpcy., as defts., in order to ascertain who was entitled to the amount of the policy.—FALLON *v.* BRITANNIA MEDICAL & GENERAL ASSURANCE CO. (1877), 11 I. L. T. 73.—**IR.**

p. *Petition by purchaser of assets—Whether estate represented by appearance of assignee.*]—Where a person claiming to be a purchaser of the assets petitioned the judge in insolvency to have them restored to him, to which petition the official assignee appeared, & on discussion the judge ordered a restoration of the estate to the alleged purchaser:—*Held:* the insolvent estate was not represented in such proceeding, & there had not been any valid adjudication upon the questions raised in this suit.—SMITH *v.* MCMILLAN (1879), 26 Gr. 300.—**CAN.**

q. *Change of parties—Death of provisional assignee—Substitution of new provisional assignee—May be merely by bill of revivor.*]—M'COLLUM *v.* CRAWFORD (1844), 6 I. Eq. R. 217.—**IR.**

r. *S. P.* O'BRIEN *v.* MAHON (1845), 7 I. Eq. R. 601; 2 Jo. & Lat. 201.—**IR.**

s. —— *Death of assignee—Substitution of new assignee—Must be by supplemental bill.*]—MEAGHER *v.* O'MARA (1841), 3 I. Eq. R. 471.—**IR.**

t. *Objection that action defended without leave of court—Not open.*]—COCHRANE *v.* OWEN (1864), 2 Hyde, 150.—**IND.**

a. *Restraint of actions—Ground for refusing.*]—A. & Co. mortgaged to pltfs. certain linens, which the mtgors. had placed in the possession of B. for the purpose of being bleached, by the same deed covenanting with pltfs. that they would hold the linens on their behalf & keep an account thereof. Subsequently pltfs. filed a bill in the Rolls Ct., while the goods remained in the possession of B., alleging that such possession was held by them as agents & trustees for pltfs., & praying an injunction to restrain them from parting with the goods. A. & Co. afterwards were adjudicated bkpts., & the messenger of the Ct. of Bkpcy. obtained possession from B. of the goods. Pltfs. then amended their bill by adding the assignees in bkpcy. as parties, & praying for an injunction against them also. Without any previous motion to stay the suit in the Rolls Ct. the assignees shortly afterwards filed their answer, impeaching pltfs.' security, & submitting that the whole motion was within the jurisdiction of the Ct. of Bkpcy. Subsequently the assignees applied to the Ct. of Bkpcy. for an order that the right of all parties claiming any lien on the goods should be determined by that ct., which motion was refused, as against pltfs., on the ground of proceedings pending in the Rolls Ct. The cause then coming on for hearing was met on its merits, but it was found that another amendment by pltfs. was necessary, which was afterwards made. On the assignees moving that all further proceedings should be stayed:—*Held:* the motion should be refused.—MERCHANT BANKING CO. *v.* SPOTTEN (1877), 11 I. L. T. 149.—**IR.**

Sect. 4.—*Actions, etc., against trustee. Sect.* 5: *Sub-sect.* 1, *A.*]

8129. —— Action for account—& to enforce security by foreclosure or sale.]—In Jan., 1885, S. commenced an action against M. for an account of what was due to him on the security of a mtge. of certain freehold property & a bill of sale of certain chattels, both dated Aug. 7, 1879, & to enforce those securities by foreclosure or sale. It was subsequently agreed that M. should execute a further bill of sale in favour of S., & that nothing should be done by S. to enforce his securities before June 30, 1886, & a bill of sale was executed on July 3. On Mar. 25, 1886, M. was adjudicated a bkpt., & on May 26 two persons were duly appointed trustees in his bkpcy., & were afterwards added as parties to the action. S. then applied to the Ct. of Bkpcy. for an order that one of such trustees, who had also been appointed receiver of bkpt.'s property, might be directed to withdraw from possession of the chattels comprised in the bills of sale, but the application was adjourned at the request of the trustees, &, for various reasons, was never brought on again. In July S. commenced an action against the trustees for an account of what was due to him on the security of the bill of sale dated July 3, 1885, & to enforce such security by foreclosure or sale. A motion was subsequently made by the trustee that all further proceedings in the two actions might be stayed until further order, on the ground that S.'s application to the Ct. of Bkpcy. was still pending, & had not been adjudicated upon, & that the same questions would have to be determined on the hearing of that application as those which arose in the actions, *viz.*, whether the bills of sale were or were not fraudulent & void, & that such questions would be better tried in the Ct. of Bkpcy. than in the Ch. Div. :—*Held :* (1) in the circumstances it would not be proper that the actions should be stayed, as questions would probably arise fitter for the consideration of the Ch. Div. than of the Ct. of Bkpcy. ; (2) the question in each case must be decided on the facts therein, & the discretion of the ct. was limited ; (3) the fact of S. having made an application to the Ct. of Bkpcy. did not deprive him of his right to proceed in the actions, as such application only related to the chattels, & not to the real estate.—SHARP *v.* MCHENRY, SHARP *v.* BROWN (1886), 55 L. T. 747.

8130. —— Grounds for refusing.]—A composition deed, by which all the creditors of debtor agreed to accept a composition of 7*s.* 6*d.* in the pound on the amount of & in full discharge of their debts, was duly executed by all the creditors, & registered under 1861 Act, & all the property of debtor was assigned to a trustee to provide for the composition. The payment of part of one of the debts to which pltfs. were entitled was afterwards agreed to be postponed till all the other creditors had received their composition in full, & the entire estate then available was distributed in paying the composition on all the debts except the portion of pltfs.' which was postponed. Some years elapsed, & it was then discovered that there was some real estate at Monte Video which had become vested in the trustee of the composition deed, & had remained unadministered, & pltfs. instituted a suit in the Ch. Div. to have such property realised with a view to payment of the balance still due. On a motion by the trustee of the composition deed to have the proceedings stayed, on the ground that the case ought to be dealt with by the Ct. of Bkpcy. :—*Held :* (1) the Ch. Div. had at least concurrent jurisdiction, & the fact that there was no body of creditors amongst whom a fund was to be distributed was a circumstance which made it expedient to exercise that jurisdiction ; (2) the fact of the deed containing a clause which made it doubtful whether it came within ss. 192 & 197 would of itself be a strong ground for not compelling the parties to go to the Ct. of Bkpcy.—JENNEY *v.* BELL (1876), 2 Ch. D. 547 ; 45 L. J. Ch. 369 ; 34 L. T. 485 ; 24 W. R. 550 ; 3 Char. Pr. Cas. 251.

Annotation :—**Mentd.** Jenney *v.* Mackintosh (1889), 61 L. T. 108, C. A.

8131. Costs—Trustee brought before court by supplemental bill.]—Assignees who are brought before the ct. by a supplemental bill, may be made liable to the costs of the whole suit.—WHITCOMB *v.* MINCHIN (1820), 5 Madd. 91 ; 56 E. R. 830.

Annotations :—**Consd.** *Re* Kindersley Castle (1834), 1 Mont. & A. 479, n. ; Cook *v.* Hathway (1869), L. R. 8 Eq. 612. **Mentd.** *Re* Bloye's Trust (1849), 2 H. & Tw. 140 ; Martinson *v.* Clowes (1882), 21 Ch. D. 857 ; Farrar *v.* Farrars (1888), 40 Ch. D. 395, C. A.

8132. —— Action unjustifiably caused by trustees.]—The official & creditors' assignees of a legatee & exor., who became bkpt., claimed from testator's estate £350, & refused to concur in a sale, unless paid that sum. In consequence of their refusal a bill was filed by the co-exor. to administer the assets, & it appearing that nothing remained due in respect of bkpt.'s share, the ct. ordered the assignees to pay the costs of the suit.

The assignees of bkpt. have no right to drive a person into this ct., except on the ordinary principle that the costs must be paid by the party by whose unfounded claim the litigation has been occasioned. I can recognise no special right in assignees that exempts them from what is the ordinary & the just rule on the subject of costs (STUART, V.-C.).—PATTISON *v.* GRAHAM (1854), 2 Sm. & G. 207 ; 65 E. R. 367.

Annotation :—**Refd.** *Re* Long, *Ex p.* Long's Assignees (1858), 31 L. T. O. S. 270.

b. *Costs—Action justifiably defended.*]—The official assignee of an insolvent firm seized goods, which he found in a store along with other goods & apparently in the order & disposition of the insolvents, & was sued by a firm, who claimed under assignment all the goods in the store ; he defended the action &, though the verdict was against him as to some of the goods claimed by pltfs. & he had to pay the costs of both sides, yet he so reduced the claim of pltfs. that the defence of the action gave a balance of advantage to the estate :—*Held :* the assignee as deft. & not as pltf. was not to blame, & he might insert in his plan of distribution the costs in the action both of himself & of pltfs.—*Re* YORSTON & WEBSTER, *Ex p.* M'EWAN & CO. (1862 1 W. & W. 133.—**AUS.**

c. —— *Action defended without leave of court.*]—Should the official assignee defend any action without leave first obtained from the ct. he will do so at his own risk in regard to the matter of costs.—COCHRANE *v.* OWEN (1864), 2 Hyde, 150.—**IND.**

8132 i. —— *Action unjustifiably caused by trustees.*]—A trustee should not be ordered to pay *de bonis propriis* the costs of unsuccessful litigation instituted against him, unless he has acted *malâ fide*, negligently or unreasonably.—*Re* POTGIETER'S ESTATE (1908), T. S. 982.—**S. AF.**

8132 ii. —— ——.]—The curator of insolvent's property with the authority of the inspectors unjustifiably contested a claim :—*Held :* he was personally liable for costs.—HEBERT *v.* RONDEAU (1912), 14 Q. P. R. 1.—**CAN.**

d —— *Official assignee—Made party in action in which not interested.*]—An official assignee, who takes no interest in property settled upon the wife of an insolvent, but who is made a party to a suit respecting such property, is entitled to his costs against pltfs.—WOODWARD *v.* JENNINGS (1864), 1 W. W. & A'B. 1.—**AUS.**

e. —— —— *Refusal to join as co-plaintiff in action in which interested.*]—An official assignee of a person taking a beneficial interest under a settlement, who refuses when applied to to become a co-pltf., but does not then disclaim & is necessarily made deft., is not entitled to his costs.—WOODWARD *v.* JENNINGS (1864), 1 W. W. & A'B. 1.—**AUS.**

f. —— *Lien on fund in court.*]—In an action by creditors of S. against

8133. —— ——.]—Trust funds stood in the bank books in the name of bkpt. & another as trustees. The assignees made no claim to it, but refused to sign a paper stating so, & which was necessary, by the rules of the bank, to obtain a transfer into the names of a new trustee :—*Held :* such conduct was unjustifiable, & the assignees ought to pay the costs occasioned.—*Re* PRIMROSE, *Ex p.* PRIMROSE (1857), 23 Beav. 590 ; 26 L. J. Ch. 666 ; 53 E. R. 232.

See, further, Part VII., Sect. 5, sub-sect. 2, B. (*a*), Part XVI., Sect. 5, & Part XVII., Sect. 9, *ante*.

SECT. 5.—ACTIONS, ETC., BY BANKRUPT.

SUB-SECT. 1.—RIGHT TO SUE.

A. In respect of what Causes of Action.

8134. General rule—Right to sue where trustee does not interfere.]—Under 6 Geo. 4, c. 16, ss. 63, 127, & 1 & 2 Will. 4, c. 56, an uncertificated bkpt. may acquire property, & contract, for the benefit of his assignees, & may sue in respect of such property or contract, & a plea showing the bkpcy., etc., constitutes no defence, unless there be an allegation that the assignees have interfered. The same is true in the case of a party who has twice been bkpt. & obtained his certificate, but has not paid 15s. in the pound, in respect of property acquired since the certificate.—HERBERT *v.* SAYER (1844), 5 Q. B. 965 ; 2 Dow. & L. 49 ; Dav. & Mer. 723 ; 13 L. J. Q. B. 209 ; 8 Jur. 812 ; 114 E. R. 1512, Ex. Ch.

Annotations :—**Explд.** Williams *v.* Chambers (1847), 11 Jur. 798. **Apld.** Jackson *v.* Burnham (1852), 8 Exch. 173. **Consd.** Sprye *v.* Porter (1856), 7 E. & B. 58 ; **Apld.** Dodds *v.* London & Eastern Banking Corpn. (1857), 30 L. T. O. S. 122 ; **Consd.** Glover *v.* Weedon (1857), 3 Jur. N. S. 903 ; **Distd.** Richbell *v.* Alexander (1861), 30 L. J. C. P. 268. **Consd.** Morgan *v.* Knight (1864), 15 C. B. N. S. 669 ; Kitson *v.* Hardwick (1872), L. R. 7 C. P. 473. **Apld.** Jameson *v.* Brick & Stone Co. (1878), 4 Q. B. D. 208, C. A. **Explд.** Cook *v.* Whellock (1890), 24 Q. B. D. 658. **Consd.** *Re* Clark, *Ex p.* Beardmore, [1894] 2 Q. B. 393, C. A. **Apld.** *Re* Bennett, *Ex p.* Official Receiver, [1907] 1 K. B. 149. **Refd.** *Re* Jardine, *Ex p.* Jardine (1850), 16 L. T. O. S. 305 ; *Re* New Land Development Assocn. & Gray, [1892] 2 Ch. 138, C. A. ; Hill *v.* Settle, [1917] 1 Ch. 319, C. A. **Mentd.** Lister *v.* Cundith (1844), 3 L. T. O. S. 242 ; Tucker *v.* Barnesley (1846), 16 M. & W. 54 ; Robinson *v.* Little (1848), 9 Q. B. 602 ; Emden *v.* Carte (1881), 44 L. T. 344 ; Cohen *v.* Mitchell (1890), 25 Q. B. D. 262, C. A. ; *Re* Solomons, [1904] 1 K. B. 106, C. A.

8135. *S. P.* DODDS *v.* LONDON & EASTERN BANKING CORPN. (1857), 30 L. T. O. S. 122.

8136. —— ——.]—Pltf., an undischarged bkpt., brought an action for an account in respect of partnership agreements between himself & defts., made since the date of his bkpcy. On a motion to stay the action on the ground that pltf. was an uncertified bkpt., & any right to sue was vested in his trustee :—*Held :* pltf. could sue without his trustee, unless the trustee intervened.—BUCHAN *v.* HILL, [1888] W. N. 233.

Annotation :—**Consd.** Cook *v.* Whellock (1890), 24 Q. B. D. 658.

See, also, No. 8148, *post*.

8137. —— —— **Debt accruing to insolvent after vesting order but before discharge.**]—Insolvent, who has taken the benefit of Judgments Act, 1838 (c. 110), may sue for a debt, which accrued to him after the vesting order & before his final discharge, unless the provisional assignee interferes & claims the debt, & a plea of pltf.'s insolvency is bad, unless it contains an express averment to that effect.—JACKSON *v.* BURNHAM (1852), 8 Exch. 173 ; 22 L. J. Ex. 13 ; 20 L. T. O. S. 129 ; 155 E. R. 1307.

Annotations :—**Distd.** Stanton *v.* Collier (1854), 23 L. J. Q. B. 116. **Refd.** Brearcy *v.* Kemp (1855), 3 C. L. R. 1259.

8138. —— —— **Whether applicable to rents of real estate.**]—In some cases with respect to dealings & transactions of a bkpt. after the bkpcy. he may, with the acquiescence of the assignee, or until the latter interfered, receive & even sue. But this does not apply to the rents of the real estate which by the bkpcy. become actually vested in the assignee (*per* CUR.).—MARKWICK *v.* HARDINGHAM (1880), 15 Ch. D. 339 ; 43 L. T. 647 ; 29 W. R. 361, C. A.

Annotation :—**Mentd.** Sanders *v.* Sanders (1881), 19 Ch. D. 373, C. A.

See, further, Sect. 1, *ante*, Nos. 8146, 8148, 8150, 8152, 8157, 8160, *post*.

8139. —— **Necessity for revesting order—Action for declaration of trust.**]—After the usual vesting order had been made by the Insolvent Debtors Ct. against an insolvent debtor, the creditors accepted a composition for their debts, & executed a release to debtor in full, but the vesting order was not

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his assignee :—*Held :* pltfs. were entitled to judgment for the amount in deft.'s hands with costs, & if pltfs. were unable to recover such costs, their solrs. were to have a first lien on the fund in ct. for costs.—LUCAS *v.* TEGART (1903), 2 O. W. R. 548. —**CAN.**

g. —— *Provisional assignee only entitled to when insolvent would be.*]—WALKER *v.* MOLLOY (1844), 6 I. Eq. R. 218.—**IR.**

h. —— *Motion to compel trustees to execute general power to sue in trustees' name—Purchaser of bankrupt's debts.*]—Where the purchaser of bkpt.'s debts moved to compel the assignees to execute a deed giving a general power to sue in their names, instead of a power to use their names, only, on his giving security for costs in the particular case where the name should be required, the purchaser was ordered to pay the costs of the motion.—*Ex p.* MULLEN (1829), 2 Ir. L. Rec. 1st Ser. 202 —**IR.**

k. —— *Proceedings compromised —Costs properly incurred.*]—Pltf. compelled deft., assignee of an insolvent, to answer the bill, but afterwards compromised the suit with the substantial defts., though noticed not to do so without providing for the assignee's costs. On motion, the ct. refused to dismiss the bill without costs.

The assignee having answered the bill at length, the ct. directed the officer, in taxing the costs, to allow the assignee only such costs as he had properly incurred.—O'REILLY *v.* WARD (1834), Hayes & Jo. 815.—**IR.**

l. —— *Action to foreclose mortgage—Death of trustee—Undertaking by mortgagee to pay costs of new trustee.*]—The assignee of an insolvent mtgor. was made a party to a suit to foreclose the mtge., but died during its progress. The mortgaged premises were the mtgor.'s only property. Pltf., in order to induce a creditor of the mtgor. to become his assignee, undertook to pay him his costs in the suit :—*Held :* pltf. was entitled to those costs as part of his own costs of suit.—MAXWELL *v.* SMYTH (1838), Jo. & Car. 72. —**IR.**

m. —— *Action brought by creditors —Beneficial to creditors made defendants.*]—Pltf., one of a number of creditors to a composition deed, having filed a bill to carry the trusts of that deed into execution, was obliged to make all the parties to the deed, & the several creditors specified in the schedule thereto, who had refused to join as co-pltfs., defts. :—*Held :* notwithstanding that the suit in its result was altogether for the benefit of defts., & that the fund had been rendered available by pltf.'s exertions, yet pltf. was only entitled to be paid his costs according to the priority of his demand.—TAYLOR *v.* GORMAN (1838), 1 Dr. & Wal. 235, n.—**IR.**

n. —— *Action by fishery servants to secure voyage for payment of wages.*]—Where the servants having a claim on the whole of the voyage until their wages are paid, take proceedings to secure the voyage for the payment of their wages, they are entitled to be paid the costs of such proceedings out of the proceeds of the voyage up to the time of the insolvency—*Re* BOUTIN'S INSOLVENT ESTATE (1860), 4 Nfld. L. R. 525.—**NFLD.**

PART XXI. SECT. 5, SUB-SECT. 1.—A.

8134 i. *General rule—Right to sue where trustee does not interfere.*]—An undischarged insolvent may sue to recover after-acquired property, movable & immovable, if the official assignee does not intervene.—SRIRAMULU NAIDU *v.* ANDALAMMAL (1906), I. L. R. 30 Mad. 145.—**IND.**

8134 ii. *S. P.* MURRAY *v.* EAST BENGAL MAHAJAN FLOTILLA CO., LTD. (1918), 22 C. W. N. 1018.—**IND.**

8134 iii. ——.]—An undischarged bkpt. may, until the official assignee intervenes, sue in his own name in respect of property acquired by him after the date of the bkpcy.—HUTCHISON *v.* BENGE (1908), 27 N. Z. L. R. 1060.—**N.Z.**

Sect. 5.—Actions, etc., by bankrupt: Sub-sect. 1, A.]

discharged, nor was a revesting order made:—*Held:* there being an admitted surplus of debtor's estate, he or those claiming under him, might sue for a declaration that a person to whom the assignee had conveyed part of insolvent's estate, was a trustee for the quondam insolvent or those claiming under him.—WEARING *v.* ELLIS (1856), 6 De G. M. & G. 596; 26 L. J. Ch. 15; 28 L. T. O. S. 113; 2 Jur. N. S. 1149; 5 W. R. 40; 43 E. R. 1365, L. C.

Annotations:—**Consd.** Bird *v.* Philpott, [1900] 1 Ch. 822. **Refd.** Martin *v.* Powning (1869), 4 Ch. App. 356, L. JJ.; Luddy's Trustee *v.* Peard (1886), 33 Ch. D. 500. **Mentd.** Troup *v.* Ricardo (1864), 4 De G. J. & Sm. 489, L. C.; Payne *v.* Dicker (1871), 24 L. T. 492; Motion *v.* Moojen (1872), L. R. 14 Eq. 202.

See, also, Nos. 8175 *et seq., post.*

8140. —— —— Action to set aside collusive sale under insolvency—Jurisdiction of Court of Chancery.]—The Ct. of Ch. has jurisdiction to entertain the suit of an insolvent debtor to set aside a sale alleged to have been collusively made under the insolvency, notwithstanding he may not have obtained a revesting order or an order to annul the proceedings.—TROUP *v.* RICARDO (1864), 4 De G. J. & Sm. 489; 5 New Rep. 62; 34 L. J. Ch. 91; 11 L. T. 399; 10 Jur. N. S. 1161; 13 W. R. 147; 46 E. R. 1008, L. C.

Annotations:—**Consd.** Smith *v.* Moffatt (1865), L. R. 1 Eq. 397; Roberts *v.* Moreton (1869), 17 W. R. 397; Motion *v.* Moojen (1872), L. R. 14 Eq. 202. **Refd.** Payne *v.* Dicker (1871), 24 L. T. 492; Bird *v.* Philpott, [1900] 1 Ch. 822.

8141. —— Action in respect of money-lending transaction.]—Pltf., who had borrowed money at an exorbitant rate of interest, on the security of his reversionary property, & was afterwards made bkpt., filed his bill against his assignee & the money-lender, asking that his security might be allowed to stand as a security only for the money actually advanced, & alleging that his property was much more than sufficient to satisfy all claims upon it, that the money-lender & the assignee had colluded together to deprive him of it, & that the latter had refused to sue on his behalf:—*Held:* pltf. could only sue by his assignee, or by leave of the Ct. of Bkpcy.—PAYNE *v.* DICKER (1871), 6 Ch. App. 578; 24 L. T. 893; 19 W. R. 987, L. C.

8142. —— Bill charging fraud against trustee.]—An uncertificated bkpt. is incapable of suing in Ch., though the bill charges fraud against all defts., including amongst them the creditors' assignee.—MOTION *v.* MOOJEN (1872), L. R. 14 Eq. 202; 41 L. J. Ch. 596; 20 W. R. 861; *subsequent proceedings, sub nom. Re* MOTION, MAULE *v.* DAVIS, 9 Ch. App. 192, L. C. & L. JJ.

Annotation:—**Refd.** Boaler *v.* Power, [1910] 2 K. B. 229, C. A.

8143. —— Sufficiency of evidence of right to sue.]—Where the bill of pltf., an uncertificated bkpt. in 1847, contained allegations that testator in the suit died in Mar., 1863, indebted to pltf., but that his assignees claimed no interest in the debt in respect of which pltf. sued:—*Held:* such allegations were sufficient to show pltf.'s title to sue.—HOLE *v.* GIMBLETT (1864), 5 New Rep. 3; 11 L. T. 294.

8144. Action as trustee—Though also cestui que trust.]—Bkpt. may sue as a trustee, though he is also a *cestui que trust* under the same instrument.—WEBSTER *v.* SCALES (1784), 4 Doug. K. B. 7; 99 E. R. 739.

Annotations:—**Apld.** Winch *v.* Keeley (1787), 1 Term Rep. 619. **Refd.** Scholey *v.* Page (1806), 3 Smith. K. B. 145.

8145. —— Of party to whom chose in action assigned.]—The assignor of a chose in action, who has become bkpt., may sue the debtor for the benefit of the assignee.—WINCH *v.* KEELEY (1787), 1 Term Rep. 619; 99 E. R. 1284.

Annotations:—**Refd.** Master *v.* Miller (1791), 4 Term Rep. 320; Young *v.* Rishworth (1838), 8 Ad. & El. 470; Sherrington *v.* Yates (1844), 13 L. J. Ex. 249, Ex. Ch.; Westoby *v.* Day (1853), 2 E. & B. 605; De Pothonier *v.* De Mattos (1858), E. B. & E. 461. **Mentd.** Scholey *v.* Page (1806), 3 Smith, K. B. 145; Dean *v.* James (1832), 1 Ad. & El. 809, n.; Carvalho *v.* Burn (1833) 4 B. & Ad. 382; Buck *v.* Lee (1834) 1 Ad. & El. 804; Doe d. Shaw *v.* Steward (1834), 1 Ad. & El. 300; Parnham *v.* Hurst (1841), 8 M. & W. 743; Boddington *v.* Castelli (1853), 17 Jur. 781, Ex. Ch.; *Re* Milnes & Robertson (1854), 15 C. B. 451; Jeffs *v.* Day (1866), L. R. 1 Q. B. 372; De Mattos *v.* Saunders (1872), L. R. 7 C. P. 570; St. Thomas' Hospital Governors *v.* Richardson (1909), 101 L. T. 771, C. A.

8146. —— For trustee—Unless he intervenes.]—An uncertificated bkpt. may sue as a trustee for his assignees; & deft. cannot object to the action unless they interpose. Unless the assignees interpose the bkpt. may maintain the action. He may sue as their trustee.—CUMMING *v.* ROEBUCK (1816), Holt, N. P. 172.

Annotations:—**Consd.** Clark *v.* Calvert (1819), 8 Taunt. 742. **Refd.** Herbert *v.* Sayer (1844), 5 Q. B. 965. **Mentd.** Goom *v.* Afalo (1826), 6 B. & C. 117; Sievewright *v.* Archibald (1851), 17 Q. B. 103.

8147. —— For landlord—Action for rent—Parol proof that no beneficial interest in bankrupt.]—In an action for rent upon an indenture of lease deft. pleaded the bkpcy. of pltf., who replied that he let the premises to deft. as trustee for J., & that he had no beneficial interest therein, & was suing as such trustee:—*Held:* his being trustee was immaterial, as he had shown by parol that he had no beneficial interest in the premises.—HOUGHTON *v.* KOENIG (1856), 18 C. B. 235; 25 L. J. C. P. 218; 20 J. P. 470; 139 E. R. 1358.

Annotation:—**Mentd.** Burchell *v.* Clark (1876), 25 W. R. 334, C. A.

8148. Action for work & labour—Where trustee does not interfere.]—An uncertificated bkpt. may maintain an action for work & labour done by him, his assignees not interfering.—CHIPPENDALL *v.* TOMLINSON (1785), 4 Doug. K. B. 318; Cooke's Bankrupt Laws, 8th ed., p. 428; 99 E. R. 900.

Annotations:—**Consd.** Silk *v.* Osborn (1794), 1 Esp. 140; Kitchen *v.* Bartsch (1805), 7 East, 53. **Apld.** Coles *v.* Barrow (1813), 4 Taunt. 754; Beckham *v.* Drake (1849), 2 H. L. Cas. 579, H. L.; Elliott *v.* Clayton (1851), 16 Q. B. 581. **Distd.** *Re* Elswood (1855), 26 L. T. O. S. 96. **Consd.** *Re* Roberts, [1900] 1 Q. B. 122, C. A. **Refd.** Drayton *v.* Dale (1823), 2 B. & C. 293; Williams *v.* Chambers (1847), 16 L. J. Q. B. 230; Wadling *v.* Oliphant (1875), 1 Q. B. D. 145.

8149. —— & materials found.]—An uncertificated bkpt. may maintain an action for work & labour, & materials found, & not for work & labour only.—SILK *v.* OSBORN (1794), 1 Esp. 140.

Annotations:—**Consd.** Elliott *v.* Clayton (1851), 16 Q. B. 581. **Refd.** Beckham *v.* Drake (1849), 2 H. L. Cas. 579, H. L.; *Re* Elswood (1855), 26 L. T. O. S. 96; Kellaway *v.* Bury (1892), 66 L. T. 599, C. A. **Mentd.** *Re* Gibbs, *Ex p.* Gibbs (1844), De G. 72, Ct. of R.

8150. —— Part done by clerks—Trustee not interfering.]—An architect, an uncertified bkpt. sued in his own name for work & labour done, some of the work having been the result of his own personal skill, some done by his clerks, & the whole of the cause of action having arisen after the adjudication & before the close of the bkpcy.:—*Held:* bkpt. was entitled to sue in his own name, so long as the trustees did not interfere.—JAMESON & CO. *v.* BRICK & STONE CO., LTD. (1878), 4 Q. B. D. 208; 48 L. J. Q. B. 249; 39 L. T. 594; 27 W. R. 672.

Annotation:—**Consd.** Emden *v.* Carte (1881), 17 Ch. D. 169.

8151. —— After abandonment of previous action by trustee.]—A. was entitled to commission for

8148 i. *Action for professional services—Trustee not interfering.*]—An uncertificated insolvent attorney may maintain an action in contract for professional services rendered by him after the sequestration of his estate, when his assignee does not interfere.—MADDEN *v.* HETHERINGTON (1872), 3 V. R. L. 68.—**AUS.**

introducing to a tradesman a purchaser for his business, which was to be paid on the completion of the bargain. After he had introduced the purchaser, but before the matter was settled, he became bkpt., & his assignees brought an action for the commission, which they afterwards discontinued, & wrote to him, saying that they disclaimed all right to the money. A. thereupon brought an action in his own name:—*Held:* he was not entitled to recover.

The assignees had no right to transfer the claim in question to bkpt. or to anybody else. The debt was part of bkpt.'s estate, which they were bound to get in for the benefit of the creditors (LORD TENTERDEN, C.J.).—HILLARY *v.* MORRIS (1831), 5 C. & P. 6.

8152. Wrongful dismissal—Trustee not interfering.]—An undischarged bkpt. employed as traveller for a firm, under a contract made before the commencement of the bkpcy., can maintain an action against the firm for a wrongful dismissal occurring after the commencement of the bkpcy., the trustee not having intervened.—BAILEY *v.* THURSTON & Co., LTD., [1903] 1 K. B. 137; 72 L. J. K. B. 36: 88 L. T. 43; 51 W. R. 162; 19 T. L. R. 75; 47 Sol. Jo. 91; 10 Mans. 1, C. A.

Annotations:—**Refd.** Affleck *v.* Hammond, [1912] 3 K. B. 162, C. A.; Hamilton *v.* Caldwell (1919), 88 L. J. P. C. 173, H. L.

8153. Action for money lent.]—An uncertificated bkpt. may maintain an action for money lent.—EVANS *v.* BROWN (1794), 1 Esp. 170.

Annotation:—**Mentd.** *Re* Gibbs, *Ex p.* Gibbs (1844), De G. 72, Ct. of R.

8154. Action on note & for money lent—Plea that trustees required payment to them—That defendant dealt with bankrupt as person capable of taking credit no answer.]—It is a good plea to an action on a promissory note & for money lent, that pltf. is an uncertificated bkpt., & that his assignees required deft. to pay to them the money claimed by pltf., & it is no good replication that the causes of action accrued after pltf. became bkpt., that the deft. treated with pltf. as a person capable of receiving credit in those behalves.—KITCHEN *v.* BARTSCH (1805), 7 East, 53; 103 E. R. 21.

Annotations:—**Distd.** Drayton *v.* Dale (1823), 2 B. & C. 293. **Consd.** Braithwaite *v.* Gardiner (1846), 8 Q. B. 473. **Refd.** Clark *v.* Calvert (1819), 8 Taunt. 742; Taylor *v.* Buchanan (1825), 4 B. & C. 419; Mackay *v.* Wood (1841), 7 M. & W. 420; Herbert *v.* Sayer (1844), 5 Q. B. 965; *Re* Gibbs, *Ex p.* Gibbs (1844), De G. 72, Ct. of R.

8155. Trover—Against stranger.]—An uncertificated bkpt. has a right to goods acquired by him since his bkpcy. against all the world but his assignees, & may maintain trover for them against a stranger.—WEBB *v.* FOX (1797), 7 Term Rep. 391; 101 E. R. 1037.

Annotations:—**Distd.** Eckhardt *v.* Wilson (1799), 8 Term Rep. 140. **Consd.** Drayton *v.* Dale (1823), 2 B. & C. 293; Hills *v.* Wilson (1828), 6 L. J. O. S. K. B. 127; Herbert *v.* Sayer (1844), 5 Q. B. 965. **Refd.** Clark *v.* Calvert (1819), 8 Taunt. 742; Till *v.* Wilson (1828), 7 B. & C. 684. **Mentd.** Sievers *v.* Boswell (1841), 11 L. J. C. P. 14.

8156. —— Goods in hands of third party.]—If an order for the delivery of goods in the hands of a third person be given to an uncertificated bkpt. in payment of a debt accrued subsequent to his bkpcy., he may maintain trover for them.—FOWLER *v.* DOWN (1797), 1 Bos. & P. 44; 126 E. R. 769.

Annotations:—**Expld.** Eckhardt *v.* Wilson (1799), 8 Term Rep. 140. **Consd.** Clark *v.* Calvert (1819), 8 Taunt. 742; Herbert *v.* Sayer (1844), 5 Q. B. 965. **Refd.** Webb *v.* Fox (1797), 7 Term Rep. 391; Kinnear *v.* Tarrant (1812), 15 East, 622; Drayton *v.* Dale (1823), 2 B. & C. 293. **Mentd.** Kitchen *v.* Bartsch (1805), 7 East, 53.

8157. Action on bill of costs—Trustee not intervening—Jus tertii of trustee no defence.]—To an action by an attorney for his bill of costs, deft. pleaded that when the bill was incurred, pltf. was an undischarged bkpt.:—*Held:* no defence to the pltf.'s right to sue, inasmuch as if the assignees did not intervene, bkpt. could maintain an action, & deft. could not set up the *jus tertii* of the assignees.—TOMLINSON *v.* DIGHTON (*circa* 1785), cited 3 Dow. & Ry. K. B. at p. 543.

Annotation:—**Refd.** Drayton *v.* Dale (1823), 3 Dow. & Ry. K. B. 534.

8158. Action on contract of sale—Made subsequent to petition to Insolvent Court.]—An insolvent may sue upon a contract of sale made by him subsequently to the hearing of his petition by the ct. for Relief of Insolvent Debtors, & while he was detained in prison by their order.—TAYLOR *v.* BUCHANAN (1825), 4 B. & C. 419; 6 Dow. & Ry. K. B. 491; 3 L. J. O. S. K. B. 258; 107 E. R. 1116.

Annotations:—**Refd.** Doe d. Palmer *v.* Andrews (1827), 4 Bing. 348. **Mentd.** Barton *v.* Tattersall (1831), 2 Russ. & M. 541; Jones *v.* Smith (1848), 1 Exch. 831.

8159. Ejectment—Provisional assignee not having shown acceptance or refusal of lease.]—The interest of an insolvent debtor in premises held by him from year to year, under an agreement for a lease, passes by the assignment to the provisional assignee, so as to prevent insolvent from maintaining ejectment against his tenant with respect to same, notwithstanding no act has been done by such provisional assignee, to show his acceptance or his refusal of the lease.—DOE d. PALMER *v.* ANDREWS (1827), 4 Bing. 348; 2 C. & P. 593; 12 Moore, C. P. 601; 5 L. J. O. S. C. P. 194; 130 E. R. 802.

Annotations:—**Consd.** Bishop *v.* Bedford Charity Trustees (1869), 20 L. J. Q. B. 53, Ex. Ch. **Refd.** Topham *v.* Dent (1830), 4 Moo. & P. 264.

8160. Action for goods sold—Trustee not interfering.]—The price of goods sold by an uncertificated bkpt., may be recovered by him against the

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8152 i. *Wrongful dismissal.*]—An undischarged bkpt. can maintain in his own name an action for wrongful dismissal occurring after the adjudication of bkpcy.—SALMON *v.* BELFAST ALHAMBRA, LTD. (1903), 37 I. L. T. 72.—IR.

o. *Trespass—On residence area.*]—An uncertificated insolvent, who holds a miners right may maintain a complaint before a warden for trespass on a residence area, & his assignee is not a necessary party to such a proceeding.—FANCY *v.* NORTH HURDSFIELD UNITED CO. (1882), 8 V. L. R. 5.—AUS.

p. *Specific performance—Of contract for lease—No trustee appointed.*]—Insolvent, before his discharge, entered into a contract for a lease at a rent. No creditors' assignee was appointed:—*Held:* he could not sue for specific performance of the contract.—M'NALLY *v.* GRADWELL (1865), 16 I. Ch. R. 512.—IR.

8159 i. *Ejectment—Trustee not interfering.*]—In an action of ejectment on notice to quit, where the landlord was insolvent, but his assignees had not taken any steps with regard to his interest in the property:—*Held:* he was entitled to maintain the action.—O'BRIEN *v.* CLOHANE (1867), 1 I. L. T. Jo. 524.—IR.

q. —— *Land sold under commission.*]—Bkpt., whose property had been sold under a commission of the ct., brought ejectment for the same land:—*Held:* he was barred by 7 Vict. c. 10, & 9 Vict. c. 30.—BRADBURY *v.* WASLEY (1860), 9 C. P. 420.—CAN.

r. *Action to recover rent—Where lease granted by trustee.*]—Where the trustee of a mtgor., the registered proprietor under Transfer of Land Act, 1890 (No. 1149), who is not in default under his mtge., grants a lease of the mortgaged land, the mtge. operating as a re-demise, s. 236 operates, notwithstanding Insolvency Act. 1890 (No. 1102), s. 3, to entitle insolvent to recover in his own name the rent payable under the lease.—EQUITY TRUSTEES EXECUTORS & AGENCY CO., LTD. *v.* AYREY (1900), 26 V. L. R. 625.—AUS.

8160 i. *Action for goods sold—Trustee not interfering.*]—To a declaration on the common counts, deft. pleaded that pltf. before action assigned under 1875 Act to an official assignee, in whom the alleged cause of action became vested. Replication, that the cause of action was for goods bargained & sold by pltf. to deft. after the assignment, & that the assignee had not interfered or required deft. to pay

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vendee, his assignees not interfering.—HAYLLAR *v.* SHERWOOD (1833), 2 Nev. & M. K. B. 401.

8161. Action by bankrupt husband & wife.]—A. directed an annuity to be paid to B. for life, & after her decease, in trust for the maintenance, etc., of C. & her issue, with limitations over. The trustees renounced the trusts, & B. became the administratrix of the estate. B., the tenant for life, died on Mar. 30, 1849. C. married E. in Sept., 1845, & in Mar., 1846, all his estate & effects were, on his own petition, vested in his assignees in insolvency, which was never superseded. The assignees never took any steps in regard to the fund. The administratrix refused to pay the annuity to pltfs., & thereupon E. & his wife filed a bill for the payment of what should be found due to them. Upon a plea in bar put in by defts., stating the insolvency of the husband:—*Held:* the plea could not be allowed as against the right of the wife, but it might stand for an answer, with liberty to pltfs. to except, & to amend their bill.—GLOVER *v.* WEEDON (1857), 3 Jur. N. S. 903; 5 W. R. 810.

See, now, Married Women's Property Acts.

8162. Action after annulment of bankruptcy—Annulment alleged to have been procured by fraud.]—A solr. & an auctioneer, who were employed by assignees in the sale of bkpt.'s property, purchased part of it. The bkpcy. was afterwards annulled, & although it was alleged the order annulling it had been obtained in circumstances of fraud, that order remained unreversed. On a bill by bkpt. to set aside the sale:—*Held:* bkpt. had a right to sue, the order annulling the bkpcy. being unreversed, & the purchase must be set aside.—ADAMS *v.* SWORDER (1863), 2 De G. J. & Sm. 44; 3 New Rep. 273; 33 L. J. Ch. 318; 9 L. T. 621; 10 Jur. N. S. 140; 12 W. R. 294; 46 E. R. 291, L. JJ.

Annotation:—**Refd.** Luddy's Trustee *v.* Peard (1886), 33 Ch. D. 500.

8163. Summons to vary certificate—Payment into court of sum for costs.]—An uncertificated bkpt., whose property was vested in the official receiver, took out a summons to vary a certificate made by the chief clerk. The official receiver declined to intervene in the proceedings, but leave had been obtained from him for appct. to use his name:—*Held:* as the application must be determined upon the assumption that the summons would be successful, it would be hard to refuse appct. permission, because the official receiver did not choose to take out a summons, & the permission should be granted, upon the terms of appct. paying into ct. a sum sufficient to cover all the costs occasioned by the application.—*Re* WHATMAN, HOAR *v.* WHATMAN, [1889] W. N. 213.

Annotation:—**Refd.** Farnham *v.* Milward, [1895] 2 Ch. 730.

8164. Damages for maintenance—In proceedings brought against trustee.]—An undischarged bkpt. is not entitled to bring an action for damages for maintenance in respect of proceedings brought against his trustee.—BOTTOMLEY *v.* BELL (1915), 31 T. L. R. 591; 59 Sol. Jo. 703, C. A.

B. Actions for wrongfully bringing about Bankruptcy.

Right of bankrupt to sue generally.]—*See* Nos. 7972, 7975, *ante.*

8165. Whether action will lie.]—Action lies for maliciously suing forth a commission of bkpcy.—BROWN *v.* CHAPMAN (1763), 3 Burr. 1418; 1 Wm. Bl. 427; 97 E. R. 905.

Annotation:—**Consd.** Cotterell *v.* Jones (1851), 11 C. B. 713.

8166. ——.]—S., an attorney, having been instructed by H. to make J. bkpt., obtained a debtor's summons under 1869 Act, s. 7, & served it on J., who thereupon applied to the registrar of the county ct. to dismiss the summons. Having heard both parties, the registrar made an order on Apr. 12, that J. should within seven days enter into a bond, with two such sufficient sureties as the ct. should approve, to pay such sum as should be recovered by H. in any proceeding taken for the recovery of the debt due to him from J. together with costs, & that all proceedings on the summons should be stayed until the ct. in which such proceedings for the recovery of the debt should be taken had come to a decision thereon. S. drew up the order, which was the first of the kind made by the county ct. in pursuance of the Act. During the seven days a correspondence took place as to the proposed sureties, who were objected to by S. on behalf of H., & no bond having been executed in consequence, a petition in bkpcy. was, by the express order of H., presented by S. on Apr. 21, under s. 8, & on the same day a receiver was appointed under s. 13, the act of bkpcy. alleged being (in the terms of s. 6 (6)) that petitioning creditor had served on J. a debtor's summons, & that he being a trader had for seven days neglected to pay the debt alleged to be due, or to secure or compound for the same. J. objected to the petition, & after several hearings the county ct. judge adjudged J. to be bkpt. This decision was affirmed by the chief judge in bkpcy., but was afterwards reversed by the Lord Justice of Appeal, who annulled the proceedings on the ground that the order of Apr. 12 was a stay of proceedings at the time of the petition & adjudication:—*Held:* (1) (KELLY, C.B., & CLEASBY, B.), an action was maintainable by J. against S. for maliciously & without reasonable & probable cause presenting the petition & causing him to be adjudicated a bkpt.; (2) (MARTIN & BRAMWELL, BB.), such an action was not maintainable by J. against S.—JOHNSON *v.* EMERSON & SPARROW (1871), L. R. 6 Exch. 329; 40 L. J. Ex. 201; 25 L. T. 337.

Annotation:—**Consd.** Quartz Hill Consolidated Gold Mining Co. *v.* Eyre (1883), 11 Q. B. D. 674, C. A.

8167. —— **Power to award damages.**]—Case for falsely & maliciously suing out a commission

him:—*Held:* good.—GRAHAM *v.* MCKERNAN (1877), 42 U. C. R. 368. —**CAN.**

s. *Action against sheriff — For allowing goods to be removed without satisfying insolvent's claim for rent.*]—In 1881 pltf. carried a resolution under the arrangement sects. of 1857 Act, for a composition with his creditors, it being required by the resolution that pltf.'s estate & effects should vest in the official assignees & H., as a security for the creditors, upon trust, in default in payment of the composition, to apply to realize the estate. Afterwards, & before the composition had been carried out, or pltf. had obtained any certificate pltf., by lease dated Apr. 13, 1883, demised premises to T. Goods of T. in those premises were seized under a *fi. fa.*, & a quarter's rent then due under the lease was claimed from the sheriff by pltf., & by the official assignees & H. The sheriff paid the official assignees, & H., & sold the goods. In an action by pltf. against the sheriff for allowing the goods to be removed without satisfying pltf.:—*Held:* pltf. was entitled to maintain the action.—DORAN *v.* MOORE (1885), 16 L. R. Ir. 181.—**IR.**

t. *Action to redeem mortgage—Right to redeem assigned to bankrupt by trustee.*]—A mtgor. having become bkpt., & having subsequently agreed with the trustee of his estate for the purchase of his assets & choses in action, commenced a suit for redemption, in which the trustee was joined as a co-deft., no deed of assignment having been executed by him:—*Held:* (1) the right of bkpt. mtgor. to maintain an action could only accrue by purchase from the trustee of his estate; (2) the right in the trustee to redeem was an equitable right only; (3) if the declaration disclosed circumstances amounting to an assignment of that right, there was no necessity to join the trustee, & if it did not it was defective.—CHALMERS *v.* CLARKE, 2 J. R. N. S. 247.—**N.Z.**

a. *Action against trustee — What must be shown.*]—To maintain an action by insolvent against his trustee, there must be shown the probability

of bkpcy., which was afterwards superseded, is a very proper action at law, though the Chancellor has power to give £200 damages by statute.—CHAPMAN *v.* PICKERSGILL (1762), 2 Wils. 145 ; 95 E. R. 734.

Annotation :—**Refd.** Rowning *v.* Goodchild (1773), 3 Wils. 443.

8168. —— Not before adjudication set aside.]—Bkpt., whose adjudication in bkpcy. has not been set aside, cannot maintain an action for maliciously procuring the bkpcy., & such an action may be summarily dismissed upon summons as frivolous & vexatious.—METROPOLITAN BANK, LTD. *v.* POOLEY (1885), 10 App. Cas. 210 ; 54 L. J. Q. B. 449 ; 53 L. T. 163 ; 49 J. P. 756 ; 33 W. R. 709, H. L.

Annotations :—**Refd.** Boaler *v.* Power, [1910] 2 K. B. 229, C. A. **Mentd.** Tucker *v.* Collinson (1886), 54 L. T. 263, C. A. ; Magrath *v.* Reichel (1887), 57 L. T. 850, D. C. ; Lawrence *v.* Norreys (1888), 39 Ch. D. 213, C. A. ; Barrett *v.* Day, Day *v.* Foster (1890), 43 Ch. D. 435 ; Bruce *v.* Ailesbury (1892), 36 Sol. Jo. 865 ; Haggard *v.* Pelicier Frères, [1892] A. C. 61, P. C. ; Fletcher *v.* Bethom (1893), 68 L. T. 438 ; Logan *v.* Bank of Scotland (1905), 94 L. T. 153, C. A. ; British Cash & Parcel Conveyors *v.* Lamson Store Service Co., [1908] 1 K. B. 1006, C. A. ; Oram *v.* Hutt, [1914] 1 Ch. 98, C. A. ; Norman *v.* Mathers (1916), 85 L. J. K. B. 857, D. C. ; Neville *v.* London Express Newspaper (1917), 1 K. B. 402.

8169. How matter determined—Not on application to strike out statement of claim.]—The question whether an action will lie, without an allegation of special damage, for falsely & maliciously & without reasonable or probable cause presenting a bkpcy. petition is not one which will be determined upon an application to strike out the statement of claim as disclosing no reasonable cause of action.—WYATT *v.* PALMER, [1899] 2 Q. B. 106 ; 68 L. J. Q. B. 709 ; 80 L. T. 639 ; 47 W. R. 549 ; 43 Sol. Jo. 553, C. A.

Annotations :—**Refd.** Birch *v.* Birch, [1902] P. 62. **Mentd.** Bright *v.* Killey (1900), 16 T. L. R. 559, C. A.

See, also, No. 8171, *post.*

8170. What must be alleged & proved.]—In an action for maliciously suing out a commission of bkpcy., it must be averred & proved that the commission was superseded before the commencement of the action ; & if this fact be not proved, pltf. ought to be non-suited, though it was not averred in the declaration, & though deft., who might have demurred for the omission, has not done so.—WHITWORTH *v.* HALL (1831), 2 B. & Ad. 695 ; 9 L. J. O. S. K. B. 297 ; 109 E. R. 1302.

Annotations :—**Consd.** Mellor *v.* Baddeley (1834), 2 Cr. & M. 675. **Apprvd.** Metropolitan Bank *v.* Pooley (1885), 10 App. Cas. 210, H. L. **Refd.** Gilding *v.* Eyre (1861), 10 C. B. N. S. 592 ; Johnson *v.* Emerson (1871), L. R. 6 Exch. 329. **Mentd.** Baynes *v.* Brewster (1841), 11 L. J. M. C. 5 ; Steward *v.* Gromett (1859), 7 C. B. N. S. 191.

8171. ——.]—In an action for maliciously suing out a commission of bkpcy., it is not sufficient to prove merely that the commission was superseded, as a supersedeas may proceed upon strict legal grounds, & does not furnish evidence of the want of probable cause.—HAY *v.* WEAKLEY (1832), 5 C. & P. 361.

See, also, No. 8169, *ante.*

8172. ——.]—*Qu. :* whether an action will lie, without an allegation of special damage, for falsely & maliciously & without reasonable or probable cause presenting a bkpcy. petition.—WYATT *v.* PALMER, [1899] 2 Q. B. 106 ; 68 L. J. Q. B. 709 ; 80 L. T. 639 ; 47 W. R. 549 ; 43 Sol. Jo. 553, C. A.

Annotations :—**Mentd.** Bright *v.* Killey (1900), 16 T. L. R. 559, C. A. ; Birch *v.* Birch, [1902] P. 62.

8173. Onus of proof of probable cause.]—In an action for maliciously suing out a commission against pltf., under which he was adjudged a bkpt., & his goods seized, but which was afterwards superseded, pltf. proved, in addition to those facts, an action of trespass brought by him against deft. for the seizure plea, alleging the bkpcy. issue joined on that fact, & verdict for pltf. He further proved that shortly before the commission was taken out he had removed some goods in circumstances which did not make the removal an act of bkpcy., but were probably relied on by deft. as having that effect. It was not shown that that was the fact upon which the comrs. made their adjudication, or by which deft. supported his plea in the former action :—*Held :* this was sufficient evidence to throw on deft. the *onus* of proving probable cause.—COTTON *v.* JAMES (1830), 1 B. & Ad. 128 ; 8 L. J. O. S. K. B. 345 ; 109 E. R. 735.

Annotations :—**Folld.** Isitt *v.* Beeston (1869), L. R. 4 Exch. 159. **Refd.** Johnson *v.* Emerson (1871), L. R. 6 Exch. 329. **Mentd.** *Re* Hunt, *Ex p.* Simpson (1844), 8 Jur. 1150 ; Mercer *v.* Whall (1845), 5 Q. B. 447.

8174. Sufficiency of proof.] — A declaration charged that deft. falsely & maliciously, & without any reasonable or probable cause, filed a petition for adjudication of bkpcy. against pltf., & falsely, & maliciously, & without reasonable or probable cause, caused & procured pltf. to be declared a bkpt. :—*Held :* that charge was established by proof that deft. petitioned for the adjudication, &, by depositions false in fact, & maliciously made, induced the comrs. to adjudicate the bkpcy., although it appeared that, even if the deposition had been true, the adjudication could not have been supported in law.—FARLEY *v.* DANKS (1855) 4 E. & B. 493 ; 24 L. J. Q. B. 244 ; 24 L. T. O. S. 212 ; 19 J. P. 628 ; 1 Jur. N. S. 331 ; 3 W. R. 173 ; 119 E. R. 180.

Annotations :—**Refd.** Johnson *v.* Emerson (1871), L. R. 6 Exch. 329. **Mentd.** Fitzjohn *v.* Mackinder (1860), 29 L. J. C. P. 167.

C. Other Cases.

See, also, Sect. 1, *ante.*

8175. Necessity for revesting order.]—Bill for an account of partnership transactions from 1837 to 1848. Plea, that in 1850 pltf. being then in custody, detained at the suit of two creditors, applied, by petition to the Ct. for Relief of Insolvent

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of a surplus after payments of debts, & *semble :* some misconduct in deft. as trustee.—VAIL *v.* GILMOUR (1885), 11 V. L. R. 381.—**AUS.**

b. —— —— *Bill to raise arrears of annuity.*]—An uncertificated bkpt. filed a bill to raise the arrears of an annuity, making the assignee deft., & stating that all, except one, of the creditors who had proved under the commission, had signed a composition deed, & that between that creditor & the assignee there was collusion :—*Held :* an uncertificated bkpt. as a general rule had no right of action against his assignee, even where it was alleged there would be a surplus, if that surplus had to be ascertained by an account, & merely to allege the existence of a surplus with a statement of collusion was not sufficient to enable the ct. to assume jurisdiction.—WYSE *v.* WATERS (1849), 1 Ir. Jur. 130. —**IR.**

c. —— *For breach of contract to retransfer estate.*]—Pltf., just after his discharge from insolvency, took action against the assignee & inspectors of his estate for breach of contract for selling the estate to another, after entering into a written contract with him to retransfer it to him for 40 cents in the dollar :—*Held :* as he had nothing at the time the contract was entered into, he could have suffered nothing by the violation of it.—STYCE *v.* DARLING (1879), 2 L. N. 250 ; 9 R. L. O. S. 557.—**CAN.**

d. —— *For neglect of duty.*]—A petition by bkpt., praying that he should be at liberty to bring an action in the name of the comrs. against his assignees for neglect of duty, was refused with costs.—*Re* MULLINS (1820), 2 Mol. 449.—**IR.**

See, further, Part VII., *ante.*

PART XXI. SECT. 5, SUB-SECT. 1.—C.

e. *Joinder of trustee as party.*]—A suit was transferred from the Queen's bench under A. J. Act, which proved to be defective for want of the assignee in insolvency as a party, there not being the necessary allegation in pltf.'s pleadings to show that the right of action had revested in pltf. :—*Held :* the cause should stand over in order to make the necessary allegation in the pleadings or to add the assignee as deft.—CURTIS *v.* WILSON (1876), 23 Gr. 215. —**CAN.**

Sect. 5.—Actions, etc., by bankrupt: Sub-sect. 1, C.]

Debtors for his discharge, & that in the same year the usual vesting order was made. The plea disclosed that pltf. was subsequently discharged out of custody by the consent of the detaining creditors without any adjudication being made upon his petition, & that the petition had not been dismissed. It stated that no order had ever been made for revesting the estate & effects of pltf. in him, but did not state that there was any other creditor for any sched. of debts :—*Held :* (1) notwithstanding pltf.'s discharge from custody, the estate remained vested in the assignee by the operation of the vesting order ; (2) it was so vested in the assignee for the benefit of pltf.'s creditors & not as a bare trustee for pltf. ; (3) in order to qualify himself to sue, pltf. must apply, under Judgments Act, 1838 (c. 110), s. 92, to the Ct. for Relief of Insolvent Debtors, & obtain from that ct. an order revesting the estate ; (4) the plea should be allowed.—TUDWAY *v.* JONES (1855), 1 K. & J. 691 ; 3 Eq. Rep. 75 ; 24 L. J. Ch. 507 ; 25 L. T. O. S. 126 ; 3 W. R. 462 ; 69 E. R. 638.

Annotations :—**Folld.** Bradberry *v.* Brooke (1856), 4 W. R. 658. **Distd.** Wearing *v.* Ellis (1856), 6 De G. M. & G. 596, L. C.

8176. ——.]—B. being insolvent, a vesting order was made, founded on a judgment in outlawry, which was afterwards reversed. B. then filed a bill to redeem a certain mtge. on which principal & interest had been paid, & another vesting order in insolvency was made. The provisional assignee was made a deft. to the bill by supplemental order :—*Held :* pltf. had no right to sue whilst the vesting order subsisted.—BRADBERRY *v.* BROOKE (1856), 26 L. J. Ch. 74 ; 5 W. R. 98, L. JJ.

8177. —— Action by devisee of insolvent.]—The devisee of an insolvent debtor who had taken the benefit of Insolvent Debtors Act, 1842 (c. 116) & obtained a release in full from all his creditors : —*Held :* entitled to sustain a bill in equity in respect of surplus real property, which had been conveyed by the official assignee, without going through the process of applying to the Insolvent Ct. for an order re-vesting the property in the assignee of the insolvent.—WEARING *v.* ELLIS (1856), 6 De G. M. & G. 596 ; 26 L. J. Ch. 15 ; 28 L. T. O. S. 113 ; 2 Jur. N. S. 1149 ; 5 W. R. 40 ; 43 E. R. 1365, L. C.

Annotations :—**Distd.** Payne *v.* Dicker (1871), 24 L. T. 492. **Expld.** Motion *v.* Moojen (1872), L. R. 14 Eq. 202. **Refd.** Troup *v.* Ricardo (1864), 4 De G. J. & Sm. 489, L. C. ; Martin *v.* Powning (1869), 4 Ch. App. 356, L. JJ. **Mentd.** Luddy's Trustee *v.* Peard (1886), 33 Ch. D. 500 ; Bird *v.* Philpott, [1900] 1 Ch. 822.

8178. Action as trustee—Of party to whom chose in action assigned.]—In a suit for building & equipping a vessel, deft. pleaded that pltfs.' claim had vested in their trustee under a composition deed. Pltfs. in their reply alleged that they had assigned the causes of action before the execution of the deed, & that the suit was brought in their names as trustees for the assignees :—*Held :* (1) the assignment of the causes of action carried with it all rights of action, which though inchoate at the time might subsequently become complete ; (2) where there was an absolute assignment of a beneficial interest in a debt the assignor might sue as trustee for the assignee, notwithstanding his subsequent execution of a composition deed.—THE WASP (1867), L. R. 1 A. & E. 367 ; 16 L. T. 854 ; 2 Mar. L. C. 552.

See, also, Part XX., Sect. 4, sub-sect. 7, *ante*, Nos. 7990—7992, *ante*.

8179. —— For co-plaintiff to whom interest assigned—Notice of assignment to defendant necessary.]—To *assumpsit* by two pltfs., for goods sold, etc., deft. pleaded the bkpcy. of one. Replication, that before the bkpcy., bkpt. pltf. assigned to the other all his interest in the debt, & that bkpt. sued only as trustee for his co-pltf. :—*Held :* the replication was bad, for not stating that debtor had had notice of the supposed assignment, although deft. had pleaded over without alleging the want of notice.—DEAN *v.* JAMES (1832), 1 Ad. & El. 809, n. ; 1 Nev. & M. K. B. 392 ; 110 E. R. 1416.

Annotations :—**Folld.** Buck *v.* Lee (1834), 1 Ad. & El. 804. **Refd.** Gibson *v.* Overbury (1841), 10 L. J. Ex. 219. **Mentd.** Harris *v.* Goodwyn (1841), 2 Man. & G. 405.

8180. —— For creditor to whom rights assigned.]—*Assumpsit* for freight due on a charter-party. Plea, the bkpcy. of pltfs. Replication that pltfs., before their bkpcy., were indebted to D. & Co., & by an order indorsed on the charter-party, requested defts. to pay D. & Co. all sums which should become due on the charter-party, that the charter-party, with the order indorsed, was delivered to D. & Co., & that defts. had notice of the order. The rejoinder traversed the notice. Pltfs., having offered their ship to defts. on charter, at 16*s.* per ton per month, the latter objected, on the ground that the ship was too large. Pltfs. then offered to take half the ship, on adventure, in partnership with defts., & it was arranged that a charter-party, in the usual form, should be executed by pltfs. & defts., & that an agreement as to the adventure should be signed by A., pltfs.' clerk, as their agent, & a memorandum of guarantee should be signed by pltfs. The agreement stated, that the trading, cargo, etc., should be upon the joint account & risk of defts. & A., & that, after payment or deduction of the freight, the profit or loss should be

f. ——.]—Where insolvent debtor files a bill without making his assignee pltf. or deft., the cause will be struck out of the list, in order to have a supplemental bill filed making the assignee a party.—ROWE *v.* MAHON (1830), 3 Ir. L. Rec. 1st ser. 150, 181.—**IR.**

g. *Cause of action accruing before resolution vesting insolvent's property in assignees.*]—Pltf. having filed a petition for arrangement, a resolution was passed by his creditors under 1857 Act, s. 347, & confirmed by the ct., purporting to declare that his estate & effects should vest in two persons, one of whom was an official assignee. At the date of the passing & confirmation of the resolution, there was a second official assignee, who was not named in the resolution as one of the parties in whom pltf.'s estate was thereby required to vest :—*Held :* pltf. was entitled to sue on a cause of action which had accrued prior to the date of the resolution.—M'CAUL *v.* CAMPBELL (1872), I. R. 8 C. L. 35. —**IR.**

h. *Action to recover property—On refusal of trustee to sue.*]—Under Law 13 of 1895, if the trustee refuses to institute an action to recover property which, in the opinion of insolvent, should belong to the estate, it is competent for him to sue, joining the trustee as deft.—MEARS *v.* RISSIK (1905), T. S. 303.—**S. AF.**

8178 i. *Action as trustee—Of party to whom bond assigned.*]—Where bkpt., thirty days before the commission, *bonâ fide* assigned part of his interest in a bond to A. :—*Held :* bkpt., & not his assignee, should sue for the interest A. had in the bond.—HUGHES *v.* NEWCASTLE DISTRICT MUTUAL FIRE INSURANCE CO. (1852), 8 U. C. R. 315.—**CAN.**

8178 ii. —— *Of party to whom policy assigned.*]—By agreement, dated Dec. 21, 1844, & made between pltf., deft., & G., which recited that G. was indebted to pltf. in £800, & that in order to secure repayment it was agreed that pltf. should effect an insurance on the life of G., deft. covenanted with pltf., his exors., administrators, & assigns, to pay the premiums as they should become due. By deed of Apr. 17, 1845, made between pltf. & M., his wife, of the first part ; T. & R. of the second part ; & H. of the third part, pltf., in consideration of £800, assigned the policy to H., his exors., etc. Deft. having failed to pay the premiums, an action of covenant was brought by pltf. for the benefit of the representative of H. :—*Held :* the right to sue upon the agreement of Dec. 21, 1844, did not pass to the assignees under the bkpcy. of pltf., but might be sued for by pltf. for the benefit of the parties claiming under the deed of Apr. 17, 1845.—KIDD *v.* LOUGHNAN (1851), 2 I. C. L. R. 336.—**IR.**

borne, & received or paid, by the parties in equal moieties. Pltfs., by their memorandum, guaranteed A. from all losses & expenses happening in the course of such trading. Pltfs., being indebted to D. & Co., in a large sum of money, subsequently deposited the charter-party with them as a security, with an indorsement upon it, directed to defts., requiring them to pay the amount due to D. & Co., & notice was afterwards given to defts. Pltfs. subsequently became bkpts., & assignees were appointed:—*Held:* the transaction amounted to an absolute assignment to D. & Co. of pltfs.' interest in the freight, so as to prevent it vesting in their assignees, & pltfs. were entitled to recover as trustees for D. & Co.—BOYD *v.* MANGLES (1849), 3 Exch. 387; 18 L. J. Ex. 273; 154 E. R. 894.

8181. —— **For vendee—No beneficial interest in bankrupt at time of bankruptcy.**]—*Assumpsit* to recover an average loss on a policy of insurance on goods from Havannah to a market in Europe, at 60*s.* per cent. premium, to return 23*s.* 9*d.* per cent. if the risk ended in the United Kingdom, & less if at other places in the North of Europe. Plea, bkpcy. of pltf. before action. Replication, that before pltf. became bkpt. he sold the goods & transferred the policy, & the right & interest of pltf. to recover for the loss of the goods, to F., & delivered the policy to him. Rejoinder, that the cargo was delivered & the risk thereon ended in England before the bkpcy. of pltf., & that the right to have a return of premium was not transferred from pltf. before his bkpcy.:—*Held:* the two causes of action being separate & totally distinct from each other, though arising upon the same instrument, pltf. was entitled to sue for average loss as trustee for his vendee, that being a cause of action in which he had no beneficial interest at the time of his bkpcy. *Semble:* the facts of bkpt. continuing to have a very small beneficial interest in a contract assigned before his bkpcy., would not defeat the right of the assignee of the contract to sue in his name (POLLOCK, C.B.).—BODDINGTON *v.* CASTELLI (1853), 1 E. & B. 879; 23 L. J. Q. B. 31; 21 L. T. O. S. 197; 17 Jur. 781; 1 W. R. 359; 1 C. L. R. 281; 118 E. R. 665, Ex. Ch.

Annotations:—**Refd.** Rose *v.* Buckett (1901), 84 L. T. 670, C. A. **Mentd.** Westoby *v.* Day (1853), 2 E. & B. 605; Johnson *v.* Diamond (1855), 11 Exch. 73.

8182. Trespass quare clausum fregit—Tenant from year to year—Bankruptcy after trespass.]—An action of trespass, *quare clausum fregit*, is maintainable by a tenant from year to year, who has become bkpt. after the committing the trespass, & before the commencement of the suit, & the rights of such action does not pass to the assignees by the assignment, unless they interfere, as bkpt. may sue as a trustee for, & has a good title against all persons but them.—CLARK *v.* CALVERT (1819), 8 Taunt. 742; 3 Moore, C. P. 96; 129 E. R. 573.

Annotations:—**Apprvd.** Rogers *v.* Spence (1844), 13 M. & W. 571, Ex. Ch. **Consd.** Rose *v.* Buckett, [1901] 2 K. B. 449, C. A. **Refd.** Beckham *v.* Drake (1841), 8 M. & W. 846.

8183. Assumpsit by several partners—Bankruptcy of one good plea in bar.]—To *assumpsit* by several partners, deft. may plead in bar the bkpcy. of one of them.—ECKHARDT *v.* WILSON (1799), 8 Term Rep. 140; 101 E. R. 1311.

Annotations:—**Mentd.** R. *v.* Watson (1816), 3 Price, 6; Gilbert *v.* Spooner (1836), 2 Gale, 135.

8184. Action to try validity of commission—Bill to recover property—Collusion alleged.]—Bkpt. cannot file a bill to recover property due to his estate against a debtor to his estate, on the ground of the invalidity of the commission, & of collusion between his assignees & the debtor, the proper course being an action to try the validity of the commission, or a petition to remove the assignees.—HAMMOND *v.* ATTWOOD (1818), 3 Madd. 158; 56 E. R. 469.

Annotations:—Heath **Refd.** *v.* Chadwick (1848), 2 Ph. 649, L. C.; Rochfort *v.* Battersby (1849), 2 H. L. Cas. 388, H. L.

8185. —— **Barred by delay.**]—A commission of bkpcy., issued in Mar. 1824, & bkpt. made an affidavit in support of the petition & otherwise acquiesced in it. In Aug. 1826, bkpt. commenced an action to try the validity of the petition:—*Held:* bkpt. was barred by lapse of time & acquiescence, & must be restrained from proceeding with the action.—*Re* CLAUGHTON, *Ex p.* LEIGH (1827), 2 Gl. & J. 332.

Annotation:—**Refd.** *Re* Barnett, *Ex p.* Reynolds (1885), 15 Q. B. D. 169, C. A.

8186. Bankruptcy abroad—Action after reinstatement by concordat—Consent of commissioners thereunder should be shown.]—Where parties have become bkpt. in France, but have been

l. —— *For wife joined as co-plaintiff.*]—A wife being entitled to her sole use, & her separate receipt good, her husband joining with her as co-pltf., is in the nature of a *prochein ami*, &, if he be discharged as an insolvent debtor, his assignee need not be a party. If there were any interest in the husband, his assignee should join, & if there were any dispute as to the wife's sole interest, the husband ought to be made deft.—LAIRD *v.* TOBIN (1830), 1 Mol. 543.—**IR.**

m. —— ——.]—Where on marriage the interest of a sum secured by mtge. is settled on the husband for life, remainder to the wife for life, & he is afterwards discharged as insolvent, it is competent for him, notwithstanding his insolvency, to file a bill with his wife to foreclose the mtge., in order to have the trust fund secured for her, for although by the insolvency all his pecuniary right in the mtge. was taken out of him, yet he still has an interest to preserve the expectant estate of his wife, & is not disqualified to join her as co-pltf. in a suit to secure it.—HORAN *v.* WOOLOUGHAN (1827), Beat. 1.—**IR.**

8182 i. *Trespass quare clausum fregit—Insolvency after act.*]—Count for trespass *quare clausum fregit* & carrying away pltf.'s goods & expelling him. Pltf. became insolvent after the accruing of the cause of action:—*Semble:* even after the assignee's appointment pltf. could sue in his own name for the cause of action in such count—DUNN *v.* IRWIN (1875), 25 C. P. 111.—**CAN.**

n. *Trover.*]—Pltf. brought an action, in which one of the counts was for trover. After the accruing of the cause of action pltf. became insolvent: *Qu.:* whether pltf., after the assignee's appointment, could have sued in his own name for the causes of action in such count.—DUNN *v.* IRWIN (1875), 25 C. P. 111.—**CAN.**

o. *Action to try validity of commission—Messenger as nominal defendant.*]—Where an action of trover is directed to be brought by bkpt. against the messenger of bkpts. as nominal deft. to try the validity of the commission, & a verdict found for bkpt., the ct. will order the solr. to the commission & the assignee to indemnify the messenger.—*Re* BURTON, *Ex p.* SCALLAN (1827), 1 Mol. 63; 1 Ir. L. Rec. 1st ser. 112, 131, 134.—**IR.**

p. —— *After discharge in insolvency.*]—Bkpt., four days after issuing the commission, was discharged as an insolvent, but the act of bkpcy., being lying three months in prison, was prior to such discharge. Bkpt. petitioned the Chancellor to direct an issue to try if he were a bkpt.:—*Held:* the question could be tried at law between the assignees under the commission & under Insolvent Act.—*Re* LEDWITCH (1821), 2 Mol. 450.—**IR.**

q. *Proceeding to set aside writ of attachment in suit depending in Insolvent Court.*]—An order *nisi* was obtained from a judge of the Supreme Ct. to set aside a writ of attachment in a suit depending in the Insolvent Ct. No *certiorari* or other proceeding had issued to bring the cause up to the Supreme Ct.:—*Held:* the proceeding was *coram non judice*, & rule *nisi* discharged.—SILVER *v.* PETITMAITRE (1872), 8 N. S. R. 551.—**CAN.**

r. *Bill for account for judgment debt.*]—Insolvent, having parted with all his estate, which became vested in the provisional assignee, cannot sustain a bill for an account of the amount due on a judgment under which he was arrested.—CROTTY *v.* CROTTY (1850), 2 Ir. Jur. 161.—**IR.**

s. *Action to recover debt—Not returned in schedule.*]—When pltf., a certified bkpt., claims a debt which he did not return in his schedule, he cannot, on that account, be nonsuited; it can only be used as an inference from which the jury may conclude whether the debt may not in reality have been satisfied.—CONNOLLY *v.* CALLAGHAN (1842), Arm. M. & O. 345.—**IR.**

t. *Action to recover real estate—Conveyed as security but conveyance*

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reinstated in their affairs by a *concordat*, it is not necessary in an action brought by them for money due to them before their bkpcy., to prove that they have performed their part of the *concordat*, but they should show that the action is brought with the assent of the comrs. named therein.—ORR *v.* BROWNE (1833), 5 C. & P. 414, N. P.

8187. Petition of right—Continuance after order staying proceedings—Contempt of court.]—D. was adjudicated a bkpt. under 1861 Act. He subsequently presented a petition of right intituled in the Queen's Bench praying the recovery of £6 15*s.* due to him from the Lords Comrs. of the Admlty. An injunction staying all further proceedings in that petition was issued against him by the Ct. of Bkpcy. under 1869 Act. Bkpt. disputed the validity of the order, & proceeded with his petition of right after service of the order:—*Held:* D. was guilty of a contempt of ct. in so doing.—*Re* DAVIS (1872), 20 W. R. 767.

8188. Cause of action reconveyed to bankrupt.]—To an action for goods sold, etc., deft. pleaded that since the cause of action arose, & before action, the estate of pltf. went into liquidation under 1869 Act, & B. was duly appointed trustee. Pltf. replied that B. for good & valuable consideration sold, assigned, & transferred to him all the estate, causes of action, etc., vested in B. as trustee under the liquidation:—*Held:* the sale was warranted by s. 25 (3) of the Act, & pltf. was entitled to sue in his own name, under s. 111.—KITSON *v.* HARDWICK (1872), L. R. 7 C. P. 473; 26 L. T. 846.

Annotations:—**Refd.** Emden *v.* Carte (1881), 17 Ch. D. 169. **Mentd.** Mercer *v.* Vans Colina, [1897] [1900] 1 Q. B. 130, n.; Affleck *v.* Hammond, [1912] 3 K. B. 162, C. A.

8189. Action to set aside judgment—As obtained by fraud.]—Where a person, who has been adjudicated a bkpt. in consequence of his failure to comply with a bkpcy. notice to pay a judgment debt, alleges that petitioning creditor's judgment was obtained by fraud, he may apply to the ct. in bkpcy., to be allowed to contest the validity of the judgment. He cannot, however, while the adjudication remains in force, bring an action to set aside the judgment on the ground that it was obtained by fraud, & the High Ct. has no jurisdiction to entertain such an action.—BOALER *v.* POWER, [1910] 2 K. B. 229; 79 L. J. K. B. 486; 102 L. T. 450; 26 T. L. R. 358; 54 Sol. Jo. 360; 17 Mans. 125, C. A.

8190. Appeal from judgment in colonial court—No sufficient averment of injustice.]—Pltf., a native of one of the colonies, alleged that he had taken the benefit of a Colonial Insolvent Act, in consequence of having had a judgment recovered against him in the Colonial Ct., from which judgment he had appealed, but unsuccessfully, that the assignee, now in England, had assets in his hands out of which, if the judgment were reversed, a large surplus would be coming to him, that the judgment was the result of an erroneous decision, & an appeal would probably be successful, but that the assignee, colluding with the judgment creditor, refused to prosecute such appeal, & prayed that the assignee might be decreed to prosecute the appeal, or that the ct. would enable pltf. to prosecute the appeal in the name of the assignee:—*Held:* there was no sufficient averment that pltf. had failed to obtain justice in the ordinary tribunals of his own country to empower the ct. to interfere, & demurrer allowed.—SMITH *v.* MOFFATT (1865), L. R. 1 Eq. 397; 35 L. J. Ch. 219; 14 L. T. 323; 12 Jur. N. S. 22; 14 W. R. 242.

8191. Appeal from injunction—Against passing off goods.]—Deft., who had become bkpt. since the trial of the action, appealed against an injunction restraining him from selling certain articles with labels or wrappers in imitation of those used by pltf., & from using a certain name, whether alone or in combination with his own or any other name, in the manufacture of those articles in such manner as to lead to the belief that the articles made by deft. had been manufactured by pltf. The trustee did not join in the appeal:—*Held:* notwithstanding the bkpcy., deft. was entitled to appeal from the injunction, inasmuch as it imposed a personal liability upon him.—DENCE *v.* MASON (1879), 41 L. T. 573, C. A.

8192. —— Against infringement of patent.]—Judgment having been given restraining defts. from making, selling, or using instruments of a certain construction as being an infringement of pltf.'s patent, & ordering delivery up of all instruments so constructed, defts. appealed, but before the appeal became bkpt.:—*Held:* defts. though bkpts., had still such an interest in being relieved from the injunction as entitled them to proceed with the appeal on giving security for costs.—UNITED TELEPHONE CO. *v.* BASSANO (1886), 31 Ch. D. 630; 55 L. J. Ch. 625; 54 L. T. 479; 34 W. R. 537; 2 T. L. R. 354, C. A.

8193. —— —— In formâ pauperis.]—Applt., a

absolute in form—Refusal of creditors to redeem.]—Debtor made an assignment of real estate to B., a creditor, the deed being absolute in form but intended as a security for the debt. Debtor afterwards became bkpt., & swore that at the meeting of creditors B. refused to give up the property without receiving payment in full of his debt & that the creditors refused to pay:—*Held:* that did not authorise bkpt. to sue for the property to his own use.—HATCH *v.* ROSS (1868), 15 Gr. 96.—CAN.

a. *Action to set aside judgment—In matrimonial suit.*]—An action by insolvent to set aside a judgment in a matrimonial suit to which he was a party, is an action he is entitled to bring independently of his estate.—KILFOIL *v.* FISHER (1916), W. L. D. 1.—S. AF.

b. *Action to set aside mortgage.*]—An action to set aside a mtge. transaction affecting property in which pltf. claimed an interest was brought by an arranging debtor, & a statement of claim was delivered. By resolution, accepting the proposal in the arrangement matter, it was provided that pltf. should pay 20*s.* in the pound on all his unsecured debts & engagements. Default was made in carrying out the arrangement, & an order for realisation was made, & a vesting certificate issued & registered. The official assignees were not parties to the action, which was commenced after the default & vesting order:—*Held:* pltf. had no *locus standi* to carry on the action, & the proceedings therein should be stayed.—HARRISON *v.* ANCKETELL, [1905] 1 I. R. 25; 39 I. L. T. 241.—IR.

c. *Execution levied by insolvent judgment creditor—After sale of debt by assignee.*]—If a judgment creditor makes an assignment under Insolvent Act, 1875, & the debt is sold by the assignee, an execution issued in the name of insolvent will be set aside, unless authorised either by the assignee or the purchaser.—JOHNSON *v.* DE VEBER (1887), 26 N. B. R. 441.—CAN.

d. *Appeal from refusal to re-open settled account.*]—Bkpt. stated & settled with his partner an account, which the Ct. of Ch. decreed ought not to be re-opened. The ct. refused to sanction the continuance of litigation by way of appeal, with a view to go behind the decision, since there could not be shown on the face of the account manifest error undiscovered during the Ch. proceedings, nor that substantial benefit would result to the creditors.—*Re* SIM (1862), 14 Ir. Jur. 282.—IR.

e. *Appeal from decree in foreclosure suit.*]—In 1821 C. took, in England, the benefit of Insolvent Act; in 1830 he mortgaged his property in Ireland, & gave a bond & judgment to secure the debt. The mtgee. filed a bill for foreclosure & sale against a prior annuitant upon the property, against the assignees in insolvency, & against insolvent. All parties, except insolvent, were content with the decree made:—*Held:* an appeal by insolvent was incompetent because of the insolvency.—ROCHFORT *v.* BATTERSBY (1849), 2 H. L. Cas. 388; 14 Jur. 229.—IR.

bkpt. for costs & damages only, arising out of an alleged infringement of a patent, presented an appeal, whereupon resps. prayed that the applt. should not be allowed to prosecute his appeal, unless the trustee were joined as a co-applt. The trustee refused to be joined :—*Held :* this being a novel case, infringement of patent with injunction standing against applt., applt. ought to be allowed to appeal *in formâ pauperis* without joining the trustee.—CROSSLEY *v.* ANTI-VIBRATION INCANDESCENT LIGHTING CO., LTD., [1906] W. N. 76, H. L.

8194. When action must be in name of bankrupt.]—Inasmuch as property, in which bkpt. has only a trust estate, does not pass to his assignees under the assignment, the *cestui que trust* cannot bring any action respecting such property in their names, but ought to bring it in the name of bkpt.—CARPENTER *v.* MARNELL (1802), 3 Bos. & P. 40 ; 127 E. R. 23.

Annotations :—**Refd.** Carvalho *v.* Burn (1833), 4 B. & Ad. 382 ; Parnham *v.* Hurst (1841), 8 M. & W. 743 ; St. Thomas' Hospital Governors *v.* Richardson (1909), 101 L. T. 771, C. A. **Mentd.** D'Arnay *v.* Chesneau (1845), 13 M. & W. 796.

See, generally, Part XX., Sect. 5, *ante*.

8195. Estoppel—Bankrupt having treated bill of sale as valid—Allegation that same invalid.]—Pltf. gave a bill of sale to defts. to secure an advance. Before the payment of the first instalment due under the bill of sale he filed a petition in bkpcy., & in his statement of affairs returned defts. as secured creditors. Defts. seized & sold the furniture, & the proceeds being insufficient to pay their debt, they proved for the residue. A composition was sanctioned by the ct. & paid to the creditors, including defts. Pltf. subsequently brought an action for the wrongful seizure of his goods, alleging that the bill of sale was invalid :—*Held :* pltf. having in the bkpcy. proceedings treated the bill of sale as valid & obtained thereby an advantage to himself could not afterwards allege that the bill of sale was invalid so as to entitle him to recover in the action.—ROE *v.* MUTUAL LOAN ASSOCN. FUND, LTD. (1887), 19 Q. B. D. 347 ; 56 L. J. Q. B. 541 ; 33 W. R. 723 ; 3 T. L. R. 655, C. A.

Annotations :—**Folld.** Comitti *v.* Maher (1905), 94 L. T. 158. **Consd.** *Re* Wilson, [1916] 1 K. B. 382, D. C. **Refd.** *Re* Deerhurst, *Ex p.* Seaton (1891), 8 Morr. 97. **Mentd.** *Re* Hobbins, *Ex p.* Official Receiver (1899), 6 Mans. 212.

See, generally, ESTOPPEL.

SUB-SECT. 2.—SECURITY FOR COSTS.

8196. Action for benefit of trustee.]—Where the action is brought or proceeded in by bkpt., whether certificated or uncertificated, for the benefit of his assignees, security for costs will be required.—SAUNDERS *v.* PURSE (1795), cited 7 Term Rep. at p. 296 ; *sub nom.* SANDERS *v.* PURSE, 1 Tidd's Practice, 8th ed., p. 581.

8197. —— Action for his own benefit.]—An uncertificated bkpt., suing for his own benefit, as for the produce of his earnings since the bkpcy., cannot be compelled to give security for costs, though it is otherwise, where the action is brought or proceeded in by bkpt., whether certificated or uncertificated, for the benefit of his assignees.—COHEN *v.* BELL (1804), 1 Tidd's Practice, 8th ed., p. 580.

Annotation :—**Refd.** Clapworthy *v.* Collier (1832), 1 L. J. Ex. 229.

8198. Action to recover property acquired after assignment.]—An insolvent brought an action to recover property acquired by him after his assignment. No order having been made to the Insolvent Ct. to enable the assignees to issue execution against the property, the ct. refused to require security for costs.—CLAPWORTHY *v.* COLLIER (1832), 2 Cr. & J. 631 ; 1 L. T. Ex. 229 ; 149 E. R. 265.

8199. Action for benefit of party to whom debt assigned.]—Where pltf. is insolvent, & has assigned the debt for which the action is brought, & is suing for the benefit of the assignee, the ct. will compel him to give security for costs.—GOATLEY *v.* EMMOTT (1854), 15 C. B. 291 ; 24 L. J. C. P. 38 ; 24 L. T. O. S. 96 ; 3 W. R. 64 ; 139 E. R. 434.

Annotations :—**Consd.** Smith *v.* Saunders (1867), 16 L. T. 386 ; White *v.* Butt, [1909] 1 K. B. 50, C. A. **Refd.** Denston *v.* Ashton (1869), L. R. 4 Q. B. 590 ; Cowell *v.* Taylor (1885), 31 Ch. D. 34, C. A. ; Lloyd *v.* Hathern Station Brick Co. (1901), 85 L. T. 158, C. A. ; Reader *v.* Kahn (1906), 85 L. J. K. B. 660, C. A.

8200. Action by party against whom receiving order made.]—Debtor, against whom a receiving order has been made, ought not merely on that ground to be ordered to give security for the costs of any action in which he may be pltf.—RHODES *v.* DAWSON (1886), 16 Q. B. D. 548 ; 55 L. J. Q. B. 134 ; 34 W. R. 240 ; 2 T. L. R. 255, C. A.

Annotations :—**Folld.** Cook *v.* Whellock (1890), 24 Q. B. D. 658, C. A. ; *Re* Smith, *Ex p.* Mason, [1893] 1 Q. B. 323 ; *Re* Berry, Duffield *v.* Williams, [1896] 1 Ch. 939 ; B. *v.* B. & F. (1902), 18 T. L. R. 380 ; Blackett *v.* Blackett & Frail, [1902] P. 170, C. A. **Refd.** *Re* Sartoris' Estate, Sartoris *v.* Sartoris, [1892] 1 Ch. 11, C. A. ; Paterson *v.* Gas Light & Coke Co. (1896), 74 L. T. 280 ; *Re* Teale, *Ex p.* Blackburn (1912), 106 L. T. 893.

8201. No suggestion that trustee real plaintiff.]—An undischarged bkpt. brought an action for an account in respect of two partnership agreements between himself & defts. made since the date of his bkpcy. On a motion that the action might be stayed till pltf. had given security for costs :—*Held :* in the absence of any suggestion that the trustee was the real pltf., bkpt. would not be required to give security for costs.—BUCHAN *v.* HILL, [1888] W. N. 233.

Annotation :—**Consd.** Cook *v.* Whellock (1890), 24 Q. B. D. 658, D. C.

PART XXI. SECT. 5, SUB-SECT. 2.

8196 i. *Action for benefit of trustee.*]—Pltf. an uncertificated bkpt. having instituted proceedings against deft. : —*Held :* the proceedings were really those of pltf.'s official assignee, & pltf. must give security for the costs of the proceedings.—DOUGLAS *v.* DANES (1904), 4 S. R. N. S. W. 612.—**AUS.**

8196 ii. —— *Decision adverse to insolvent already given.*]—If as the result of an action personal to insolvent the money recovered will go into the estate, & if a decision adverse to insolvent has already been given as regards such action the ct. will order insolvent to give security for costs. —KILFOIL *v.* FISHER (1916), W. L. D. 1.—**S. AF.**

f. *Action against trustee.*]—The ct. declined to compel insolvent to give security for costs, in an action by him against his assignees, when it appeared to have been brought *bonâ fide* for the purpose of trying a substantial question of property.—DELAHAY *v.* KELLY (1851), 2 I. C. L. R. 34 ; 4 Ir. Jur. 118.—**IR.**

8198 i. *Action to recover property acquired after insolvency.*]—An undischarged insolvent brought an action for the recovery of a sum due in respect of brokerage from deft. & earned by him subsequent to his adjudication, no order for security for costs should be made.—MURRAY *v.* EAST BENGAL MAHAJAN FLOTILLA CO., LTD. (1918), 22 C. W. N. 1018. —**IND.**

8198 ii. ——.]—Where an undischarged bkpt., before the intervention of the official assignee, is suing in his own name in respect of property acquired by him after the date of the bkpcy., pltf. cannot be compelled to give security for the costs of the action, merely because he is an undischarged bkpt.—HUTCHISON *v.* BENGE (1908), 27 N. Z. L. R. 1060.—**N.Z.**

h. *Action for damages arising after bankruptcy.*]—An undischarged bkpt., who is bringing in his own name an action for wrongful dismissal occurring after the adjudication of bkpcy., cannot be called upon to give security for costs, even though resident out of the jurisdiction.—SALMON *v.* BELFAST ALHAMBRA, LTD. (1903), 37 I. L. T. 72.—**IR.**

k. *Action arising out of contract.*]—Where an undischarged bkpt. sues on a cause of action arising out of contract, he will be required to give security for costs, whether the cause of action vested in him at the time of his bkpcy. or after bkpcy. & before

Sect. 5.—*Actions, etc., by bankrupt: Sub-sect.* 2. *Sect.* 6: *Sub-sect.* 1.]

8202. Bankrupt not mere nominal plaintiff.]—Pltf. in 1887 granted a lease of premises to deft. The premises had belonged to pltf. since 1884. In 1885 pltf. was adjudicated a bkpt., & his discharge was granted conditionally upon his paying his creditors 5*s.* in the pound, which had not been paid. Pltf. sued deft. for arrears of rent under the lease, & deft. applied for security for costs of the action:—*Held:* the fact that pltf. was an undischarged bkpt. was not a sufficient ground for ordering him to give security for costs, & he was not a mere nominal pltf., &. deft. was estopped from setting up pltf.'s bkpcy. for any purpose.—COOK *v.* WHELLOCK (1890), 24 Q. B. D. 658; 59 L. J. Q. B. 329; 62 L. T. 675; 38 W. R. 534; 6 T. L. R. 314, C. A.

Annotations:—**Distd.** Lloyd *v.* Hathern Station Brick Co. (1901), 85 L. T. 158, C. A. **Reid.** Blackett *v.* Blackett & Frail (1902), 18 T. L. R. 443.

8203. ——.]—Pltf., while an undischarged bkpt., earned his living as a commission agent, & obtained from defts. a commission note under which he was to be paid £60 if he procured a loan for them. The whole or part of the £60 would be required for bkpt.'s maintenance. The trustee gave notice to defts. that he claimed any money payable to pltf. under the commission note, but subsequently gave them notice of withdrawal of his claim. Defts. applied for an order that pltf. should give security for the costs of the action on the ground that he was merely a nominal pltf. suing for the benefit of the trustee:—*Held:* as the whole or part of the money claimed was required for bkpt.'s maintenance, he was not a mere nominal pltf. & could not be ordered to give security for costs.—AFFLECK *v.* HAMMOND, [1912] 3 K. B. 162; 81 L. J. K. B. 565; 106 L. T. 8; 19 Mans. 111, C. A.

Annotations:—**Mentd.** Hill *v.* Settle (1917), 86 L. J. Ch. 243 C. A.; Hamilton *v.* Caldwell (1919), 88 L. J. P. C. 173, H. L.

8204. Claim for damages in divorce court.]—There is no settled practice in the Probate & Divorce Div. that petitioner, who is an undischarged bkpt. & who claims damages from co-respondent, must give security for costs, unless he withdraws the claim for damages.—BLACKETT *v.* BLACKETT & FRAIL, [1902] P. 170; 71 L. J. P. 69; 86 L. T. 669; 50 W. R. 516; 18 T. L. R. 567; 46 Sol. Jo. 482, C. A.; *affg.* 18 T. L. R. 380, 443.

8205. Security ordered on terms.]—Where deft. had twice obtained time to plead, the ct. refused to compel pltf. to give security for costs, although he had been four times a bkpt., & his estate had never paid 15*s.* in the pound, except upon the terms of deft. undertaking not to plead those matters.—ALEXANDER *v.* TOWNLEY (1842), 4 Man. & G. 772; 5 Scott, N. R. 452; 11 L. J. C. P. 322; 134 E. R. 317.

8206. Costs of appeal—From injunction against infringement of patent.]—Judgment having been given restraining defts. from making, selling, or using instruments of a certain construction as being an infringement of pltf's. patent, & ordering delivery up of all instruments so constructed, defts. appealed, but before appeal became bkpt. An order was made dismissing the appeal, unless within a certain time bkpts. gave security for costs.—UNITED TELEPHONE CO. *v.* BASSANO (1886), 31 Ch. D. 630; 55 L. J. Ch. 625; 54 L. T. 479; 34 W. R. 537; 2 T. L. R. 354, C. A.

See, also, No. 8263, *post.*

SECT. 6.—ACTIONS, ETC., AGAINST BANKRUPT.

SUB-SECT. 1.—IN GENERAL.

8207. Right to sue—Trover.]—Where a person has his election, either to bring trover or an action for money had & received, he may maintain the former notwithstanding the bkpcy. of debtor after the cause of action accrued, & though the bkpcy. would be a bar to the latter.—PARKER *v.* NORTON (1796), 6 Term Rep. 695; 101 E. R. 777.

Annotations:—**Apprvd.** Parker *v.* Crole (1828), 5 Bing. 63. **Distd.** Woolley *v.* Smith (1846), 3 C. B. 610. **Reid.** Ansell *v.* Waterhouse (1812), 2 Chit. 1.

8208. —— **Bankruptcy under French commission—Debt proved thereunder—Bankrupt having absconded.**]—Bkpt., who has assigned his property to his assignees under a French commission, cannot afterwards be sued in a ct. of justice in the British dominions by one of his creditors for a

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discharge.—WILKINSON *v.* JOHNSTON (1889), 7 N. Z. L. R. 369.—**N.Z.**

l. *Action to set aside attachment—Costs of trustee as defendant.*]—In a suit by insolvent to set aside an attachment as fraudulently issued, the assignee in insolvency of pltf. having been made deft., although not a party to the alleged fraud, an order was granted under Insolvent Act, 1875, s. 39, requiring pltf. to give security for the costs of deft., the assignee.—LEE *v.* MOFFATT (1875), 6 P. R. 284.—**CAN.**

m. *Caveat.*]—On a motion that deft., who was an uncertificated bkpt., should give security for costs, or that the *caveat* lodged by him should be set aside:—*Held:* the *caveat* lodged by him should be set aside & contentious proceedings discontinued, unless within fourteen days security for costs be given by him or on his behalf, after service of a copy of the order on his assignees.—LAMBERT *v.* BASSETT (1877), 9 I. L. T. 30.—**IR.**

PART XXI. SECT. 6, SUB-SECT. 1.

n. *Right to sue—Action prohibited under foreign law.*]—Where, according to the law of a foreign country, no action can be brought against insolvent for the recovery of a debt, although he is not, according to the law of that country, discharged from the debt until he obtains his certificate, no action can be brought for the recovery of the debt in Victoria, even though he has not obtained his certificate.—SPALDING *v.* BAILEY (1891), 17 V. L. R. 478.—**AUS.**

o. —— *By foreign company—Foreign Companies Act.*]—MINOT GROCERY CO. *v.* DURICK (1913), 23 W. L. R. 270; 3 W. W. R. 904; 10 D. L. R. 126; 6 Sask. L. R. 44.—**CAN.**

p. —— *For relief against decree—Consent given thereto in ignorance of bankruptcy.*]—Debtor made an assignment of real estate to B., a creditor, the deed being absolute in form, but intended as a security for the debt. Debtor afterwards became bkpt. under 7 Vict. c. 10. Many years subsequently he filed a bill against the mtgee.'s administrator for an account. The administrator, being ignorant of the bkpcy., consented to a decree referring it to the master to take the necessary accounts on the footing of the assignment being a security, but on afterwards discovering the fact of the bkpcy., he filed a petition setting up the bkpcy. & claiming relief against the decree:—*Held:* the decree should be set aside, & the bill dismissed with costs, unless the assignee in bkpcy. was willing to adopt the suit & to become bound by it.—HATCH *v.* ROSS (1868), 15 Gr. 96.—**CAN.**

q. —— *On security given prior to insolvency.*]—Since 3 & 4 Vict. c. 107 no action can be maintained against insolvent, on a security given for a debt due prior to his insolvency, even though the security may have been given by the direction of the Insolvent Comr. who tried the case, & as the condition of insolvent's discharge.—QUINLIVAN *v.* QUINLIVAN (1842) Ir. Cir. Rep. 692.—**IR.**

r. —— *On bill of exchange—Accepted by insolvent.*]—A civil bill is maintainable against insolvent on a bill of exchange, accepted by him prior to his insolvency, he not having given notice of the insolvency to the party whom he knew to be holder of the bill, although the bill was returned in his schedule.—CAULFIELD *v.* KETTLEWELL (1841), Ir. Cir. Rep. 28.—**IR.**

s. —— *Ejectment—Joinder of trustee.*]—Chattel interests in land remain vested in bkpt. or insolvent until his assignees have elected to take same, & until such election the assignees need not be joined with bkpt. or insolvent as parties in an ejectment on the title for the land.—HANWAY *v.* TAYLOR (1874), 8 I. L. T. 98.—**IR.**

t. —— *Arrears of rentcharge—Joinder of trustee.*]—The grantor of a rentcharge, though discharged as insolvent, continued in possession of the lands:—*Held:* his assignee ought to be made an answering party to the grantee's bill to raise arrears by

debt proved under it. *Semble:* nor even for a debt not proved under it.

The fact of bkpt. having absconded, & having been condemned whilst absent, to five years' imprisonment, & hard labour, for a fraudulent bkpcy., does not give any further right to a credtor to sue him for a debt contracted before his bkpcy. —QUELIN *v.* MOISSON (1828), 1 Knapp, 265; 12 E. R. 320, P. C.

Annotations:—**Expld.** Bartley *v.* Hodges (1861), 30 L. J. Q. B. 352. **Consd.** Ellis *v.* M'Henry (1871), L. R. 6 C. P. 228; Gibbs *v.* Société Industrielle & Commerciale des Métaux (1890), 25 Q. B. D. 399, C. A.; Annamalai Chetty *v.* Murugasa Chetty (1903), 72 L. J. P. C. 89, P. C.

See, further, Part XVIII., Sect. 10, *ante*.

8209. —— Specific performance—Trustee necessary party.]—Deft., having in 1857 made a mtge. of freeholds to pltf. to secure repayment of a sum of money & interest, in June, 1861, signed a memorandum, whereby he charged certain copyholds with the same debt, & undertook, when required, at his own expense, to execute to pltf. such mtge. of the same as he should require. Deft. afterwards became a bkpt. After the adjudication, & before the ct. had made any vesting order as to the copyholds, pltf. filed a bill alleging that deft. had been applied to & refused to perform his undertaking to execute a conveyance, or to sign any mtge. of the copyholds, & praying for specific performance of the agreement The assignees were not made parties to the suit, bkpt. being sole deft:—*Held:* the assignees were necessary parties to the suit.—POOLE *v.* BURSELL (1862), 6 L. T. 777; 8 Jur. N. S. 1224; 10 W. R. 861.

8210. —— Debt contracted fraudulently—Action after accepting composition.]—A creditor, who alleges that his debt has been contracted fraudulently by his debtor, may, after receiving a composition from him under 1869 Act, s. 126, commence an action against him for the balance of the debt without being obliged to prove to the Bkpcy. Ct. a *primâ facie* case of fraud.—*Re* JACOBS, *Ex p.* HALFORD (1875), L. R. 19 Eq. 436; 44 L. J. Bcy. 53; 32 L. T. 103; 23 W. R. 442.

Annotation:—**Distd.** *Re* Balbirnie, *Ex p.* Jameson (1876), 3 Ch. D. 488, C. A.

See, now, 1914 Act, s. 17.

See, further, Part XXIII., *post*.

8211. —— —— Judgment unenforceable till after discharge.]—A creditor is entitled to take proceedings & recover judgment against a liquidating debtor for a debt incurred by means of fraud while the liquidation proceedings are pending, although the judgment cannot be enforced until debtor obtains his discharge.—ROSS *v.* GUTTERIDGE (1882), 52 L. J. Ch. 280; 48 L. T. 117.

See, further, Part XVIII., Sect. 7, *ante*.

8212. —— Bankrupt with solvent partner—Bankrupt entitled to indemnity.]—Where one of two partners becomes bkpt., & a joint creditor proves the amount of his debt under the fiat, & afterwards brings an action against the solvent partner for recovery of the same debt, joining bkpt. as deft. in the action, for conformity, bkpt. is entitled to a full indemnity from the creditor against the consequences of the action.—*Re* STANTON, *Ex p.* STANTON (1840), 1 Mont. D. & De G. 273; 4 Jur. 684, Ct. of R.

See, further, Part XI., *ante*.

8213. —— Receiving order made in lieu of committal.]—Upon the hearing of a judgment summons, in lieu of an order of committal a receiving order was made against debtor:—*Held:* a creditor could not thereafter bring an action against debtor in respect of a debt provable in bkpcy.—BLOUNT *v.* WHITELY (1898), 79 L. T. 635; 6 Mans. 48, C. A.

See, further, Part IV., Sect. 6, *ante*.

8214. Right to issue sequestration—To compel attendance before colonial court—Leave of court.]—Before issuing a sequestration against real estate of bkpt. situate in a colony, for the purpose of compelling his appearance in an action in the colonial ct. to realise a mtge. given by him of other real estate in the colony, the leave of the Ct. of Bkpcy. ought to be obtained.

Where such a sequestration had been issued without leave, & an appearance had been entered in the colonial action:—*Held:* it was sufficient that pltfs. in the action should undertake not to use the sequestration for any other purpose.—*Re* BOUSTEAD, *Ex p.* ROGERS (1881), 16 Ch. D. 665; 44 L. T. 357, C. A.

Annotation:—**Mentd.** Callender, Sykes *v.* Lagos, Williams *v.* Davies, [1891] A. C. 460, P. C.

8215. Restraint of action—Jurisdiction of court—One partner filing petition—Application by receiver before trustee appointed.]—Where one partner of a firm files a petition for liquidation by arrangement under 1869 Act, s. 125, the ct. has no jurisdiction to restrain an action by a creditor of the firm against all the partners. The ct. has power to grant an injunction under s. 13, on the application of the receiver under a liquidation by arrangement, before a trustee has been appointed.—*Re* DE VECCHJ, *Ex p.* ISAAC (1870), 6 Ch. App. 58; 40 L. J. Bcy. 19; 23 L. T. 523; 19 W. R. 38, L. JJ.

Annotation:—**Mentd.** *Re* Ferrige, *Ex p.* Ferrige (1875), L. R. 20 Eq. 289.

8216. —— —— Action of ejectment by mortgagee—Action restrained till after first meeting.]—Where, after a petition for liquidation filed by debtor, a mtgee. of debtor's farm brings an action

means of a receiver.—CURTIN *v.* DARCY (1845), 2 Jo. & Lat. 718.—**IR.**

a. —— *For debt not matured.*]—Under Insolvent Acts of Upper Canada a creditor, whose debt has not matured, may commence proceedings against his debtor who is insolvent, in like manner as he might have done if his debt had been overdue at the time.—*Re* MOORE (1868), 18 C. P. 446.—**CAN.**

b. *Restraint of action—Jurisdiction of court.*]—The Ct. of Bkpcy. will restrain an action in the Common Law Divisions against bkpt. when necessary or expedient, when no injustice will be done.—*Re* SHANNON (1894), 29 I. L. T. 135.—**IR.**

c. —— —— *Distraint for taxes.*]—A distress for money due as taxes to the Collector General of Rates, under Dublin Rates Act, s. 70, is a legal process against the estate of debtor in respect of a provable debt, which the ct. has, under 1872 Act, s. 68, power to restrain.—*Re* S. L. (1889), 23 L. R. Ir. 538.—**IR.**

d. —— *Presidency Towns Insolvency Act, 1909, s. 18 (3).*]—The wording of the above sub-sect. will justify a stay of proceedings in an action not pending at the time of the order of adjudication.—MAHOMED HAJI ESSACK *v.* ABDUL RAHIMAN (1917), I. L. R. 41 Bom. 312.—**IND.**

e. —— *Foreclosure action by mortgagor.*]—When a mtgee. has filed a foreclosure bill against a bkpt. mtgor., the duty of the assignee is to apply to the ct. to stay the proceedings in the suit, & for the mtgee. to come in & sell.—BERNARD *v.* SADLIER (1841), 4 I. Eq. R. 61.—**IR.**

f. —— *Conditional order obtained by suppression of facts discharged.*]—BRITISH LINEN CO. *v.* DONOVAN (1872), 7 I. L. T. 81.—**IR.**

g. *Evidence—Certified copies of orders.*]—In an action against a bkpt. firm W. D. & N. & F. to set aside a transfer to F. as fraudulent, objection was taken to the admission in evidence of an order of adjudication & an order of reference made in bkpcy. proceedings in a foreign ct. against the firm, on the ground that the certified copies of the orders produced were not under the seal of the foreign ct. but under the hand of the referee in bkpcy. only. —*Held:* the referee's certificate was sufficient.—MINOT GROCERY CO. *v.* DURICK (1913), 23 W. L. R. 270; 3 W. W. R. 904; 10 D. L. R. 126; 6 Sask. L. R. 44.—**CAN.**

h. *Security for costs—Ejectment.*]—The ct. declined to compel insolvent deft., who had been served with an ejectment on the title, to give security for costs.—WESTON *v.* SHEEHAN (1848), 12 I. L. R. 311.—**IR.**

k. —— ——.]—Insolvent in possession having been served with an

Sect. 6.—*Actions, etc., against bankrupt: Sub-sects.* 1 & 2.]

of ejectment for the purpose of recovering possession of the property, the ct. has jurisdiction to restrain the action until after the first meeting of creditors.—*Re* JORDAN (1870), 18 W. R. 863.

See 1914 Act, s. 9.

See, generally, Part I., Sect. 4, *ante*.

8217. —— On application of petitioning creditor —Subject to conditions.]—The ct. will, on the motion of petitioning creditor, restrain creditors from proceeding in their actions against debtor, provided it has some guarantee that petitioning creditor will proceed with his petition.—*Re* DAVIES (1870), 21 L. T. 685.

8218. —— Effect of delay in applying—Plaintiff restrained from enforcing judgment.]—Partners, who had accepted a bill of exchange, dissolved partnership, & one filed a petition for liquidation by arrangement, & a resolution for liquidation was passed by the creditors & a trustee chosen. Immediately afterwards the holder of the bill commenced an action against the acceptors. After notice of trial had been given, the trustee applied for an injunction to restrain further proceedings against debtor in the action:—*Held:* though it would have been proper to restrain pltf. from proceeding against the insolvent acceptor, if the injunction had been applied for at once, the proper course in the circumstances was to allow the action to proceed, & to restrain pltf. from enforcing his judgment against the insolvent acceptor.—*Re* MANNING, *Ex p.* MILLS (1871), 6 Ch. App. 594; 40 L. J. Bcy. 89; 24 L. T. 859; 19 W. R. 912, L. JJ.

Annotation:—**Consd.** *Re* Dixon, *Ex p.* Gordon (1873), 8 Ch. App. 555, L. JJ.

8219. —— By English creditor in foreign courts.]—The ct. will grant an injunction to restrain the proceedings of an English creditor in a foreign ct. for a debt incurred in England against debtor, who has filed a petition under the liquidation clauses of 1869 Act.—*Re* DISTIN, *Ex p.* ORMISTON (1871), 24 L. T. 197.

Annotation:—**Consd.** *Re* Chapman (1872), L. R. 15 Eq. 75.

8220. —— ——.]—Debtor became bkpt. in England, having real estate in Scotland:—*Held:* such state of circumstances gave no jurisdiction to the Ct. of Ch. to restrain a creditor, who had not proved under the bkpcy., from proceeding in an action against the assignees in Scotland, for the purpose of recovering out of the real estate there an amount equal to the dividend which would have been payable upon the debt.—PENNELL *v.* ROY (1853), 3 De G. M. & G. 126; 22 L. J. Ch. 409; 21 L. T. O. S. 14; 17 Jur. 247; 43 E. R. 50, L. JJ.

Annotations:—**Reld.** North London Ry. Co. *v.* G. N. Ry. Co. (1883), 11 Q. B. D. 30, C. A. **Mentd.** Maunsell *v.* Mid. G. W. Ry. (of Ireland) Co. (1863), 8 L. T. 347; Stevens *v.* Chown, Stevens *v.* Clark, [1901] 1 Ch. 894.

8221. —— By foreign creditor in foreign court.]—The ct. will not grant an injunction, which would be wholly ineffectual for the purposes intended, & will decline to make an order to restrain proceedings in an action commenced by a foreign creditor in a foreign ct., notwithstanding that the debt, in respect of which the action was brought, was incurred upon a bill of exchange accepted & payable in England.

The ct. will, upon a proper case being made, give leave to defend the action.—*Re* CHAPMAN (1872), L. R. 15 Eq. 75; 42 L. J. Bcy. 38; 27 L. T. 628; 21 W. R. 104.

8222. —— Against compounding debtor—In what cases action should proceed.]—When an action is brought by one of the creditors of a compounding debtor against debtor for his original debt, the Ct. of Bkpcy. ought to restrain the action if it can see clearly that it is vexatious & without foundation, even though the question in dispute concerns only debtor & the creditor who is suing, but if there is a substantial question to be tried, the action ought to be allowed to proceed.—*Re* LOPEZ, *Ex p.* LOPEZ (1877), 5 Ch. D. 65; 46 L. J. Bcy. 95; 36 L. T. 275, C. A.

8223. —— Receiving order made against defendant.]—Deft. presented a petition, on which a receiving order was made on Oct. 24, 1885. Pltf. brought his action against deft. on the balance of an account on Sept. 19, 1887. Deft. applied for an order to stay the action, on the ground that a bkpcy. petition had been presented by him & a receiving order made against him, & that the action being in respect of a debt provable in the bkpcy. had been commenced without leave of the ct.:—*Held:* the action should be restrained, as there was no special or exceptional circumstances which would entitle the ct. to allow it to continue.—BROWNSCOMBE *v.* FAIR (1887), 58 L. T. 85, D. C.

—— Effect of proving for debt sued on.]—*See* Part VIII., Sect. 13, *ante*.

8224. Removal of bankrupt guardian ad litem —Liability for costs.]—Where a man claims to be entitled to sue or as a resp. has submitted his rights as a litigant to the jurisdiction of the ct. he cannot avoid the liability to pay costs.

An undischarged bkpt., as guardian *ad litem* of his infant child instituted proceedings, without the concurrence of his trustee in bkpcy., as one of the pltfs. in an administration action but the infant was subsequently made a deft. On a motion to remove the father from his position as guardian *ad litem* & appoint a proper person:—*Held:* he must pay the costs of the application.—*Re* THOMSON, THOMSON *v.* THOMSON (1897), 32 L. Jo. 161; 102 L. T. Jo. 486.

See, generally, PRACTICE & PROCEDURE.

Removal of bankrupt trustee.]—*See* TRUSTS & TRUSTEES.

SUB-SECT. 2.—WHAT DEFENCES AVAILABLE.

8225. Bankruptcy—Whether bar to trover.]—Bkpcy. is no bar to an action of trover, though the conversion happened before the bkpcy.—PARKER

ejectment for non-payment of rent, & having taken defence thereto:—*Held:* the defence should be altered by the insertion of the name of the assignee for that of insolvent, or insolvent should give security for costs.—HOY *v.* DILLON (1843), 5 I. L. R. 243.—**IR.**

l. —— —— *At suit of trustee.*]—Insolvent, who has been served with a declaration in ejectment at the suit of his assignee, will not, unless in a special case, be ordered to give security for costs, prior to taking defence.—EVANS *v.* REILY (1839), Jo. & Car. 152.—**IR.**

m. —— *Good defence on merits disclosed.*]—When debtor, against whom proceedings have been taken, swears to a good defence on the merits, & states facts from which the ct. may infer that there is a serious question to be tried, the ct. will not compel him to enter into a bond, until after the time within which the action at law may be tried.—*Re* M'AULEY, *Ex p.* TIERMAN (1858), 8 I. Ch. R. 212.—**IR.**

n. *Costs.*]—Insolvent, when deft., is not entitled to his costs.—CONLAN *v.* JACKSON (1839), 1 I. Eq. R. 276.—**IR.**

PART XXI. SECT. 6, SUB-SECT. 2.

o. *Bankruptcy—After accrual of cause of action.*]—A plea that deft. became a bkpt. after the accrual of the supposed cause of action in the declaration mentioned, if any such there be:—*Held:* bad, as neither avoiding or confessing the debt (CRAMPTON, J., *diss.*).—FRAZER *v.* BLAKE (1851), 1 I. C. L. R. 179.—**IR.**

p. *Insolvency—Whether bar to*

v. NORTON (1796), 6 Term Rep. 695 ; 101 E. R. 777.

Annotations :—**Distd.** Wooley *v.* Smith (1846), 3 C. B. 610. **Refd.** Ansell *v.* Waterhouse (1817), 2 Chit. 1 ; Parker *v.* Crole (1823), 5 Bing. 63.

8226. —— Under French commission.]—QUELIN *v.* MOISSON, No. 8208, *ante*.

8227. —— Summons to sign judgment.]—Where deft. had filed a petition in bkpcy. &, in defence to a summons to sign judgment on a specially indorsed writ, urged that pltf. should prove his debt under that :—*Held :* bkpcy. was not a defence to an action.—ANON. (1875), Bitt. Prac. Cas. 33.

8228. —— ——.]—Leave to sign judgment was given, although deft. alleged that he had taken proceedings in bkpcy. & that he disputed the correctness of the account delivered.—ANON. (1876), 2 Char. Cham. Cas. 18.

See, now, 1914 Act, ss. 7, 9 & 105 (4).

8229. Discharge—Must be specially pleaded—Debt accruing since act of bankruptcy—Surety.]—Bkpt. sued by his surety, or person who was liable for his debt, at the time of the commission issued against him, though the surety became such after the act of bkpcy., & paid the debt after the issuing of the commission, cannot, without specially pleading it, in like manner as after 5 Geo. 2, c. 30, s. 7, avail himself of his certificate under 49 Geo. 3, c. 121, s. 8.—STEDMAN *v.* MARTINNANT (1810), 12 East, 664 ; 104 E. R. 259 ; *subsequent proceedings* (1811), 13 East, 427.

Annotation :—**Expld.** M'Dougal *v.* Paton (1818), 8 Taunt. 584.

8230. —— After action brought—Pleading puis darrein continuance.]—Where a person, who has become bkpt., is sued for a cause of action accruing before his bkpcy., & pending the suit & before trial obtains his certificate, he must plead it *puis darrein continuance*, & if he neglects to do so, & judgment is obtained against him, he cannot plead his certificate to an action on such judgment.—TODD *v.* MAXFIELD (1826), 6 B. & C. 105 ; 9 Dow. & Ry. K. B. 171 ; 108 E. R. 391.

Annotation :—**Refd.** Rossi *v.* Bailey (1868), L. R. 3 Q. B. 621.

8231. —— —— ——.]—Deft. was adjudged bkpt. on Sept. 3. An action was commenced against him on Nov. 11, & on Nov. 27 he obtained his order of discharge, & then pleaded, in the general form, that he became bkpt. before action brought, & that the cause of action accrued before the bkpcy. :—*Held :* the plea was not proved, for it was the order of discharge, & not the adjudication, which was the bar, & the defence arose after action brought & ought to have been pleaded according to the fact, as required by s. 68 of the C. L. P. Act, 1852 (c. 76), s. 68.—JONES *v.* HILL (1870), L. R. 5 Q. B. 230 ; 39 L. J. Q. B. 74 ; 21 L. T. 784 ; 18 W. R. 453.

8232. —— —— —— Effect of delay.]—An action was commenced against deft., in May, on an annuity deed, a fiat issued against him in June, in July he pleaded *non est factum*, & in Dec. he obtained his certificate. Application was made to a judge, in Jan., for leave to withdraw the plea & plead the certificate, but was refused, because it was too late to plead it *puis darrien continuance ;* afterwards the cause was tried, & pltf. had a verdict. On motion for a rule for staying proceedings, on the ground of deft. having obtained his certificate, & the debt being provable under the fiat, the ct. refused to assist deft., because of his laches in not pleading his certificate in proper time.—SHARPE *v.* D'ALMAINE (1840), 4 Jur. 989.

8233. —— Obtained by fraud—Answer to plea.]—*Held :* it was a good answer to a plea of bkpcy. that the certificate was obtained by fraud, though the enactment to that effect in 5 Geo. 2, c. 30, s. 7, was not repeated in 6 Geo. 4, c. 16.—HORN *v.* ION (1832), 4 B. & Ad. 78 ; 1 Nev. & M. K. B. 627 ; 2 L. J. K. B. 153 ; 110 E. R. 385.

Annotations :—**Consd.** *Re* Williams (1857), 29 L. T. O. S. 66. **Refd.** Gill *v.* Barron (1868), L. R. 2 P. C. 157, P. C.

8234. —— Under insolvent law of colony—No allegation that plaintiff or defendant domiciled there.]—In an action on a bill of exchange drawn & accepted in England, & also for money lent, interest, & on accounts stated in England, deft. pleaded a discharge under the insolvent law of the colony of Victoria, not alleging that either pltf. or deft. was domiciled in that colony :—*Held :* no answer to the action.—BARTLEY *v.* HODGES (1861), 1 B. & S. 375 ; 30 L. J. Q. B. 352 ; 4 L. T. 445 ; 8 Jur. N. S. 52 ; 9 W. R. 693 ; 121 E. R. 754.

Annotations :—**Consd.** Gardiner *v.* Houghton (1862), 2 B. & S. 743 ; Gibbs *v.* Société Industrielle et Commerciale des Métaux (1890), 25 Q. B. D. 399, C. A. **Refd.** Ellis *v.* M'Henry (1871), L. R. 6 C. P. 228 ; Faure Electric Accumulator Co. *v.* Phillipart (1888), 58 L. T. 525.

See, generally, Part I., Sect. 5, & Part XVIII., Sect. 10, *ante*.

8235. —— Judgment obtained after.]—If a judgment is not obtained till after bkpt.'s discharge takes effect, he must plead in the form given by statute, & if he omits to do so, he loses his protection.—ROSSI *v.* BAILEY (1868), L. R. 3 Q. B. 621 ; 8 B. & S. 748 ; 37 L. J. Q. B. 204 ; 19 L. T. 130 ; 16 W. R. 1042.

Annotations :—**Refd.** *Re* Deed of Composition, *Ex p.* Anon. (1868), 19 L. T. 73 ; Godwin *v.* Stone (1869), L. R. 4 Exch. 331. **Mentd.** Ames *v.* Waterlow (1869), L. R. 5 C. P. 53 ; Allen *v.* Carter (1870), L. R. 5 C. P. 414 ; Davis *v.* Hedges (1871), 25 L. T. 155.

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action on note.]—Plea in bar to an action on a note, averring the pendency of proceedings commenced by pltf. against deft., under Insolvent Act, 1864, for the same cause of action, subsequent to the declaration in the cause :—*Held :* bad.—BALDWIN *v.* PETERMAN (1866), 16 C. P. 310.—**CAN.**

q. *Payment of composition — To holder—Note indorsed to third party after becoming due.*]—To an action on a note brought by an indorser against the maker, deft. pleaded that while A. was the holder of the note he compounded by a general agreement with A. & all his other creditors at 10*s.* in the pound, which composition was afterwards paid to A. in satisfaction of the note & accepted, & that the note was indorsed to pltf. after it became due. At the trial it was proved merely that deft. having become insolvent had paid some of his creditors one rate in the pound in discharge of their debts & to other creditors another rate :—*Held :* verdict should be entered for pltf.—FORSTER *v.* BETTES (1849), 5 U. C. R. 599.—**CAN.**

r. *Discharge—Action on guarantee.*]—*Held :* 3 Geo. 4, c. 124, s. 3, enabled a party who had become insolvent to set up his discharge, under Insolvent Acts, as a good bar to an action at the suit of a party whom he guaranteed, before his insolvency, against all damage, by reason of his paying over to insolvent a deposit made with him as trustee for insolvent, & a third person.—SIDLEY *v.* TATE (1841), Ir. Cir. Rep. 96.—**IR.**

s. —— *Scire facias on recognizance.*]—A discharge under 6 & 7 Will. 4, c. 14 :—*Held :* not a defence to a *sci. fa.* on a recognizance by a tenant under the ct.—R. *v.* O'DONNELL (1844), 6 I. Eq. R. 639 ; 1 Jo. & Lat. 271.—**IR.**

t. —— *Scire facias to revive judgment.*]—When insolvent, having returned a judgment debt in his schedule, was duly discharged, & was never served with the *sci. fa.* to revive the judgment, the ct. set aside an execution under it without costs, with liberty to deft. to plead to the *sci. fa.*, although upwards of a year had elapsed since the revivor, & no proceedings had been taken to set it aside.—CHARLES *v.* HYDE, 2 Leg. Rep. 42.—**IR.**

[* 8233 i. —— *Obtained by fraud—Answer to plea.*]—Some nine years after deft. had obtained his discharge in insolvency, pltf., a scheduled creditor, issued a *fi. fa.* against deft.'s goods on a judgment recovered before the discharge, contending that the discharge was void, because deft. had, previous to his assignment, fraudulently allowed a judgment to be recovered against him & his assets taken, & also because, his assets being so taken, there was nothing at the time of the assignment on which it could operate. Pltf. had consented to the assignment, & did not appeal from the order of discharge, nor did he, when the discharge was being granted, raise the objection of no assets :—*Held :* the *fi. fa.* must be set aside, & pltf.'s remedy, if any, was by action on the judgment.—PARKE *v.* DAY (1875), 24 C. P. 619.—**CAN.**

Sect 6.—*Actions, etc., against bankrupt: Sub-sect.* 2. *Sect.* 7: *Sub-sect.* 1, *A.*]

8236. —— Omission to plead discharge—Composition.]—At the first meeting under a petition the creditors resolved to accept a composition, which resolution was subsequently confirmed. At the date of the petition a creditor for £50, who held a bill of exchange as security, did not appear by name in the list, though the bill was included as a liability to an unknown holder. The creditor refused the first instalment of the composition which was tendered to him, & bringing an action against debtor, obtained judgment by default & issued execution. Thereupon debtor obtained an *interim* injunction :—*Held :* as debtor had omitted to plead the discharge granted by the creditors, the injunction must be dissolved.—*Re* THOMPSON (1870), 15 Sol. Jo. 7.

See, generally, Part XVIII., Sects. 7 & 9, *ante*.

SECT. 7.—ACTIONS, ETC., PENDING AT TIME OF BANKRUPTCY.

SUB-SECT. 1. —BANKRUPTCY OF PLAINTIFF.

A. In General.

See, now, R. S. C. Ord. 17, r. 1.

8237. Whether action may proceed—Trustee giving security for costs.]—*Qu. :* whether notwithstanding the bkpcy. of pltf. at law the action may not proceed, the assignees giving security for the costs.—WILLIAMS *v.* KINDER (1799), 4 Ves. 387 ; 31 E. R. 197.

8238. Whether suit abated—Insolvency pending account.]—By the insolvency of pltf. pending an account the suit is abated.—WILLIAMS *v.* KINDER (1799), 4 Ves. 387 ; 31 E. R. 197.

8239. —— No one appearing for bankrupt or trustee at trial.]—After issue had been joined & notice of trial given by sole pltf. in an action, he filed a petition, under which a trustee of his property was appointed. When the action came on for trial no one appeared for pltf. or for the trustee, & there was no evidence that any notice of the action had been served on the trustee :—*Held :* the action had abated, & the only order which could be made was to strike the action out of the list.—ELDRIDGE *v.* BURGESS (1878), 7 Ch. D. 411 ; 47 L. J. Ch. 342 ; 38 L. T. 232 ; 26 W. R. 435.

Annotations :—**Consd.** Barker *v.* Johnson (1889), 60 L. T. 64. **Mentd.** *Re* Shephard, Atkins *v.* Shephard (1889), 43 Ch. D. 131, C. A.

8240. —— Reassignment of right of action—After discharge.]—After the defence in an action had been delivered pltf. was adjudicated bkpt., & the right of action passed to the official assignee. Bkpt. obtained his discharge, & the official assignee reassigned to bkpt. the right of action :—*Held :* the cause of action continued, & the action did not become abated by reason of the bkpcy.—BARKER *v.* JOHNSON (1889), 60 L. T. 64 ; 5 T. L. R. 278.

8241. —— Cause of action vesting in trustee—Right of bankrupt to continue action.]—Where sole pltf. becomes bkpt., he cannot continue the action.—JACKSON *v.* NORTH EASTERN RY. CO. (1877), 5 Ch. D. 844 ; 46 L. J. Ch. 723 ; 36 L. T. 779 ; 25 W. R. 518, C. A.

Annotations :—**Consd.** Warder *v.* Saunders (1882), 10 Q. B. D. 114. **Refd.** Farnham *v.* Milward, [1895] 2 Ch. 730. **Mentd.** Eldridge *v.* Burgess (1878), 7 Ch. D. 411.

8242. —— Intervention by official receiver—Bankrupt suing on behalf of himself & all other creditors.]—A receiving order followed by an adjudication in bkpcy. was made against pltf. in an action, in which the claim on behalf of himself & all other creditors was for an order setting aside an assignment of personal property by way of settlement made by deft. upon his wife previously to his bkpcy. :—*Held :* the action must be dismissed, unless the official receiver intervened within a specified time, on the ground that, although the action was brought on behalf of all the creditors, pltf. could only sue as a creditor, & when he ceased to be such by the assignment by operation of law to his trustee, he ceased to be a person capable of continuing the action, & as he was not a trustee of the right of action, but suing as a creditor in his own right, & a receiving order & injunction obtained in the action did not operate in the same manner as a judgment in a creditor's administration action, where the ct. undertook to protect all the creditors.—WOLFF *v.* VAN BOOLEN (1906), 94 L. T. 502.

8243. Time given to trustee to proceed in suit—By filing supplemental bill—Liberty to apply.]—On a motion to dismiss a bill for want of prosecution, pltf. having become bkpt., the assignees were given a month to proceed in the suit, by filing a supplemental bill, if they thought proper, & if they did not do so, deft. to have liberty to apply again.—MUMFORD *v.* RANDALL (1811), 1 Rose, 196 ; *sub nom.* RANDALL *v.* MUMFORD, 18 Ves. 424 ; 34 E. R. 377, L. C.

Annotations :—**Consd.** Caddick *v.* Masson (1827), 1 Sim. 501 ; Lee *v.* Lee (1842), 1 Hare, 617. **Refd.** Bradberry *v.* Brooke (1856), 26 L. J. Ch. 74, L. JJ. **Mentd.** Wheeler *v.* Malins (1818), 4 Madd. 171.

PART XXI. SECT. 7, SUB-SECT. 1.—A.

8237 i. *Whether action may proceed.*]—An action commenced before pltf.'s insolvency will not be dismissed on an exception to the form of action.—RICHARDSON *v.* MORDEN (1915), 16 Q. P. R. 319.—**CAN.**

8237 ii. ——.]—The original bill had been filed by pltf., who afterwards became insolvent :—*Held :* the title of the assignee appointed subsequently was good by relation.—CASHELL *v.* KELLY (1842), 1 Con. & Law. 246 ; 2 Dr. & War. 181.—**IR.**

8237 iii. —— *Trustee not intervening.*]—Where pltf. commences an action, & pending the proceedings becomes bkpt., he may, under 7 Vict. c. 10, ss. 31 & 32, continue the suit in his own name, unless the assignees intervene.—IRELAND *v.* WAGSTAFF (1848), 4 U. C. R. 231.—**CAN.**

8237 iv. —— *On joinder of trustee.*]—In a supplemental bill by pltf., who had been found bkpt., & which charged that his assignees having got sufficient to pay all his creditors, would not proceed for his benefit in the suit :—*Held :* the assignees ought to be made parties.—BREBNER *v.* THOMPSON (1827), 2 Mol. 433.—**IR.**

8237 v. —— —— *Validity of commission disputed.*]—Pltf. in equity being found bkpt., but disputing the validity of the commission may proceed in the suit, bringing the assignee before the ct. by supplemental bill.—KELLY *v.* DOWLING (1828), 1 Mol. 73.—**IR.**

8237 vi. —— *After arrest & discharge.*]—Pltf., subsequently to the accrual of the cause of action & declaration filed thereon, being arrested, filed his petition & executed the usual assignment, under Insolvent Act. Having paid the debt for which he was arrested, he was discharged by the detaining creditor, without having his petition dismissed by the Insolvent Ct. :—*Held :* he was not entitled to continue the action.—MOULDS *v.* POWER (1841), 2 Leg. Rep. 24 ; 4 I. L. R. 163 ; Jebb & B. 22.—**IR.**

8242 i. *Whether suit abated—Bankrupt suing for benefit of creditors.*]—Counts for trespass *quare clausum fregit*, & carrying away pltf.'s goods & expelling him, & for trover. Plea, that after the accruing of the causes of action pltf. became insolvent & made an assignment to W., in whom, as such assignee, all pltf.'s causes of action, etc., became vested. Pltf. replied that the action was brought for the benefit of pltf.'s creditors :—*Held :* pltf. having, before the appointment of the assignee, rightly sued in his own name, he might continue to do so so long as the assignee did not intervene & have his name inserted.—DUNN *v.* IRWIN (1875), 25 C. P. 111.—**CAN.**

a. —— *What course defendant should take.*]—CAMERON *v.* EAGER (1873), 9 C. L. J. N. S. 263.—**CAN.**

b. —— *Continuation of suit in favour of creditors.*]—Although a suit be totally abated by pltf. becoming insolvent, it is capable of being continued so as to allow the benefit of

8244. Motion to procure trustee to file supplemental bill—Or bill to be dismissed.]—On bkpcy. of pltf., motion may be made by deft. that pltf. procure his assignees to file a supplemental bill, or that the bill shall stand dismissed without costs. —WHEELER *v.* MALINS (1818), 4 Madd. 171 ; 56 E. R. 670.

Annotations :—**Refd.** Lee *v.* Lee (1842), 1 Hare, 617 ; Fisher *v.* Fisher (1847), 6 Hare, 628.

8245. Action by one partner against other & third party—Joint fiat against both partners—Action against third party not maintainable.]—A joint fiat in bkpcy. was issued against two partners, pending a suit by one of them against the other & a third person, who had previously retired from the business, to set aside the partnership agreement on the ground of fraud & misrepresentation on the part of both defts., & for repayment of the money which pltf. had brought into the concern under that agreement. The assignees obtained leave from the Ct. of Review to prosecute the suit against the retired partner, & they proceeded by supplemental bill, in which the creditors' assignees were pltfs. & the official assignee & the retired partner were defts. :—*Held :* the creditors' assignees, who represented not only original pltf. on whose behalf relief was sought, but also the bkpt. partner, who was an original deft. against whom relief was sought, could not sustain the suit against the retired partner. *Semble :* in such a case the suit might have been prosecuted by assignees appointed to represent the separate estate of pltf. in the original suit. *Qu. :* whether, if it had appeared in evidence in the suit, that deft., the retired partner, was alone or otherwise, answerable for the fraud, the ct. could, in such a case, have made a conditional decree, imposing terms upon pltfs., as representing bkpt., who was originally charged as deft.—ROBERTSON *v.* SOUTHGATE (1848), 6 Hare, 536 ; 67 E. R. 1276.

8246. Supplemental order to carry on proceedings—Nothing remaining to be done except taxation of costs.]—Pltf., in a suit in which nothing remained to be done but the taxation & payment to him by deft. of his costs, became bkpt. :—*Held :* a supplemental order to carry on proceedings might be made, on the application of his assignee.—ELLISON *v.* SHARP (1867), 2 Ch. App. 355 ; 36 L. J. Ch. 508 ; 15 W. R. 501, L. JJ.

Annotation :—**Apld.** Wajra Karur Diamond Syndicate *v.* Miller (1906), 50 Sol. Jo. 696.

8247. Interpleader—Claim arising after issue settled—Trustee added as claimant on his application.]—If, after an interpleader issue has been settled, the execution debtor files a petition, & the trustee claims the goods, in respect of which the issue has been directed, the trustee will, upon his application, be added as a claimant in the trial of the issue.—BIRD *v.* MATHEWS (1882), 46 L. T. 512, C. A.

Annotation :—**Consd.** *Re* Harrison, *Ex p.* Essex (1893), 62 L. J. Q. B. 266, D. C.

8248. Action by two plaintiffs—Bankruptcy of one—Trustee added as party.]—B., who was employed to sell an estate, believing that certain parts of the estate could be resold at a considerable profit on the reserved price, induced A. to become the nominal purchaser of the lots at the reserved price, which A. agreed to do on a promise made to him by B. that he would finance him throughout the affair. In order to carry out the transaction it was agreed that A. should hand to B. a document in the form of a cheque to be drawn by him for the amount of the deposit money in favour of B.'s firm as auctioneers of the estate, B. undertaking that the cheque should not be presented or used. In pursuance of such arrangement the estate was knocked down to A., & a cheque given by him for £1,310 for the deposit. Afterwards B., in breach of the agreement, presented the cheque & induced C. & Co., bankers, to cash it, & B. received the amount, though at that time C. & Co. had no assets of A.'s to meet the cheque. C. & Co. & A. having brought an action to recover the £1,310 paid by C. & Co. on the cheque, A. became bkpt. :—*Held :* as, if the case for pltfs. were true, either the bankers or their customer must be entitled to recover, & in the latter case his trustee, the name of the trustee was properly substituted for that of A.—HOARE & Co., & NEWTON *v.* BAKER (1887), 4 T. L. R. 26, D. C.

8249. Effect of election not to continue action.]—Where a trustee elects, under C. L. P. Act, 1852 (c. 76), s. 142, not to continue a pending action commenced by debtor, such election is not a bar to a subsequent action by the trustee in his representative capacity founded on the same cause of action.—BENNETT *v.* GAMGEE (1877), 46 L. J. Q. B. 204 ; 36 L. T. 48 ; 41 J. P. 152 ; 25 W. R. 293, C. A.

8250. Refusal of one trustee to continue—Other entitled to continue—Making co-trustee defendant]—On refusal by one of two trustees :—*Held :* the other was entitled to continue the action, making his co-trustee deft.—JACKSON *v.* NORTH EASTERN RY. CO. (1877), 5 Ch. D. 844 ; 46 L. J. Ch. 723 ; 36 L. T. 779 ; 25 W. R. 518, C. A.

Annotations :—**Consd.** Warder *v.* Saunders (1882), 10 Q. B. D. 114. **Mentd.** Eldridge *v.* Burgess (1878), 7 Ch. D. 411 ; Farnham *v.* Milward, [1895] 2 Ch. 730.

8251. Costs—Defendant being plaintiff's trustee.]—Practice as to costs of dismissing a bill, where

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it to creditors proving charges under a decree made in a suit seeking the continuance & benefit of the abated suit.—BENNETT *v.* BERNARD (1848), 10 I. Eq. R. 584.—**IR.**

c. *Bankruptcy supervening before appeal by defendant—Official assignee must be made party.*]—Where a judgment creditor becomes bkpt. before debtor can appeal against the judgment, he must make the official assignee a party to the record.—FRIEDLANDER *v.* BLACK'S ESTATE, OFFICIAL ASSIGNEE (1888), 6 N. Z. L. R. 512.—**N.Z.**

d. —— *Position of official asignee when made party.*]—An agent, after judgment for him in an action against his principal to obtain an indemnity, became bkpt., & the principal having appealed to the High Ct. against such judgment, the official assignee was made a party :—*Held :* the official assignee was not entitled to any further relief than that to which the agent was entitled.—RANKIN *v.* PALMER (1912), 16 C. L. R. 285.—**AUS.**

e. *Election by trustee to continue action.*]—Assignees of insolvent ordered to elect either to discontinue the action commenced before the insolvency, or to continue it, pursuant to C. L. P. Act, 1853, s. 162.—MACNAMARA *v.* LYNCH (1858), 8 I. C. L. R. App. xi. —**IR.**

f. *S. P.* TIERNEY *v.* THOMAS (1857), 8 I. C. L. R. App. xi., n.—**IR.**

g. —— *Trustee not bound to adopt form of suit.*]—The assignee of bkpt. need not adopt the suit in the form in which it has been instituted by bkpt., & although he elects to prosecute the demand, he may file a new original bill.—POOLE *v.* FRANKS (1828), 1 Mol. 78.—**IR.**

h. *Admission of debt by defendant —Application for payment into court —How made.*]—Where deft. in an action admits a sum to be due to pltf., but claims a set-off exceeding it in amount, & pltf. becomes bkpt., an application for an order for the payment into ct. of the sum admitted by deft. in the action, should be made in the pending action & not in bkpcy.—*Re* HUTCHISON (1885), 3 N. Z. L. R. 462.—**N.Z.**

k. *Right to issue execution.*]—Pltf. having marked judgment on an award, became insolvent, but no suggestion of his insolvency was entered upon the record of the judgment. Deft. having been subsequently arrested under a *ca. sa.* upon the judgment, the ct. set aside the proceedings, but restrained deft. from bringing an action.—CAROLAN *v.* NOLAN (1857), 7 I. C. L. R. 114 ; 10 Ir. Jur. 31. —**IR.**

8251 i. *Costs—Defendant being plaintiff's trustee.*]—Where, after a bill of foreclosure filed, pltf. becomes insolvent, the costs of the assignee, afterwards made deft., must be paid by

Sect. 7.—Actions, etc., pending at time of bankruptcy: Sub-sect. 1, A. & B.; sub-sect. 2, A.]

sole pltf. becomes insolvent, & sole deft. is his assignee with a vesting order.—DANIEL *v.* HARDING (1842), 1 Y. & C. Ch. Cas. 436; 11 L. J. Ch. 160; 62 E. R. 959.

8252. —— —— Order dismissing bill with costs.]—Where sole pltf. has become bkpt., & deft. is appointed his trustee, deft. may obtain an order dismissing the bill with costs against him, he undertaking not to take any proceedings for enforcing the order, except by proving for the amount of his costs in the bkpcy.—ABBOTSON *v.* GREGG (1871), 23 L. T. 796; 19 W. R. 340.

8253. —— Trustee added as co-plaintiff in appeal—Personal liability.]—Debtor before his bkpcy. gave notice of appeal to the House of Lords. His trustee was added as co-pltf., & prosecuted the appeal as pltf. The appeal was dismissed, & the trustee was ordered "to pay or cause to be paid to resps. their costs:—*Held:* the order imposed a personal liability on the trustee.—MARBELLA IRON ORE CO., LTD. *v.* ALLEN (1878), 47 L. J. Q. B. 601; 38 L. T. 815; 42 J. P. 679.

Annotation:—**Mentd.** West Ham Union Grdns. *v.* St. Matthew, Bethnall Green, [1895] 1 Q. B. 662, C. A.

8254. —— Jurisdiction to order security for—Trustee added as plaintiff—Action remitted to county court.]—Where an action of contract brought in the High Ct. has been ordered to be tried in a county ct. under County Ct. Act, 1888 (c. 43), s. 65, & upon the bkpcy. of pltf., but prior to the writ & order remitting the action having been lodged with the registrar of the county ct., the trustee is added as pltf., there is no jurisdiction to order the trustee to give security for costs.—HEMMING *v.* DAVIES, [1898] 1 Q. B. 660; 67 L. J. Q. B. 458; 78 L. T. 500; 14 T. L. R. 309; 42 Sol. Jo. 365; 5 Mans. 73, D. C.

8255. —— —— For what costs.]—Security for costs, where pltf. has become bkpt. or has filed a petition for liquidation, is not necessarily confined to future costs, but may, when applied for promptly, be extended to costs already incurred in the suit.—BROCKLEBANK & CO. *v.* KING'S LYNN STEAMSHIP CO. (1878), 3 C. P. D. 365; 47 L. J. Q. B. 321; 38 L. T. 489; 27 W. R. 94.

Annotations:—**Folld.** *Re* Carta Para Mining Co. (1881), 19 Ch. D. 457. **Consd.** Rhodes *v.* Dawson (1886), 16 Q. B. D. 548, C. A. **Mentd.** Cowell *v.* Taylor (1885), 31 Ch. D. 34, C. A.

8256. —— When security ordered—Petition for liquidation by arrangement.]—Pltf., in an action of trover, filed a petition for liquidation by arrangement under 1869 Act, s. 125, & a receiver was appointed under Rule 260 of Bkpcy. Rules, 1869:—*Held:* pltf. was rightly ordered to give security for costs.—MALCOLM *v.* HODGKINSON (1873), L. R. 8 Q. B. 209; 21 W. R. 360.

Annotations:—**Folld.** *Re* Carta Para Mining Co. (1881), 19 Ch. D. 457. **Consd.** Cowell *v.* Taylor (1885), 31 Ch. D. 34, C. A. N.F. Rhodes *v.* Dawson (1886), 16 Q. B. D. 548, C. A. **Refd.** Blackett *v.* Blackett & Frail (1902), 86 L. T. 669, C. A.

8257. Assignment of right of action by trustee.]—During the pendency of an action pltf. became bkpt. His trustee assigned the right of action to a creditor, on the terms that the creditor should continue the action at his own expense, & that any money, which might be recovered or received by way of compromise, should be divided between the trustee & the creditor, the trustee taking one quarter & the creditor the remainder:—*Held:* the transaction was permitted by the bkpcy laws.—GUY *v.* CHURCHILL (1888), 40 Ch. D. 481; 58 L. J. Ch. 345; 60 L. T. 473; 37 W. R. 504; 5 T. L. R. 149.

Annotations:—**Refd.** Howard *v.* Fanshawe, [1895] 2 Ch. 581. **Mentd.** County Hotel & Wine Co. *v.* L. & N. W. Ry., [1918] 2 K. B. 251.

B. Stay of Proceedings.

8258. Discretion of court—Bankrupt having rendered himself liable to imprisonment.]—Pltf. in an action in the Ch. Div., having failed to pay into ct., when ordered, a sum of money which he had received in a fiduciary capacity, was served with a notice of motion for a writ of attachment against him. He thereupon filed his petition in bkpcy., & applied to the Ct. of Bkpcy. under 1883 Act, s. 9, to stay further proceedings in the action, on the ground that the claim against him was a debt provable in his bkpcy.:—*Held:* his application must be refused, for no good reason was shown why the Ct. of Bkpcy. should interfere. *Semble:* the jurisdiction conferred on the Ct. of Bkpcy. by the above sect. will not, as a general rule, be exercised in favour of bkpt. personally, where he has by some misconduct in some other proceedings rendered himself liable to imprisonment.—*Re* MACKINTOSH, *Ex p.* MACKINTOSH (1884), 13 Q. B. D. 235; 51 L. T. 208; 33 W. R. 140.

Annotation:—**Mentd.** *Re* Smith, Hands *v.* Andrews & Hooton (1893), 68 L. T. 337, C. A.

8259. How obtained—Order in chambers—Trustee declining to proceed.]—Where pltf. is adjudicated bkpt. after action brought & his trustee declines to proceed with the action, it may be stayed by an order in chambers, & deft. need not plead the bkpcy. in bar.—WARDER *v.* SAUNDERS (1882), 10 Q. B. D. 114; 47 L. T. 475, D. C.

8260. Notice of motion—Service on trustee.]—Where pltf. had made default in delivering his statement of claim, & had since become bkpt.:—*Held:* notice of motion to dismiss for want of prosecution should be served on the trustees.—WRIGHT *v.* SWINDON, MARLBOROUGH & ANDOVER RY. CO. (1876), 4 Ch. D. 164; 46 L. J. Ch. 199.

8261. When granted—Trustee declining to state whether he will continue action.]—Defts. applied for an order on a summons to stay further proceedings in an action, on the ground that pltf. had become bkpt. Notice of the summons had been served on the trustee, who when the case was before the master had declined to say whether or not he would continue the action, & had not appeared at the hearing of the appeal when the question had been referred from the master to the judge. The judge refused to make the order staying the action:—*Held:* defts. were entitled to the order prayed for.—READING *v.* LONDON SCHOOL BOARD (1886), 3 T. L. R. 261, D C.

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pltf., his insolvency having occasioned the additional party, & he has no right to throw the costs on the mtgor.—HORAN *v.* WOOLOUGHAN (1827), Beat. 1.—**IR.**

l. —— *Of solicitor retained by insolvent—& employed by trustee.*]—The contract to be implied from the employment by the trustees, of an attorney to carry on a suit already commenced by insolvent as pltf., & in which such attorney was retained for him, is a contract to pay all subsequent costs, but not the costs incurred prior to such employment.—SHAMRAV PANDURANG *v.* BHUGVANDAS PURSHOTAMDAS' TRUSTEES (1868), 5 Bom. O. C. 163.—**IND.**

PART XXI. SECT. 7, SUB-SECT. 1.—B.

m. *General rule.*]—Where pltf. became insolvent after issue joined, but deft. was not entitled to judgment as in case of a nonsuit:—*Held:* the proper course was to stay proceedings, without costs on either side, with liberty to the assignee to bring his action.—HAMILL *v.* HANNAN (1837), 5 Ir. L. Rec. N. S. 223.—**IR.**

n. *When granted — Foreign insolvency of plaintiff.*]—After the commencement of an action, pltf. was made bkpt. in New Zealand. Deft. thereupon applied to stay proceedings in the action, until the official assignee should elect to continue or should refuse to continue the action:—*Held:* neither C. L. P. Act (17 Vict. No. 21), s. 115, nor Insolvent Act (5 Vict. No. 17), s. 33, referred to a foreign insolvency, & application refused.—PROUDFOOT *v.* STUBBINS, PROUDFOOT *v.* BANK OF NEW ZEALAND, PROUDFOOT *v.* HOLT (1885–6), 7 N. S. W. L. R. 131.—**AUS.**

8262. Against whom—Trustee declining to proceed—Action brought by committee of lunatic—Trustee made defendant against his will.]—Where an action has been brought by the committee of a lunatic, & the lunatic is subsequently adjudicated bkpt. the right of action vests in his trustee, & if the trustee declines to prosecute the action he cannot be added as deft. against his will. Where he has been so added, he is entitled to have the action stayed as against him.—FARNHAM *v.* MILWARD & Co., [1895] 2 Ch. 730; 64 L. J. Ch. 816; 73 L. T. 434; 44 W. R. 135; 13 R. 810.

Annotations:—**Refd.** Didisheim *v.* London & Westminster Bank, [1900] 2 Ch. 15, C. A.; *Re* Townshend's Settlmt., Townshend *v.* Robins, [1908] 1 Ch. 201.

8263. For what time—Until security for costs provided.]—Where pltf. was discharged under Insolvent Act after issue joined, & before notice of trial given, the ct. stayed the proceedings until the assignee, or some creditor of pltf., should give security for costs.—HEAFORD *v.* KNIGHT (1824), 2 B. & C. 579; 4 Dow. & Ry. K. B. 81; 2 L. J. O. S. K. B. 114; 107 E. R. 499.

Annotations:—**Distd.** Mylett *v.* Hucker (1837), 5 Dowl. 647; Stead *v.* Williams (1848), 5 C. B. 528.

8264. —— Until payment of costs—Suit revived by trustee—After plaintiff ordered to pay costs.]—Where pltf., who has been ordered to pay the costs of a proceeding in the suit, becomes bkpt., & the suit is revived by his assignee, the ct. will stay proceedings, until payment of the costs which pltf. has been ordered to pay.—COOK *v.* HATHWAY (1869), L. R. 8 Eq. 612; 39 L. J. Ch. 99; 21 L. T. 484; 17 W. R. 1057.

8265. Removal of stay—Bankrupt purchasing assets after discharge.]—Pltf. in an action to recover money due on commission was adjudicated bkpt. shortly after notice of trial. His trustee elected not to proceed with the action, & deft. thereupon obtained an unconditional order staying the proceedings. Pltf. having obtained his discharge & purchased his assets from the trustee, applied for a removal of the stay, in order that he might continue the action:—*Held:* pltf. could not stand in a better position with regard to the action than his trustee, &, in the absence of special circumstances which would have entitled the trustee to reopen the action after submitting to an unconditional stay of proceedings, the stay could not be removed.—SELIG *v.* LION, [1891] 1 Q. B. 513; 60 L. J. Q. B. 403; 64 L. T. 796; 39 W. R. 254, D. C.

Annotations:—**Distd.** Graves *v.* Graves (1893), 69 L. T. 420. **Follid.** Bean *v.* Flower (1895), 73 L. T. 118.

SUB-SECT. 2.—BANKRUPTCY OF DEFENDANT.

A. In General.

8266. Effect of discharge.]—A certificate in discharge of bkpt. pending a suit operates in the nature of a release.—ANON. (1774), Lofft, 437; 98 E. R. 734.

8267. Whether action abated—On granting of receiving order.]—The making of a receiving order against deft., during the pendency of an action, does not cause an abatement, but no execution can be issued on the judgment.—COHEN *v.* REBOW (1908), *Times*, April 13.

See, also, No. 8272, *post*, &, *generally*, Part IV., Sect. 6, *ante*.

8268. Where plaintiff elects to come in under commission—Entry on record.]—Where pltf., in an action against bkpt., makes his election to proceed under the commission, deft. is entitled to have some entry or suggestion, recording the election, put on the record.—KEMP *v.* POTTER (1816), 6 Taunt. 549; 128 E. R. 1148.

Annotations:—**Consd.** Harley *v.* Greenwood (1821), 5 B. & Ald. 95. **N.F.** Sainter *v.* Fergusson (1849), 8 C. B. 619. It does not appear that any such suggestion has ever been entered, or attempted to be entered on any record whatever, notwithstanding the desire expressed by GIBBS, C.J., in *Kemp* v. *Potter* to originate such a practice (MAULE, J.).

8269. —— After judgment—Entry on roll.]—Where pltf. proves after judgment for his debt, under proceedings in bkpcy. against deft., it is unnecessary to enter a suggestion of such proof upon the roll.—SAINTER *v.* FERGUSSON (1849), 8 C. B. 619; 7 Dow. & L. 301; 14 L. T. O. S. 203; 137 E. R. 650.

8270. Right of trustee—To enter claim & plead—Bankrupt's effects sold under venditioni exponas—Effect of delay.]—Where deft.'s effects have been sold under a *venditioni exponas* on an extent in default of claim, it does not conclude his assignees under a commission of bkpcy., & they will be allowed, on application, to enter their claim, & plead in a proper case where the proceedings have gone so far, on payment of costs of the sale & the application, & putting the prosecutors of the extent in the same situation as if they had claimed & pleaded in due time. A short delay, as a month, is not laches in the case of assignees.—R. *v.* ADAM (1817), 5 Price, 39; 146 E. R. 529.

8271. —— To come in & defend—Judgment by default set aside—On payment of costs.]—An action was brought on a bill of exchange for £110 drawn by P. & indorsed to pltf. P. became bkpt. & suffered judgment by default. P.'s trustee having applied to defend the action, £180 being paid into ct.:—*Held:* the judgment should be set aside on payment of costs, & the trustee should be at liberty to defend in the name of debtor, the money to remain in ct.—GODDARD *v.* POOLE (1875), Bitt. Prac. Cas. 40; 1 Char. Cham. Cas. 126.

8272. Whether official receiver should be made party—Change or transmission of interest or liability—R. S. C., Ord. 17, r. 4—On granting of

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8263 i. *For what time—Until security for costs provided.*]—Defts. obtained an order to stay proceedings until security was given for costs, pltf. having become insolvent.—SMITH *v.* COMMERCIAL UNION INSURANCE CO. (1873), 33 U. C. R. 529; *dbtd.* HUMPHRIES *v.* RAMSAY, 7 P. R. 188.—**CAN.**

8263 ii. —— —— *Or trustee intervened.*]—Pltfs. became insolvent after an appeal was taken by deft. to the Supreme Ct. from the judgment of the county ct., setting aside pleas. The ct. granted an order preventing the cause from being proceeded with, unless pltfs. should give security or the assignee should intervene.—EVANS *v.* FOSTER (1879), 1 R. & G. 6.—**CAN.**

PART XXI. SECT. 7, SUB-SECT. 2.—A.

o. Right of bankrupt—To defend action—After trustee's refusal to do so.]—In a suit by the lessor against the lessee for forfeiture of a lease by reason of breaches of covenant, no cause of action survives against deft. who has become insolvent & whose estate has vested in the official assignee, & if the official assignee refuses to defend, the latter cannot do so independently of the official assignee.—TRIBHOVANDAS NAROTAMDAS *v.* ABDULALLY HAKIMJI (1914), I. L. R. 39 Bom. 568.—**IND.**

p. —— *To proceed with motion for new trial—After trustee has abandoned action.*]—In May, 1889, pltf. recovered a verdict against M., & in July M. was adjudicated bkpt., from which order he appealed. Pending the appeal, which was subsequently dismissed, leave was granted to M. upon terms, to move for a rule *nisi* for a new trial. Pltf. notified the official assignee, who elected to abandon the action. M., having complied with the terms imposed, appeared to move for the rule *nisi*:—*Held:* the ct. could not entertain the motion, notwithstanding that M. had previously obtained leave to proceed.—WANT *v.* MOSS (1889), 10 N. S. W. L. R. 274.—**AUS.**

8271 i. *Right of trustee—To come in & defend.*]—The official assignee has no right to be made a party to suits against insolvent pending at the time of a vesting order being made, nor, after judgment & decree in a suit against insolvent prior to the vesting order, to get himself made a party with a view of setting aside the judgment or appealing therefrom.—*Re* HUNT, MONNET & Co., *Ex p.* GAMBLE *v* BHOLAGIR MANGIR (1864), 1 Bom. 251.—**IND.**

Sect. 7.—Actions, etc., pending at time of bankruptcy: Sub-sect. 2, A. & B.]

receiving order.]—The making after the commencement of an action, of a receiving order against deft. does not cause any such change or transmission of interest or liability within the above rule as to render it necessary or desirable that the official receiver should be made a party to the action.—*Re* BERRY, DUFFIELD *v.* WILLIAMS, [1896] 1 Ch. 939; 65 L. J. Ch. 245; 74 L. T. 306; 44 W. R. 346; 40 Sol. Jo. 275; 3 Mans. 11.

See, also, No. 8267, *ante,* &, *generally,* Part IV., Sect. 6, *ante.*

8273. —— —— —— Interest of bankrupt as tenant for life in remainder.]—Testator by his will directed his trustees to pay the income of certain shares to his wife, who predeceased him, for her life, & after her decease to A. for her life, & then to B. her husband for his life, & after the decease of the survivor of A. & B. to divide such shares among their children who attained twenty-one in equal shares, & he devised certain real estate in the events which happened to C., the eldest child of A. & B., & certain other real estate to all the children of A. & B. share & share alike. On the death of testator in 1894, B., who in the events which happened became the sole trustee of the will, managed the property devised & bequeathed, the children of A. & B. not having attained twenty-one. In 1906 C. commenced an action against B., claiming accounts of the rents & profits of the real estate, & to have the trusts of the will so far as they concerned the shares carried into execution by the ct. By orders made in the action for inquiries & by the master's certificates certain sums were found due & ordered to be paid by B. in respect of such rents & profits, & the shares were sold & the proceeds thereof paid into ct. By the order on further consideration an inquiry was directed at the option of C., & at his risk as to costs, whether any sum was due to him out of the shares of the children of A. & B. in such rents & profits for the maintenance by him of such children during their minorities. In 1908 B. was adjudicated bkpt., & the official receiver of the district was appointed trustee in his bkpcy. C. thereupon obtained the usual *ex p.* order under the above rule to join the official receiver as deft. to the action. The official receiver then took out a summons to discharge the order joining him as deft.:—*Held:* (1) the official receiver was properly joined as deft. to the action, there having been a transmission of interest within the above rule, viz., the interest of B. as tenant for life in remainder of the shares, & it was desirable he should be a party to the action so as to bind him by any proceedings with reference to such shares or the proceeds of sale thereof, & also for the purpose of having his decision as to whether he would proceed with the inquiry ordered as to whether any sum was due to B. for maintenance; (2) the inquiry as to maintenance was not one which could be taken in bkpcy. proceedings.—*Re* SYKES, JARAM *v.* HOLMES (1909), 100 L. T. 265.

8274. Whether trustee necessary party—Action on claim not provable in bankruptcy.]—A shareholder in a co. commenced an action against the co. & H., its vendor & promoter, claiming, as against H., a declaration that the prospectus was fraudulent within Cos. Act, 1867 (c. 131), s. 38, damages & an indemnity, & a declaration that H. was liable, under Directors' Liability Act, 1890 (c. 64), to pay to pltf. compensation. H. having become bkpt., pltf. obtained an order, under R. S. C., Ord. 17, r. 4, to carry on proceedings against his trustee. On a motion by the trustee to discharge that order:—*Held:* (1) so far as the action against H. was one for deceit, or based on Cos. Act, 1867, s. 38, the claims were not provable in bkpcy. by virtue of 1883 Act, s. 37 (1), & the trustee was not a necessary party; (2) so far as the claim against H. was based on Directors' Liability Act, 1890, if it was not provable in bkpcy., then the trustee was not a necessary party, & if it was provable, then the proper course for pltf. to pursue was to go into the Bkpcy. Ct. & prove his claim; (3) the order allowing pltf. to carry on proceedings against the trustee must be discharged.—GREENWOOD *v.* HUMBER & CO. (PORTUGAL), LTD. (1898), 6 Mans. 42.

8275. —— Bankruptcy of two of five defendants—Action continued against other three—No notice to trustees of bankrupts.]—Where two of five defts., jointly & severally liable to pltf., had become bkpt.:—*Held:* the action might proceed against the other three defts. without bringing the trustees of the two bkpt. defts. before the ct., or giving them notice of the proceedings.—LLOYD *v.* DIMMACK (1877), 7 Ch. D. 398; 47 L. J. Ch. 398; 38 L. T. 173; 26 W. R. 458.

Annotations:—**Mentd.** Hughes-Hallett *v.* Indian Mammoth Gold Mines (1882), 31 W. R. 285; Wolmershausen *v.* Gullick, [1893] 2 Ch. 514.

8276. —— Bankruptcy of one of two defendants—Trustee made party.]—Where there is an action against two defts. & one is a bkpt., it being a claim against both, the one who does not become bkpt. cannot be made liable, unless the action goes on. Then the trustee may be made a party. The judgment is not against him or that he pay out of the estate, but judgment being against other deft., pltf. is at liberty to prove in the bkpcy. the amount of the claim established, & there the trustee is a party because it is necessary both as against bkpt.'s estate & the other deft. that the action should go on (COTTON, L.J.).—BARTER *v.* DUBEUX (1881), 7 Q. B. D. 413; 50 L. J. Q. B. 527; 44 L. T. 596; 29 W. R. 622, C. A.

Annotations:—**Refd.** Hale *v.* Boustead (1881), 8 Q. B. D. 453; *Re* Berry, Duffield *v.* Williams (1896), 74 L. T. 306.

8275 i. *Whether trustee necessary party—Bankruptcy of one of several defendants.*]—Where one of several defts. has become bkpt., his assignees are necessary parties, & the ct. will not proceed to make a decree in their absence.—BARNHART *v.* PATTERSON (1845), 1 O. S. 673.—**CAN.**

q. —— *Foreclosure suit—Insolvency in England.*]—In a bill filed by a mtgee. to foreclose a mtge., if the mtgor. has taken the benefit of Insolvent Act in England, it is necessary that his assignees there should be made parties.—HUMFREY *v.* LATOUCH (1829), 2 Ir. L. Rec. 1st ser. 446.—**IR.**

r. —— *Proceedings to charge stock subject to marriage settlement.*]—Testator, the father of deft.'s wife, bequeathed money in the funds to trustees, in trust to pay the dividends to the wife, &, at her decease, to & among her children as she should appoint, or in default of appointment, share & share alike, with remainder over to the trustees in the event of the children dying under age or unmarried. A conditional order was obtained by pltf. to charge the stock; but before it was made absolute, deft. became insolvent, & filed a petition in the Insolvent Ct.:—*Held:* the conditional order could not be made absolute, the assignee of insolvent not being before the ct.—MILLS *v.* HORNER (1844), 6 I. L. R. 210.—**IR.**

s. —— *How joined.*]—When deft. becomes insolvent pending the suit, the provisional assignee is properly made a party to the suit by supplemental bill.—RODDY *v.* MOLLOY (1848), 13 I. Eq. R. 90.—**IR.**

t. *What documents must be served on assignee when action revived against him.*]—When deft. becomes insolvent before the time for answering a bill expires, & the suit is thereupon revived against the assignee, it is necessary to serve the assignee with the bill as well as with the order to revive.—SMITH *v.* LINES (1866), 1 Ch. Ch. 398.—**CAN.**

w. *Position of trustee when made party—How far bound by accounts taken.*]—The assignees of deft., who became bkpt. pending the suit, being

8277. Rights of plaintiff—Order for continuance against trustee.]—Where deft. became bkpt. in the course of an action, the ct. ordered continuance against the trustee, as if he occupied the same position as original deft.—WALKER *v.* BLACKMORE (1876), 3 Char. Pr. Cas. 389.

8278. —— Order that trustee be made party—When granted.]—After issue joined in an action by the indorsees against the acceptor of a bill of exchange, in which the defence was that pltfs. took the bill without value & after notice that deft. had been defrauded of it, deft., who was sole deft., filed a petition in liquidation & a trustee was appointed. The Bkpcy. Ct. refused to restrain the action, but restrained pltfs. from enforcing any judgment they might obtain in the action either against the property or person of debtor, & the trustee declined to admit pltf.'s claim:—*Held:* the Bkpcy. Ct. was the proper ct. in which pltfs. ought to prove their debt, & there was no ground for making an order under R. S. C. Ord. 50, r. 2, that the trustee be made a party to the action or be served with notice thereof.—BARTER *v.* DUBEUX (1881), 7 Q. B. D. 413; 50 L. J. Q. B. 527; 44 L. T. 596; 29 W. R. 622, C. A.

Annotations:—**Expld.** Hale *v.* Boustead (1881), 8 Q. B. D. 453. **Refd.** *Re* Berry, Duffield *v.* Williams (1896), 74 L. T. 306.

8279. —— —— How application made—In chambers.]—An application for an order for continuance of an action against deft.'s trustee in bkpcy. should be made in chambers.—WALKER *v.* BLACKMORE (1876), 3 Char. Pr. Cas. 389.

8280. —— To confess goods in order & disposition of defendant— & sign judgment for costs.]—Where deft. is adjudicated bkpt. during the pending of an action, though in respect of an act of bkpcy. committed before the commencement of the action, pltf. may confess that the property claimed in the action was in the order & disposition of deft. at the date of the act of bkpcy., & sign judgment for his costs under R. S. C. Ord. 20, r. 3.—CHAMPION *v.* FORMBY (1878), 7 Ch. D. 373; 47 L. J. Ch. 395; 26 W. R. 391.

8281. —— Duty to file pleadings or notice of motion for judgment—Trustee not appearing—After notice that action restored to paper for trial.]—Deft. became bkpt. after service of notice of trial, & the common order of revivor was then made against his trustee & served on him. The trustee did not enter an appearance. Notice was served on him that the action was restored to the paper for trial, but he did not appear at the trial:—*Held:* it was not necessary for pltf. to file the pleadings or a notice of motion for judgment as against the trustee, under R. S. C., 1875, Ord. 19.—CHORLTON *v.* DICKIE (1879), 13 Ch. D. 160; 49 L. J. Ch. 40; 41 L. T. 467; 28 W. R. 228.

Annotation:—**Distd.** Barter *v.* Dubeux (1881), 7 Q. B. D. 413, C. A.

B. Stay of Proceedings.

8282. Jurisdiction of court—To restrain chancery proceedings—"Legal process"—Restraint of sale under sequestration.]—A sequestration in a Ch. suit is a "legal process" within 1869 Act, s. 13; & where the usual order directing a sale by the sequestrators had been made by the Ct. of Ch., & the owner of the property was adjudicated bkpt. before the sale.—*Held:* the Ct. of Bkpcy. had jurisdiction to restrain the sale.—*Re* BROWNE, *Ex p.* HUGHES (1871), L. R. 12 Eq. 137; 19 W. R. 771.

Annotations:—**Folld.** *Re* Hastings, *Ex p.* Brown (1892), 9 Morr. 234. **Apld.** *Re* Pollard, *Ex p.* Pollard, [1903] 2 K. B. 41, C. A.

8283. —— —— —— ——.]—A writ of sequestration had been issued out of the Ch. Div. to enforce payment into ct., under which debtor's property, both real & personal, was seized. Before sale debtor was adjudicated bkpt. upon the petition of other creditors, & the judge of the county ct. granted an injunction, under 1883 Act, s. 10, restraining the sale:—*Held:* the ct. had jurisdiction to restrain the sale.—*Re* HASTINGS, *Ex p.* BROWN (1892), 61 L. J. Q. B. 654; 67 L. T. 234; 8 T. L. R. 683; 36 Sol. Jo. 733; 9 Morr. 234, D. C.

Annotation:—**Refd.** *Re* Pollard, *Ex p.* Pollard, [1903] 2 K. B. 41, C. A.

8284. —— To restrain action by foreign creditor.]—The Ct. of Bkpcy. has jurisdiction to, & will restrain a foreign creditor, who is suing debtor in an English ct., from proceeding in his action after he has had notice of the filing of a petition for liquidation by debtor.—*Re* THORPE, *Ex p.* HARTEL (1873), 8 Ch. App. 743; 42 L. J. Bcy. 34; 28 L. T. 530; 21 W. R. 428, L. J.

Annotations:—**Folld.** *Re* Glover, *Ex p.* Radcliffe Investment Co. (1873), 43 L. J. Bcy. 4. **Refd.** *Re* Harper, *Ex p.* King (1873), L. R. 17 Eq. 336; *Re* Barnett, *Ex p.* Reynolds (1885), 15 Q. B. D. 169. **Mentd.** Eyre *v.* Smith (1877), 2 C. P. D. 435, C. A.

8285. —— Action for foreclosure.]—A county ct. judge, in the exercise of his bkpcy. jurisdiction, has power, under 1869 Act, s. 72, to grant an injunction restraining an action for foreclosure brought by a mtgee. of bkpt. & then pending in the Ch. Div., & it makes no difference that such action has been commenced before the institution of the bkpcy. proceedings.—SNOW *v.* SHERWELL (1877), 25 W. R. 433, C. A.

Annotation:—**Consd.** *Re* Barnett, *Ex p.* Reynolds (1885), 15 Q. B. D. 169, C. A.

8286. —— County court—High court allowing action to proceed.]—The power to stay proceedings against a debtor ought not to be exercised by the

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brought before the ct. by supplemental bill, are bound by all the accounts taken before the bkpcy., but not by those taken after it, & before they were parties.—ORMSBY *v.* PALMER (1825), 2 Mol. 361.—**IR.**

8277 i. *Rights of plaintiff—Order for continuance against trustee.*]—Where, after a suit was brought, defts. made an assignment for creditors, the names of defts. were ordered to be struck out & that of the assignee added.—GAULT BROTHERS CO., LTD. *v.* MORRELL 26 C. L. T. 318; 3 N. B. Eq. Rep. 173.—**CAN.**

a. —— *Dismissal of bill without costs.*]—When pltf. discovers the insolvency of deft. he should apply to dismiss the bill without costs.—DROUGHT *v.* ROBINSON (1828), Beat. 87.—**IR.**

PART XXI. SECT. 7, SUB-SECT. 2.—B.

b. *Jurisdiction of court—To restrain action in Ontario—Against defendant bankrupt in England.*]—*Qu.:* as to the power of a judge under English 1883 Act, to grant an injunction enjoining pltfs. from proceeding with an action in the High Ct. of Justice for Ontario against defts., subject to proceedings in bkpcy. in England.—MARITIME BANK *v.* STEWART (1889), 13 P. R. 86, 262, 291.—**CAN.**

c. *What actions — Interpleader — Goods not in sheriff's custody.*]—An interpleader issue, if the goods are not in the custody of the sheriff, is not stayed by the insolvency of the judgment debtor.—HARRIS *v.* SOLOMAN (1879), 2 N. S. W. S. C. R. N. S. 207.—**AUS.**

d. —— *Administration bill — 5 Vict. No. 17, s. 31.*]—The above sect. does not extend to proceedings in equity, *e.g.* an administration bill by a mtge. creditor against the administratrix and heir of intestate.—FAIRBAIRN *v.* CLARKE (1862), 1 W. & W. 333.—**AUS.**

e. —— *Action against administratrix as such.*]—An arranging debtor having been sued in her representative capacity, as administratrix of the personal estate & effects of her husband, deceased, pleaded to the action, & afterwards obtained an order for protection under 1857 Act, s. 143. Notice of trial having been served & issues returned, she applied to the ct. to restrain pltf. from proceeding with the action:—*Held:* pltf. should be at liberty to enter an interlocutory judgment, & his rights should be ascertained in the ct., & the judgment filled up for the amount of his actual debt when duly proved, but no execution should issue, & he should be paid his costs of the action & of the motion.—HAYDEN *v.* GOFF (1873), 7 I. L. T. 152.—**IR.**

f. —— *Action on debt after schedule filed—Right of assignee under Insolvency Act, s. 49.*]—Under the above sect, the assignee, after schedule

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county ct., where the High Ct. has with knowledge of the bkpcy. proceedings allowed the matter to proceed. *Qu.:* whether the power of the county ct. is not limited to proceedings pending in it.—*Re* RICHARDSON & COOK, *Ex p.* GRIME'S EXECUTORS (1902), 86 L. T. 690, D. C.

8287. What actions—Counts in both contract & tort.]—A creditor brought an action at law against his debtor, in which he joined counts in contract for breach of promise in not accepting bills of exchange, with counts in tort for misrepresentations contained in a letter written by debtor. Debtor afterwards filed a petition for liquidation, & the creditors agreed to a composition:—*Held:* debtor was entitled to an injunction to restrain pltf. from proceeding at law on the counts in contract, but the ct. had no jurisdiction to restrain him from proceeding on the counts in tort.—*Re* EDWARDS, *Ex p.* BAUM (1874), 9 Ch. App. 673; 44 L. J. Bcy. 25; 31 L. T. 12, L. JJ.

Annotations:—**Distd.** *Re* Watson, *Ex p.* Watson (1876), 2 Ch. D. 63, C. A. **Refd.** *Re* Lopez, *Ex p.* Lopez (1877), 5 Ch. D. 65, C. A. **Mentd.** Lord's Trustee *v.* G. E. Ry. (1908), 77 L. J. K. B. 611, C. A.

See, now, 1914 Act, s. 9.

8288. —— Action to which discharge of debtor no defence—Cancellation of agreement for fraudulent misrepresentation.]—A. filed a bill against B., praying that an agreement might be cancelled, & a sum of money paid under it repaid, on the ground of fraudulent misrepresentations by B. Before the suit came to a hearing B. became a liquidating debtor, & the suit was revived against his trustee. The trustee then applied to the Ct. of Bkpcy. for an injunction to restrain the suit in Ch.:—*Held:* (1) the Ct. of Bkpcy. would not restrain proceedings in a suit or action, to which the discharge of debtor in bkpcy. would be no defence; (2) pltf. had a right to prosecute his remedy against debtor personally in the suit, notwithstanding the proceedings in liquidation, & injunction refused.—*Re* BLAKE, *Ex p.* COKER (1875), 10 Ch. App. 652; 44 L. J. Bcy. 126; 24 W. R. 145, L. JJ.

Annotations:—**Refd.** Hale *v.* Boustead (1881), 8 Q. B. D. 453. **Mentd.** Phosphate Sewage Co. *v.* Hartmont (1877), 25 W. R. 743.

8289. —— Action against married woman trader.]—A writ was issued for goods sold & delivered against a married woman trading separately from her husband. Part of the defence raised being that proceedings in bkpcy. were then pending:—*Held:* as long as those proceedings remained undisturbed, application to recover the debt must be made in bkpcy., & leave given to go in & prove for the debt & the costs of the action.—DAY *v.* FREUND (1876), 35 L. T. 551; 25 W. R. 222.

Annotation:—**Expld.** *Re* Grissell, *Ex p.* Jones (1879), 48 L. J. Bcy. 109, C. A. You must not treat *Day* v. *Freund* as a decision that a married woman with a separate estate can be made bkpt.; all that Bacon, V.-C., says is: I find a *de facto* bkpcy. which has not been attempted to be disturbed (JAMES, L.J.).

8290. —— Defendant having had leave to defend —On payment into court.]—M. commenced an action in Mar. against N. to recover £364, money paid to his use, & it was set down for trial, but before the hearing N. absconded & was adjudicated bkpt., H. being appointed trustee. N. had leave to defend the action on payment of £150 into ct. The ct. made an order restraining M. from proceeding with his action, proof to be made in the bkpcy.—*Re* NEIL, *Ex p.* HARPER (1887), 4 T. L. R. 65.

8291. When granted—Decree for specific performance subject to reference—Trustee declining to accept contract.]—A purchaser, against whom the vendor had obtained a decree for specific performance, subject to a reference as to title, became bkpt., & his assignee declined to accept the contract. The chief clerk made his certificate of good title:—*Held:* an order should be made staying all proceedings in the suit, without prejudice to any application which pltf. might be advised to make under 1849 Act.—KELL *v.* NOKES (1866), 35 L. J. Ch. 729; 14 L. T. 697; 12 Jur. N. S. 780; 14 W. R. 908.

8292. —— Only when necessary to protect general interests of creditors—Bankruptcy per se insufficient.]—The fact of debtor before a Ct. of Bkpcy. being sole deft. in a Ch. suit, is not of itself sufficient ground for an application to a Ct. of Bkpcy. to stay proceedings in the Ch. suit. The Ct. of Bkpcy. will not interfere in such cases, except when such interference is requisite for protecting the general interests of the creditors.—*Re* TURNER, *Ex p.* HIDE (1872), 20 W. R. 508.

8293. Grounds for refusing.]—An attorney brought an action for business done, against deft., a commission of bkpcy. against whom had been superseded. Pltf. after being nonsuited took out a fiat in bkpcy. against deft. The ct. refused to allow the proceedings to be stayed without costs, on a suggestion that the case was within 6 Geo. 4, c. 16, s. 59.—EICKE *v.* NOKES (1834), 1 Bing. N. C. 69; 4 Moo. & S. 585; 3 L. J. C. P. 256; 131 E. R. 1044.

Annotation:—**Mentd.** *Re* Vanlaun, *Ex p.* Chatterton, [1907] 2 K. B. 23, C. A.

8294. —— Court not satisfied that plaintiff would not be prejudiced.]—In 1885 an agreement was made in London, by which resp. was to act for debtors' firm as agent in Australia, but in 1886 he was dismissed from service, & commenced an action against the firm in the Australian Cts. for breach of the agreement. In 1887 the senior partner of the firm died & his son was taken into the business, but in 1889 a receiving order was made against the firm, & the official receiver applied for an injunction to restrain resp. from proceeding with his action:—*Held:* as the ct. was not satisfied that the rights of resp. as pltf. in the action would not be prejudiced, or that expense would be saved, the application must be refused.—*Re* SPALDING, *Ex p.* CHIEF OFFICIAL RECEIVER (1889), 61 L. T. 83; 5 T. L. R. 478; 6 Morr. 163.

C. Costs.

8295. Jurisdiction of court—To order payment by trustee personally—Trustee not made party—Appearing at trial & fighting action.]—Deft. became bkpt. after the close of the pleadings. The

filed & before discharge, may apply to any ct. in which a suit is brought against insolvent for any debt or demand admitted in the schedule, or disputed as to amount only, for a stay.—*Re* HUNT, MONNET & CO., *Ex p.* GAMBLE *v.* BHOLAGIR MANGIR (1864), 1 Bom. 251.—**IND.**

g. *For what time—Until security for amount of verdict & costs provided.*]—Deft., after having obtained a conditional order to set aside a verdict had for pltf. became bkpt.:—*Held:* unless deft. should consent to a *stet processus* without costs, all proceedings should be stayed until security given by deft. or his assignees for the amount of the verdict & pltf.'s costs.—MEGAW *v.* DE LIZARDI (1873), I. R. 7 C. L. 205.—**IR.**

h. *When refused—Improper conduct of bankrupt.*]—Where a debt arose from debtor's improper conduct, & he could have satisfied the debt, at least in part, but was on his own petition adjudicated bkpt., the ct., under 1883 Act, s. 56, allowed proceedings to be continued which had been taken by the creditor before the bkpcy. to enforce payment.—MCKILLOP *v.* VALENTINE (1893), 11 N. Z. L. R. 678.—**N.Z.**

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k. *Of judgment creditor.*]—A judgment creditor was refused payment in full of certain costs, which he had incurred in recovering his judgment & getting an order for payment by

trustee was not made a party, but he appeared at the trial & fought the action:—*Held:* he had waived the irregularity, & there was jurisdiction to order him to pay the costs personally.—LONDON SCHOOL BOARD *v.* WALL BROTHERS (1891), 7 T. L. R. 566; 8 Morr. 202, C. A.

Annotation:—**Mentd.** Dakin *v.* Lee, [1916] 1 K. B. 566, D. C.

8296. —— What court—1915 Rules, r. 96 (3).]—The word "court" in the above rule, which provides (*inter alia*) that where a trustee in bkpcy. is, at the instance of other parties, made a party to the action, he is not personally liable for costs unless the ct. otherwise directs, means the ct. having jurisdiction in bkpcy.—HILL *v.* COOKE-HILL, [1916] W. N. 61.

8297. Whether trustee personally liable—Defence vexatiously continued.]—If assignees continue to defend a suit instituted against bkpt., which is decided in favour of pltf. with costs, & they have no assets, they are not personally liable, unless they vexatiously continued the defence.—*Re* KINDERSLEY CASTLE (1834), 1 Mont. & A. 479, n., Ct. of R.

8298. —— Trustee appearing & defending—Bankrupt not appearing at hearing.]—When bkpt. deft. does not appear at the hearing, & his trustees appear & defend, they are liable to the costs of the action.—WATSON *v.* HOLLIDAY (1882), 20 Ch. D. 780; 46 L. T. 878; 30 W. R. 747; *affd.* (1883), 52 L. J. Ch. 543, C. A.

8299. —— Bankrupt having appealed against interlocutory order—Trustee not proceeding with appeal—But proceeding with defence.]—An interlocutory order for an injunction & receiver having been made against defts. in an action, they gave notice of appeal, & shortly afterwards became bkpt. An order was made for carrying on the proceedings against their trustee. The trustee gave notice to pltf. that he should not proceed with the appeal. Shortly afterwards the trustee entered an appearance & called for a statement of claim. He declined to undertake to pay the costs of the appeal incurred by pltf. before the notice that the appeal would not be proceeded with, & the appeal came on that the question as to the costs might be decided:—*Held:* the appeal must be dismissed with costs to be paid by the trustee, for having adopted the defence of bkpts. he had placed himself in their position as to the whole of the action, & could not reject part of the proceedings in it.—BORNEMAN *v.* WILSON (1884), 28 Ch. D. 53; 54 L. J. Ch. 631; 51 L. T. 728; 33 W. R. 141; 1 T. L. R. 64, C. A.

Annotation:—**Folld.** London School Board *v.* Wall (1891), 7 T. L. R. 566, C. A.

8300. —— Trustee not entering appearance.]—Where deft. becomes bkpt. & his trustee is added as deft. to the action, but does not enter an appearance, the trustee will not be made personally liable for the costs.—DANSK REKYLRIFFEL SYNDIKAT AKT. *v.* SNELL, [1908] 2 Ch. 127; 77 L. J. Ch. 352; 98 L. T. 830; 15 Mans. 134.

Annotation:—**Mentd.** Barker *v.* Stickney, [1919] 1 K. B. 121, C. A.

8301. —— Trustee appearing & contesting claim—Failure to substantiate denials.]—Where an action was pending in which a declaration was claimed that deft. held a mtge., which he had taken in his own name, as trustee for pltf., &, deft. having been adjudicated a bkpt., the trustee in bkpcy. was, on pltf.'s application, added as deft. to the action, & contested the pltf.'s claim:—*Held:* as the question in the action was whether the trustee in bkpcy. was right in denying pltf.'s assertion that he was a *cestui que trust*, & the trustee had failed to substantiate his denial, costs must follow the event in the usual way, & an order must be made making the trustee personally liable for the costs.—HILL *v.* COOKE-HILL, [1916] W. N. 61.

SUB-SECT. 3.—TRANSFER OF PROCEEDINGS.

See 1914 Act, ss. 100 (2), 105 (4), & 1915 Rules, r. 18.

8302. Jurisdiction of court—After receiving order but before adjudication.]—*Qu.:* whether where a receiving order has been made, but debtor has not been adjudicated a bkpt., the ct. has any jurisdiction under 1883 Act, s. 102 (4) to make an order to transfer.—*Re* WHITE & CO., *Ex p.* OFFICIAL RECEIVER (1884), 1 Morr. 77.

8303. What must be shown—Advantage by transfer.]—When application is made under 1883 Act, s. 102 (4) for the transfer of an action pending in another division of the High Ct., some proof must be afforded that advantage is likely to be derived by reason of such transfer to the judge in bkpcy.—*Re* WHITE & CO., *Ex p.* OFFICIAL RECEIVER (1884), 1 Morr. 77.

8304. When transferred—Administration action.]—Testator up to his decease carried on business in partnership with his son. The capital belonged to the father, & the articles contained provisions vesting the son's share immediately on the father's death in the father's exors. The father by will appointed the son & two other persons exors., with discretionary powers to sell the business to the son & to continue it in the meantime. The son alone proved, & continued the business with testator's assets, & within a year from the father's death a suit was instituted by separate creditors of the father for the administration of his estate. A receiver was appointed in the suit, & shortly afterwards a trustee was appointed under a liquidation petition, which had been presented by the son before the receiver was appointed. The bill was amended by making the trustee a party, & praying an injunction to restrain him from meddling with the estate of testator:—*Held:* the Ct. of Bkpcy. was the proper forum for deciding the questions arising between the estates of the father & the son.—MORLEY *v.* WHITE, *Re* WHITE (1872), 8 Ch. App. 214; 42 L. J. Bcy. 76; 27 L. T. 736; 21 W. R. 132, L. JJ.

Annotations:—**Distd.** *Re* Dixon, *Ex p.* Gordon (1873), 8 Ch. App. [557, n.; *Re* Charlton, *Ex p.* Charlton (1878), 38 L. T. 295. **Reld.** Graham *v.* Winterton (1873), L. R. 16 Eq. 243; Snow *v.* Sherwell (1877), 25 W. R. 433, C. A.; *Re* Yates, *Ex p.* Brown (1879), 27 W. R. 651, C. A.; *Re* Barnett, *Ex p.* Reynolds (1885), 15 Q. B. D. 169, C. A.; *Re* Somes, Stewart *v.* Somes (1895), 73 L. J. 359, C. A. **Mentd.** *Re* Harrison, *Ex p.* Butters (1880), 43 L. T. 2, C. A.

8305. —— ——.]—A., B., & C. were in partnership together, carrying on business as T. C. & Co., & were also trustees of the will of T. C. deceased, a former partner in the firm. The firm having presented a liquidation petition, under which resolutions were passed for a composition, was subsequently adjudicated bkpt. Previously to the adjudication, an administration action had been brought by beneficiaries under the will of T. C. charging A., B., & C., & also a firm of B. & Co., with breaches of trust & fraud in the administration of testator's estate, under which a receiver

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instalments against deft., who subsequently filed a petition.—*Re* X. (1897), 32 I. L. T. 11.—IR.

8298 i. *Whether trustee personally liable—Trustee intervening—Costs incurred previously.*]—Where an assignee elects to intervene in proceedings commenced by insolvent before insolvency, he becomes liable personally for all costs incurred before such intervention.—CROTTY *v.* ANDERSON (1896), 22 V. L. R. 120.—AUS.

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had been appointed, & he, by order of the ct., had taken possession of the property of the firm, & was carrying on the partnership business :—*Held :* an order in bkpcy. restraining the administration action was an improper exercise of the power of the ct., as the matters in dispute could be better considered in the administration action in Ch. than by the Ct. of Bkpcy.—*Re* CHARLTON, *Ex p.* CHARLTON (1878), 38 L. T. 295 ; 26 W. R. 468.

8306. ——.]—Where an action for administration had been commenced in the Ch. Div. by the beneficiaries of a deceased partner against the sole trustee of his estate, who was also his surviving partner, & less than two months afterwards a receiving order was made against such partner-trustee, the Judge in Bkpcy., in the exercise of his discretion, under 1883 Act, s. 102 (4), made an order transferring the action to himself.—*Re* SOMES, *Ex p.* DELLER *v.* SOMES (1895), 2 Mans. 396 ; 15 R. 438.

8307. —— Suit in Chancery by legatees—Against executors & continuing partners of testator's firm.]—A suit in Ch. was instituted by legatees under the will of testator against his exors. & against the continuing partners of a firm of which he had been a member at the time of his death, & D., another partner who had retired after testator's death, for the purpose of winding up the affairs of the partnership as they existed at the time of testator's death, & obtaining payment to his estate of the share of the capital due to him. After the bill was filed the continuing partners filed a petition for liquidation by arrangement, & a trustee was appointed. The trustee was made a party to the suit by a supplemental order, but no relief was prayed against him. The trustee having applied to the Ct. of Bkpcy. for an injunction to restrain the proceedings in the suit as against him BACON, C.J., refused the injunction on the ground that the ct. had no jurisdiction to grant the injunction. After the order was made D. also filed a petition for liquidation :—*Held :* on the production of evidence that D. had also become a liquidating debtor, all the matters in question in the suit might be properly determined in bkpcy., & the trustee was entitled to the injunction asked for.—*Re* DIXON, *Ex p.* GORDON (1873), 8 Ch. App. 555 ; 42 L. J. Bcy. 41 ; 28 L. T. 858 ; 21 W. R. 690, L. JJ.

Annotations :—**Consd.** *Re* Barnett, *Ex p.* Reynolds (1885), 15 Q. B. D. 169, C. A. ; *Re* Somes, Stewart *v.* Somes (1895), 73 L. T. 359, C. A. **Mentd.** *Re* Dempsey, *Ex p.* Dempsey (1873), 21 W. R. 800, L. JJ.

8308. —— Trustee having better title than bankrupt.]—The ct. will not, on the application of the trustee, make an order under 1883 Act, s. 102 (4), transferring to the Judge in Bkpcy. an action pending in any other Division by or against bkpt. at the time when the receiving order was made, unless the trustee has by operation of the bkpcy. law a higher & better title than bkpt.

Application was made by a trustee for the transfer for trial before the Bkpcy. Judge of two foreclosure actions, commenced against debtor before the receiving order by originating summons in the Ch. Div., in which the trustee had been joined as co-deft. :—*Held :* the sole question for trial was the validity of the mtges., in which no question of priorities could arise, & the trustee having no higher & better title than bkpt. would have had, the order of transfer ought not to be made.—*Re* CHAMPAGNÉ, *Ex p.* KEMP (1893), 69 L. T. 763 ; 10 Morr. 285 ; 10 R. 57.

8309. Grounds for refusing—No advantage—Delay of one action.]—On application by a trustee under 1883 Act, s. 102 (4) to transfer three actions pending in the Q. B. Div. to the judge in bkpcy., in the first of which bkpt. was pltf., & in the other two deft. in the first action was suing the bkpt. :—*Held :* the application must be refused, as no advantage would be derived from the transfer, & the trial of the first action, in which deft. had been ordered to pay money into ct. would be delayed.—*Re* ROSS, *Ex p.* THE TRUSTEE (1888), 37 W. R. 255, 5 Morr. 281.

SECT. 8.—ACTIONS, ETC., BY CREDITORS IN NAME OF TRUSTEE.

8310. Right to sue—On allegation of collusion—Between trustee & party against whom relief sought.]—Creditors of insolvent cannot maintain a suit, respecting property or rights alleged to have belonged to insolvent, & to be vested in his assignee under Insolvent Debtors Acts, upon an allegation of collusion between the assignee & the party against whom the relief is prayed, & the same rule applies to suits for a similar object by the insolvent himself.—HEATH *v.* CHADWICK (1848), 2 Ph. 649 ; 12 L. T. O. S. 325 ; 41 E. R. 1094, L. C.

Annotations :—**Distd.** Wearing *v.* Ellis (1856), 6 De G. M. & G. 596, L. C. **Apld.** Davis *v.* Snell (1860), 2 De G. F. & J. 463, L. C. **Consd.** Motion *v.* Moojen (1872), L. R. 14 Eq. 202. **Reid.** Rochfort *v.* Battersby (1849), 2 H. L. Cas. 388, H. L. **Mentd.** Bryson *v.* Warwick & Birmingham Canal Co. (1853), 1 Sm. & G. 447 ; Goldsmith *v.* Russell (1855), 5 De G. M. & G. 547, L. C.

8311. Action in name of trustee—On indemnity—Undertaking to account for surplus—Creditor holding note as security for smaller debt.]—Bkpt. having delivered a promissory note as a security for a debt less than the amount of the note, without indorsement :—*Held :* the creditor should be at liberty to bring an action on the note in the name of the assignees, indemnifying them, & undertaking to account for the surplus recovered.—*Re* SALISBURY, *Ex p.* BROWN (1824), 1 Gl. & J. 407.

PART XXI. SECT. 8.

l. *Right to sue—Action not authorised by trustee.*]—An action by purchasers of insolvents' estate against creditors of insolvents :—*Held :* not to lie without the consent of the assignee.—MASON *v.* MERCHANTS BANK (1877), 27 C. P. 383.—**CAN.**

m. —— *Action to make property acquired after discharge liable to plaintiff's debt.*]—A suit may, in particular circumstances, be sustained in the name of a schedule creditor of insolvent, to make the property of insolvent, acquired after his discharge, liable to his debt.—GLENNY *v.* WOOLSEY (1856), 4 I. Ch. R. 636.—**IR.**

n. *Action in name of trustee—Must be within scope of order under R. S. O.*, 1887 (*c.* 124), *s.* 7 (2), *giving creditor right to bring action.*]—CAMPBELL *v.* HALLY (1895), 22 A. R. 217. —**CAN.**

o. —— *Extent of permission.*]—Assignees are not obliged to give the purchaser of bkpt.'s debts a general power to sue for them in their names, but only permission to use their names, on his giving security for costs, in the particular case where the use of the names should be required.—*Ex p.* MULLEN (1829), 2 Ir. L. Rec. 1st ser. 202.—**IR.**

p. —— *Rights of creditor.*]—The rights of a creditor suing in the assignee's name are not affected by acts done before action by the assignee in his personal capacity.—MACTAVISH *v.* ROGERS (1896), 23 A. R. 17.—**CAN.**

q. —— —— *To attack bonâ fide compromise by trustee.*]—A creditor suing in the name of the assignee cannot attack the *bona fides* of a compromise, entered into before action brought, between the assignee & deft., unless deft. can be restored to his original position.—CAMPBELL *v.* HALLY (1895), 22 A. R. 217.—**CAN.**

r. —— —— —— *To increase amount recoverable by acquiring other claims.*]—A creditor suing in the name of the assignee cannot increase the amount that he can recover by acquiring the claims of other creditors unwilling to take part in the proposed proceedings.—MACTAVISH *v.* ROGERS (1896), 23 A. R. 17.—**CAN.**

8311 i. —— *On indemnity.*]—An assignee applied to have a bill taken off the file, his name having been used without his knowledge or consent. At the bar he only asked to be indemnified against costs, the suit being

Annotation :—**Consd.** *Re* Dean, *Ex p.* Rhodes (1837), 2 Deac. 364, Ct. of R.

8312. —— —— —— **Mortgage deed deposited to secure bills.**]—A. being the legal mtgee. of a freehold estate, deposited the mtge. deed with petitioner to secure the payment of two bills of exchange accepted by him for A.'s accommodation. A. became bkpt., & the bills were not paid. A large sum of money being due on the original mtge. :—*Held :* petitioner should be at liberty to use the names of the assignees to get in the money, & the assignees should do all necessary acts for that purpose, petitioner indemnifying them & undertaking to apply the money got in to the payment of the two bills & to account to the assignees for the surplus.—*Re* RUCKER, *Ex p.* COLES (1832), 1 Deac. & Ch. 100 ; 1 L. J. Bcy. 18, Ct. of R.

8313. —— —— **Trustee refusing to bring action to recover property.**]—Where the assignee refuses to bring an action for the recovery of property, which a creditor alleges to have belonged to bkpt., the ct. will permit the creditor to bring the action in the name of the assignees, upon entering into a proper indemnity.—*Re* ELSTON, *Ex p.* RYLAND (1832), 2 Deac. & Ch. 392, Ct. of R.

Annotation :—**Consd.** *Re* Stiff, *Ex p.* Madigan (1864), 10 L. T. 914.

8314. —— —— ——.]—When a minority of the creditors are dissatisfied with the refusal of the trustee to take proceedings to recover property alleged to be part of bkpt.'s estate, & desire to institute such proceedings themselves, they must, in the first instance, apply to the trustee for leave to use his name, & offer him a proper indemnity. If he refuses, they are entitled to apply to the ct. for leave to use the name of the trustee on giving him an indemnity against costs.—*Re* GENESE, *Ex p.* KEARSLEY (1886), 17 Q. B. D. 1 ; 55 L. J. Q. B. 325 ; 34 W. R. 474 ; 3 Morr. 57.

Annotations :—**Refd.** *Re* Malden, Gibson, *Ex p:* James (1886), 3 Morr. 185, D. C. ; The Lord of the Isles, [1894] P. 342.

8315. —— —— **Trustee declining to prosecute suit.**]—If assignees decline to prosecute a suit, the creditors are entitled to do so, upon indemnifying the assignees against costs, etc.—*Re* MEIKLAM, *Ex p.* POOLEY (1864), 10 L. T. 102.

Annotations :—**Folld.** *Re* Mason, *Ex p.* Osborne (1864), 12 W. R. 722. **Consd.** *Re* Stiff, *Ex p.* Madigan (1864), 10 L. T. 914.

8316. —— —— **To recover money from party actually receiving same.**]—After the presentation of a bkpcy. petition against debtor, the debt of petitioning creditor was paid, the money passing through the hands of appcts. Debtor was subsequently adjudicated bkpt. on another petition, & a motion was made by the trustee against appcts. to recover the money from them. Appcts. applied for leave to take proceedings in the name of the trustee, on giving him a proper indemnity, against the persons who had actually received the money, & that, pending such proceedings, the motion of the trustee against appcts. might be stayed :—*Held :* leave would be given to appcts. to use the name of the trustee, on giving a proper indemnity, &, although the ct. would not stay the motion of the trustee, the two cases should come on for hearing together.—*Re* JACKSON, *Ex p.* HOGAN & HUGHES (1891), 8 Morr. 172.

8317. —— —— **Sufficiency of indemnity.**]—Where a secured creditor, who relies on his security, wishes to exercise his power of sale & to enforce a contract made by the bkpt., & applies to the trustee in bkpcy. for the use of his name, he must give a full & proper indemnity : an indemnity limited to assets received by the creditor as receiver & manager is not wide enough.—*Re* GRENFELL, *Ex p.* PLENDER, [1915] H. B. R. 74.

8318. —— **When court will compel assignee to allow use of name.**]—The ct. will not permit a small section of the creditors to examine a party who is a stranger to the proceedings in order to make out a case against him for proceedings elsewhere. Nor will it compel the creditors' assignees to allow their names to be used for the purpose of instituting a suit in equity against a third party, especially where the rights to be enforced are of a doubtful character.—*Re* STIFF, *Ex p.* MADIGAN (1864), 10 L. T. 914.

8319. —— ——.]—The ct. will not, under Consolidation Act, 1849, s. 153, give leave to creditors to institute proceedings in equity, in the name of the assignees, for the purpose of upsetting a deed executed by the bkpt. in blank within three months of his bkpcy., unless the assignees are fully indemnified against costs in respect of such proceedings.—*Re* MASON, *Ex p.* OSBORNE (1864), 10 L. T. 355 ; 12 W. R. 722.

SECT. 9.—**ARBITRATIONS.**

8320. Right of bankrupt to refer—Enforcement of order for costs.]—It is competent to bkpt., if he will, to become party to a reference concerning a matter which has passed to his assignees, &, if bkpt. be ordered by the arbitrator to pay costs, the ct. will enforce the payment by rule under Judgments Act, 1838 (c. 110), s. 18.—*Re* MILNES & ROBERTSON (1854), 15 C. B. 451 ; 24 L. J. C. P. 29 ; 24 L. T. O. S. 116 ; 18 Jur. 1008 ; 3 C. L. R. 232 ; 139 E. R. 501.

Annotation :—**Refd.** Wilson *v.* Morrell (1855), 15 C. B. 720.

8321. Agreement to refer to arbitration—Stamp duty.]—An agreement by assignees to refer to arbn. certain disputes connected with a building contract entered into by bkpt. before his bkpcy., is exempt from stamp duty under 6 Geo. 4, c. 16, s. 98.—WRIGHT *v.* WEBB (1846), 7 L. T. O. S. 433, N. P. ; *subsequent proceedings*, 8 L. T. O. S. 145.

8322. —— **Effect of—How for admission of assets.**]—If assignees refer generally all matters in dispute to arbn., without protesting against the

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for the estate's benefit :—*Held :* the motion should be refused.—BELL *v.* DAWSON (1834), Hayes & Jo. 801. —**IR.**

t. —— *Action begun before insolvency.*]—An action begun by creditors before an assignment, in which the assignee was after the assignment added as co-pltf., can be continued by the original pltfs. & other creditors for their own benefit, upon indemnity to the assignee.—GAGE *v.* DOUGLAS (1891), 14 P. R. 126.—**CAN.**

a. —— —— *Right of defendant creditor.*]—A creditor, whose security is being attacked, may join with the attacking creditor in indemnifying the assignee, so that, if he fail to retain his security, he may participate in the fruits of the litigation.—BARBER *v.* CRATHERN (1897), 28 O. R. 615. —**CAN.**

b. —— —— *Trustee having neither residence nor property within jurisdiction—Security for costs.*]—Where nominal pltf., an assignee for creditors had no permanent residence & no property within the jurisdiction, & the creditor, who was really bringing the action, had given pltf. an indemnity against costs :—*Held :* such indemnity should be assigned to deft., failing which pltf. should give security in the usual way.—SKILL *v.* LOUGHEED (1912), 21 O. W. R. 167 ; 3 O. W. N. 647 ; 1 D. L. R. 899.—**CAN.**

c. —— *What actions—Not action to avoid settlement alleged to be bad in bankruptcy.*]—*Re* CAREY, *Ex p.* OFFICIAL ASSIGNEE (1893), 14 N. S. W. B. 66.—**AUS.**

d. —— —— *Action to recover goods fraudulently concealed.*]—An action to recover goods fraudulently concealed may be brought with the assignee's consent in his name without any order under Assignments Act, s. 7 (2), but without an order the recovery will be for the benefit of the estate & not for the creditor bringing the action.—DOULL *v.* KOPMAN (1895), 22 A. R. 447.—**CAN.**

e. —— —— *Action to recover amount of dividend overpaid.*]—*Re* MERCER (1873), 7 I. L. T. 32.—**IR.**

Sect. 9.—*Arbitrations. Sect.* 10. *Part XXII. Sect.* 1: *Sub-sect.* 1.]

reference being taken as an admission of assets, it will, as in the case of an exor. or administrator, amount to such admission.—ROBSON *v.* —— (1813), 2 Rose, 50, L. C.

8323. —— —— On right to costs—Under 1849 Act, s. 86.]—The creditor of a trader having in pursuance of the above Act, filed an affidavit of debt, & the amount having been disputed, an order was made that deft. should enter into a bond with two sureties. An action was brought to recover the amount claimed, & an agreement was entered into between pltf., deft., & K., in pursuance of which the order for the bond was discharged, & the bkpcy. proceedings were terminated, K. depositing cheques for the debts & costs, if any recovered in the action, in case of a verdict for deft. the cheques to be returned to K., upon his paying £6 for the costs of debtor's summons, & also the costs of any issue found for pltf. At the trial of the cause it was agreed that a verdict should be entered for pltf., subject to the award of an arbitrator, the costs of the cause to abide the event of the award, & the costs of the reference to be in the discretion of the arbitrator. The arbitrator awarded that the verdict should be reduced so that the creditor recovered a sum less than that sworn to:—*Held:* as the verdict was to be operative, the above sect. applied, notwithstanding the cause had been referred to the award of an arbitrator.—FOSTER *v.* HANSON (1857), 1 H. & N. 755, n.; 156 E. R. 1405.

8324. —— —— —— ——.]—Pltf., who has filed an affidavit of debt against deft. in the Ct. of Bkpcy., without any reasonable or probable cause, cannot be deprived of his costs under the above sect., when before trial the action is referred to the award of an arbitrator.—STEVENS *v.* RUSSELL (1857), 1 H. & N. 752; 156 E. R. 1404.

8325. —— Right of trustee to revoke—One party becoming bankrupt before award.]—Where parties have submitted a dispute to arbn., & one of them becomes bkpt. before award, his assignees may revoke the submission.—MARSH *v.* WOOD (1829), 9 B. & C. 659; 4 Man. & Ry. K. B. 504; 7 L. J. O. S. K. B. 327; 109 E. R. 245.

Annotations:—**Expld.** Tayler *v.* Marling (1840), 2 Man. & G. 55. **Consd.** Taylor *v.* Shuttleworth (1840), 6 Bing. N. C. 277. **Expld.** Gibson *v.* Carruthers (1841), 8 M. & W. 321; Hemsworth *v.* Brian (1845), 14 L. J. C. P. 134. **Distd.** *Re* Milnes & Robertson (1854), 15 C. B. 451. **Expld.** *Re* Kitchin, *Ex p.* Young (1881), 45 L. T. 90, C. A.

See, now, Arbitration Act, 1889 (c. 49), s. 1.

8326. —— Not revoked by bankruptcy of plaintiff before award.]—The bkpcy. of pltf. before the making of an award does not operate as a revocation of a submission to arbn.—HEMSWORTH *v.* BRIAN (1845), 1 C. B. 131; 2 Dow. & L. 844; 14 L. J. C. P. 134; 4 L. T. O. S. 315; 135 E. R. 486.

Annotation:—**Mentd.** Rule *v.* Bryde (1847), 1 Ex. Ch. 151.

See, further, ARBITRATION, Vol. II., p. 397.

8327. —— No order for reference before bankruptcy.]—A. having brought an action for damages against B., on the ground of misrepresentation in the sale of a business, & B. another action against A. to recover the sum for which it was sold, it was agreed to refer A.'s action, & that B.'s should be stayed to abide whatever set-off the arbitrator might award to A. in the shape of damage. The agreement was embodied in a judge's order, but no order of reference was made before B. became a bkpt.:—*Held:* the assignees of B. were bound by the terms of the order, & could not commence an action pending the completion of the award.—*Re* GEDDES, *Ex p.* MICHIE (1840), 1 Mont. D. & De G. 181; 9 L. J. Bcy. 23; 4 Jur. 490, Ct. of R.

Annotation:—**Distd.** Pennell *v.* Walker (1856), 18 C. B. 651.

8328. Whether award binding on trustee—Award after secret act of bankruptcy.]—An award was made in an adversary suit between A. & B., & confirmed by the ct. A. was then a bkpt., but not known to be so, & a commission was afterwards taken out:—*Held:* the award was binding on the assignee.—WHITACRE *v.* PAWLIN (1691), 2 Vern. 229; 23 E. R. 748; *revsd.* on another point, 14 Lords Journals, 651.

8329. —— Award after bankruptcy—Trustee not appearing before arbitrator.]—In an action brought against J. by defts., a verdict was taken against him for £10,000, subject to an award. J. then became bkpt., & afterwards the award was made by which the amount of the damages was reduced. It did not appear that the assignees went in before the arbitrator:—*Held:* they were not bound by the award.—DOD *v.* HERRING (1829), 3 Sim. 143; 57 E. R. 953; *subsequent proceedings,* (1830), 1 Russ. & M. 153, L. C.

8330. Right of trustee to benefit of award—On satisfying bankrupt's solicitor's lien for costs of action & reference.]—An uncertificated bkpt. brought an action for work & labour, etc. as a builder, which was referred, & the arbitrator awarded in favour of pltf. The assignees claimed the sum awarded:—*Held:* the assignees, to be entitled to the benefit of the award, must satisfy the lien of bkpt.'s attorney for his costs in the action & reference.—JONES *v.* TURNBULL (1837), 2 M. & W. 601; 5 Dowl. 591; 1 Murp. & H. 106; 6 L. J. Ex. 166; 1 Jur. 638; 150 E. R. 897.

Annotation:—**Refd.** *Re* Meter Cabs, [1911] 2 Ch. 557.

SECT. 10.—**EXECUTIONS BY TRUSTEE.**

8331. Leave to issue execution—Under R. S. C. Ord. 42—Whether trustee must be made party—Under Ord. 17.]—*Semble:* the trustee in bkpcy. of the judgment creditor is not entitled to apply under Ord. 42 for leave to issue execution, unless he has first been made a party to the proceedings under Ord. 17.—*Re* CLEMENTS, *Ex p.* CLEMENTS, [1901] 1 K. B. 260; 83 L. T. 464; 49 W. R. 176; 45 Sol. Jo. 81, D. C.

Annotation:—**Mentd.** *Re* Bagley, [1911] 1 K. B. 317, C. A.

8332. —— —— —— ——.]—In May, 1909, G. recovered judgment against B. for £550. In July M. & W., judgment creditors of G. for a larger amount, obtained a garnishee order *nisi* on the judgment recovered by G. against B., & in Jan., 1910, the garnishee order was made absolute, In Dec., 1909, M. & W. served a bkpcy. notice on G. in respect of their judgment debt, & in Feb., 1910, a receiving order was made against him, founded on his non-compliance with the bkpcy. notice. In May, 1910, G.'s trustee assented to a deed of arrangement entered into between B. & his creditors in Oct., 1909. In June, 1910, having first obtained leave under Ord. 42, r. 23, to issue execution on the judgment recovered by G. against B., he issued a bkpcy. notice against B., in respect of that judgment, & on his failure to comply with the notice presented a petition in bkpcy. against him:—*Held:* it was necessary for the trustee before obtaining leave to issue execution on the judgment to be formally joined as a party to the proceedings under Ord. 17, r. 4.—*Re* BAGLEY, [1911] 1 K. B. 317; 80 L. J. K. B. 168; 103 L. T. 470; 55 Sol. Jo. 48; 18 Mans. 1, C. A.

Annotation:—**Mentd.** *Re* Wilson, [1916] 1 K. B. 382, C. A.

PART XXI. SECT. 10.

1. On judgment obtained before bankruptcy.]—Where a man recovers a judgment & becomes bkpt. his trustee can issue execution on the original judgment.—FORD, TIPPING & CO.'S CREDITORS' TRUSTEE *v.* BEATTON (1884), 3 N. Z. L. R. 160. —N.Z.

Part XXII.—The Debtors Acts and Bankruptcy Offences generally.

NOTE.—*The Debtors Acts are those of* 1869 (*c.* 62) *&* 1878 (*c.* 54), *& are herein referred to as* 1869 *Act & 1878 Act respectively, Bankruptcy Act,* 1869 (*c.* 71), *being referred to in this Part as* 1869 *Bankruptcy Act.*

SECT. 1.—ABOLITION OF IMPRISONMENT FOR DEBT.

SUB-SECT. 1.—IN GENERAL.

8333. General rule—Abolishment of imprisonment for debt.]—1869 Act is an Act for abolishing imprisonment for debt; not merely for abolishing imprisonment for debt following upon judgments of the Superior Cts., but for the abolition of imprisonment for debt in those circumstances in which it could take place in the cty. cts.; & it provides a series of other safeguards for that which is deemed to be a right that should be safely hedged round, *viz.*, the power of incarcerating debtor for the non-payment of his debt. There are, under this Act, more stringent conditions to be fulfilled before a person can be sent to prison (HANNEN, J.).—FRAZER *v.* DANIEL (1870), 21 L. T. 723.

8334. —— ——.]—If the case does not come within any of the exceptions mentioned, there can be no imprisonment for default in payment, for the money is due as a debt (WILLS, J.).—BUCKLEY *v.* CRAWFORD, [1893] 1 Q. B. 105; 62 L. J. Q. B. 87; 67 L. T. 681; 57 J. P. 89; 41 W. R. 239; 9 T. L. R. 85; 37 Sol. Jo. 67; 5 R. 125.

8335. —— ——.]—A person cannot be committed for non-payment of a sum of money, except in certain cases specified in 1869 Act, s. 4 (BYRNE, J.).—CARTER *v.* ROBERTS, [1903] 2 Ch. 312; 72 L. J. Ch. 655; 89 L. T. 239; 47 Sol. Jo. 515.

Annotation:—**Mentd.** *Re* Launder, Launder *v.* Richards (1908), 98 L. T. 554.

8336. Exceptions—General nature of—Punitive.]—The exceptions are all of a character which indicates that the Legislature wished merely to limit the term of imprisonment in regard to certain debts which were not simple debts, contracted in the ordinary intercourse between man & man, where credit is given by one person to another, but were debts, the incurring of which was in some degree worthy of being visited with punishment. In every case there is something of the character of delinquency pointed out (LORD HATHERLEY, C.).—MIDDLETON *v.* CHICHESTER (1871), 6 Ch. App. 152; 40 L. J. Ch. 237; 24 L. T. 173; 19 W. R. 369, L. C. & L. JJ.

Annotations:—**Consd.** *Re* Diamond Fuel Co., Metcalfe's Case (1880), 13 Ch. D. 815; *Re* Hulkes, Powell *v.* Hulkes (1886), 33 Ch. D. 552; *Re* Smith, Hands *v.* Andrews, [1893] 2 Ch. 1, C. A.; *Re* Edgcome, *Ex p.* Edgcome, [1902] 2 K. B. 403, C. A. **Refd.** *Re* Hincks, *Ex p.* Cuddiford (1876), 24 W. R. 931; Brewster *v.* Prior (1887), 3 T. L. R. 590; *Re* Walker, Walker *v.* Walker (1890), 60 L. J. Ch. 25; *Re* Greer, Napper *v.* Fanshawe, [1895] 2 Ch. 217; Church's Trustee *v.* Hibbard, [1902] 2 Ch. 784, C. A. **Mentd.** Ferguson *v.* Ferguson (1875), 44 L. J. Ch. 615, L. JJ. Phosphate Sewage Co. *v.* Hartmont (1877), 25 W. R. 743.

8337. —— —— ——.]—I do not think that 1869 Act, which, though it abolished imprisonment for debt in certain cases, was, as it in fact says in so many words, legislation "for the punishment of fraudulent debtors," did not mean punishment. When we come to look at the Act, we find that it contains different provisions to meet different classes of debtors, there being one set of provisions in the case of defaulting debtors of a certain class, & special provisions being made in the case of debtors guilty of misdemeanour or other misconduct; &, looking at these provisions, it is impossible to suppose that punishment for misconduct was not intended to be meted out. The Act abolishes imprisonment for debt in the case of an honest debtor, but it is at the same time intended for the punishment of a fraudulent or dishonest debtor. It is in that sense vindictive, & intended to be so. Then we come to 1878 Act, which was passed to meet a special class of cases. It was not intended by this Act to get rid of the penal clauses of the previous Act, but only to give the judges a judicial discretion to deal with these exceptional cases, which the Legislature did not think of when it passed the previous Act (JESSEL, M.R.).—MARRIS *v.* INGRAM (1879), 13 Ch. D. 338; 49 L. J. Ch. 123; 41 L. T. 613; 28 W. R. 434.

Annotations:—**Consd.** *Re* Freston (1883), 11 Q. B. D. 545, C. A.; *Re* Knowles, Doodson *v.* Turner (1883), 52 L. J. Ch. 685; Harvey *v.* Harvey (1884), 26 Ch. D. 644; Mitchell *v.* Simpson (1889), 23 Q. B. D. 373; Church's Trustee *v.* Hibbard, [1902] 2 Ch. 784, C. A. **Refd.** Holroyde *v.* Garnett (1882), 20 Ch. D. 532; *Re* Gent, Gent-Davis *v.* Harris (1888), 40 Ch. D. 190; *Re* Edye (1890), 63 L. T. 762; Iles *v.* T. (1892), 36 Sol. Jo. 502; Buckley *v.* Crawford, [1893] 1 Q. B. 105; *Re* Smith, Hands *v.* Andrews, [1893] 2 Ch. 1, C. A.; *Re* Berwick, Berwick *v.* Lane (1899), 81 L. T. 722; Bailey *v.* Plant (1900), 2 W. C. C. 160; *Re* Edgcome, *Ex p.* Edgcome, [1902] 2 K. B. 403, C. A. **Mentd.** Piddocke *v.* Burt, [1894] 1 Ch. 343; *Re* Fewster, Herdman *v.* Fewster, [1901] 1 Ch. 447; Gordon *v.* Holland, Holland *v.* Gordon (1913), 82 L. J. P. C. 81, P. C.

8338. —— —— ——.]—The remedy against the property or person of a debtor prohibited by 1883 Act, s. 9, is in respect of a debt, & intended to enforce payment of that debt; but the remedy by committal or attachment under 1869 Act, is punishment for an offence.

The punitive character of 1869 Act, s. 4 (3), cannot now be questioned (LINDLEY, L.J.).—*Re* SMITH, HANDS *v.* ANDREWS, [1893] 2 Ch. 1; 62 L. J. Ch. 336; 68 L. T. 337; 57 J. P. 516; 41 W. R. 289; 9 T. L. R. 238; 37 Sol. Jo. 247; 2 R. 360, C. A.

Annotations:—**Consd.** Church's Trustee *v.* Hibbard, [1902] 2 Ch. 784, C. A.; *Re* Bourne, Davey *v.* Bourne, [1906] 1 Ch. 697, C. A. **Refd.** *Re* Berwick, Berwick *v.* Lane (1899), 81 L. T. 722; *Re* Edgcome, *Ex p.* Edgcome, [1902] 2 K. B. 403, C. A.

8339. —— —— ——.]—The orders under 1869 Act, s. 4 (3) are not in the nature of remedies for the recovery of debts, but are in the nature of punishment (VAUGHAN-WILLIAMS, L. J.).—

PART XXII. SECT. 1, SUB-SECT. 1.

8333 i. *General rule—Abolishment of imprisonment for debt*—1915 *Act* (*Vict.*).]—The above Act abolishes coercion of the body of a judgment debtor by way of execution to obtain payment of a debt. Imprisonment is provided for specified cases of dishonest or unjust conduct.—NEW MARCH *v.* ATKINSON (1918), 25 C. L. R. 381.—**AUS.**

8336 i. *Exceptions—General nature of —Punitive*—1874 *Act.*]—The object is to punish fraud or contumacy, & not to provide a means of putting on pressure to enforce payment.—ACKROYD *v.* BISHOP (1891), 9 N. Z. L. R. 250.—**N.Z.**

8336 ii. — — — *R. S. O.* 1897, (*c.* 60).]—An order for committal is not a punishment for disobedience but a punishment for fraudulent conduct of debtor in having refused or neglected to pay the judgment debt, he having the means & ability to pay.—*Re* KAY *v.* STORRY (1904), 24 C. L. T. 313; 8 O. L. R. 45; 3 O. W. R. 784.—**CAN.**

Sect. 1.—*Abolition of imprisonment for debt: Subsects.* 1, 2 & 3, *A.*]

CHURCH'S TRUSTEE *v.* HIBBARD, [1902] 2 Ch. 784; 72 L. J. Ch. 46; 87 L. T. 412; 51 W. R. 293, C. A.

8340. —— —— ——.]—The exceptions from the general rule that there shall be no imprisonment for debt were excepted because imprisonment under them all was meant to be a punishment (ROMER, L.J.).—*Re* EDGCOME, *Ex p.* EDGCOME, [1902] 2 K. B. 403; 71 L. J. K. B. 722; 87 L. T. 108; 50 W. R. 678; 18 T. L. R. 734; 46 Sol. Jo. 649; 9 Mans. 227, C. A.

Annotation:—**Mentd.** Church's Trustee *v.* Montague, Hibbard (1902), 87 L. T. 412, C. A.

8341. —— **Attachment under—Whether on ex parte application.**]—An attachment ought not to issue under any of the exceptions in 1869 Act, s. 4, *ex p.*, but debtor should have an opportunity of showing that he is not within the exception (JAMES, L.J.).—FERGUSON *v.* FERGUSON (1875), 10 Ch. App. 661; 44 L. J. Ch. 615, L. JJ.

Annotation:—**Refd.** Brewster *v.* Prior (1887), 3 T. L. R. 590.

8342. —— **Release of person imprisoned under—Whether order necessary.**]—No order is necessary for the discharge of a prisoner in custody for contempt under any of the exceptions contained in 1869 Act, s. 4, where the writ of attachment has appended to it a note in the following terms: "NOTE—This writ does not authorise an imprisonment for any longer period than one year," which it is the usual practice to append to all writs of attachment issued under the above sect.—*Re* EDWARDS, BROOKE *v.* EDWARDS (1882), 21 Ch. D. 230; 51 L. J. Ch. 943; 30 W. R. 656.

See, also, Nos. 8350, 8382 *et seq.*, 8433, 8434, *post.*

8343. Application of 1869 Act—To Crown debt.]—Deft. at the suit of the Crown is liable to arrest, as if the Act had not passed, Crown debts not being either directly or by implication referred to in that Act, & it is not necessary to go through the form of an inquisition, as in the case of an extent.—A.-G. *v.* EDMUNDS (1870), 22 L. T. 667.

8344. —— ——.]—The recognisance entered into before the clerk of Parliament to secure the costs of an appeal to the House of Lords, constitutes a Crown debt, which is not subject to the Act, & the person bound by such recognisance is, when the same is estreated, liable to imprisonment for non-payment of the sum in which he is bound.—*Re* SMITH (1876), 2 Ex. D. 47; 46 L. J. Q. B. 73; 35 L. T. 858.

8345. —— **"Default in payment of sum of money."**]—The words in the enacting part of s. 4, "default in payment of a sum of money," are advisedly used instead of "debt," in order to include cases which might not properly have been called cases of debt, such as costs on a judgment of non-suit, or costs on a verdict for deft., or, damages in an action of tort, or costs under a rule of ct. (LUSH, J.).—R. *v.* PRATT (1870), L. R. 5 Q. B. 176; 39 L. J. M. C. 73; 18 W. R. 626; *sub nom. Ex p.* COLE, 21 L. T. 750; 34 J. P. 150.

Annotations:—**Consd.** Buckley *v.* Crawford, [1893] 1 Q. B. 105. **Mentd.** *Re* Edgcome, *Ex p.* Edgcome (1902), 87 L. T. 108, C. A.

8346. —— —— **Security for costs in matrimonial suit—Divorce.**]—Resp. to a petition for dissolution of marriage was ordered to find security for petitioner's costs of hearing the suit. Resp. did not obey the order:—*Held:* this was not a "default in payment of a sum of money," & the ct.'s jurisdiction to attach was not taken away by s. 4.—LYNCH *v.* LYNCH (1885), 10 P. D. 183; 54 L. J. P. 93; 34 W. R. 47.

Annotation:—**Consd.** Bates *v.* Bates (1888), 14 P. D. 17, C. A.

8347. —— —— —— ——.]—Resp. in a suit for divorce was an undischarged bkpt., but was shown to be in receipt of a weekly salary of £30, which was not under the control of the trustee in bkpcy. An order had been made by the ct., & duly served on him, to pay into ct. or give security for £40, to cover the wife's costs of the hearing of her petition, but although nearly two years had elapsed from the date of such order he had failed to comply with it:—*Held:* the fact that resp. had been adjudged bkpt. did not preclude the ct. from issuing an attachment.—SHINE *v.* SHINE, [1893] P. 289; 63 L. J. P. 60; 69 L. T. 500; 6 R. 663.

8348. —— —— —— **Judicial separation.**]—In a wife's petition for a judicial separation the husband was ordered to pay a sum of money into ct. as security for her costs. He made default in payment:—*Held:* this was not "default in payment of a sum of money" within s. 4, & he was liable to attachment for disobeying the order of the ct.—BATES *v.* BATES (1888), 14 P. D. 17; 58 L. J. P. 85; 60 L. T. 125; 37 W. R. 230; 5 T. L. R. 155, C. A.

Annotations:—**Distd.** Clarke *v.* Clarke, [1891] P. 278. **Apld.** Shine *v.* Shine, [1893] P. 289. **Refd.** Ivimey *v.* Ivimey, [1908] 2 K. B. 260, C. A.

8349. —— —— **Costs of motion for attachment.**]—Upon a motion for an attachment, no order was made except that resp. pay the costs of the motion. Upon default in payment:—*Held:* the ct. had no jurisdiction to commit to prison for the default.—MICKLETHWAITE *v.* FLETCHER (1879), 27 W. R. 793.

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a. *Application of Acts*—1869 *Act.*]—*Held:* in force in Manitoba.—*Re* BREMNER (1889), 6 Man. L. R. 73.—**CAN.**

b. —— ——.]—*Held:* Act in force in the North West Territory.—IVERSON *v.* ENWRIGHT (1905), 2 W. L. R. 20.—**CAN.**

c. —— 1844 *Act.*]—*Held:* retrospective.—BANK OF BRITISH NORTH AMERICA *v.* CLARKE (1845), 1 U. C. R. 1.—**CAN.**

d. —— 1872 *Act.*]—Pltf. had, before the above Act came into operation, demised premises to deft. Three quarterly gales accrued due after the Act came into operation:—*Held:* pltf. was entitled to arrest deft.—PARKER *v.* M'HUGO (1874), I. R. 9 C. L. 265.—**IR.**

e. —— ——.]—Debtor cannot be arrested on foot of a judgment entered after the above Act for a sum due before the Act.—ARKINS *v.* MAGRATH (1874), I. R. 8 C. L. 114.—**IR.**

f. —— ——.]—Although, since the above Act, imprisonment for contempt, which consists of the non-payment of money pursuant to the order of a ct. should, in analogy to the statute, be restricted to the limit which the statute has placed upon imprisonment for debt, yet the only remedy for a prisoner detained in custody under process of contempt, for a period exceeding that limit, is by application to the ct. by which the order for attachment was made. *Semble:* in cases of contempt for non-payment of money, imprisonment for a period of twelve months should be treated as a purging of the contempt.—M'COMBE *v.* GRAY (1879), 4 L. R. Ir. 432.—**IR.**

g. —— ——.]—The right of a Ct. of Ch. to attach is subject to the above Act. While a Ct. of Equity may enforce obedience to its decrees by attachment, such remedy is not available to enforce payment of a debt found due to an estate in an administration suit. In such case proceedings should be for a committal under the above Act.—SHEEHY *v.* SHEEHY (1904), 38 I. L. T. 251.—**IR.**

h. —— —— *Decrees after passing of Act.*]—Debts & costs payable under a decree made in a suit after the passing of the above Act are within the meaning of the Act.—KIRBY *v.* SMYTH (1876), 10 I. R. Eq. 417.—**IR.**

k. —— —— ——.]—Costs, ordered to be paid to deft. constitute a "liability incurred" which may be enforced under the above Act, when the order has been made since the passing of the Act.—HOLLAND *v.* REID (1874), I. R. 8 C. L. 403.—**IR.**

l. —— 1890 *Act, s.* 22—*Distress warrant unnecessary.*]—The words "in default of distress or otherwise," in the above sect. mean "whether the creditor had distrained & failed to find sufficient distress, or had not distrained."—ALTSON *v.* DUNNE (1900), 26 V. L. R. 372.—**AUS.**

8350. Release of prisoner—On what terms.]—Since 1869 Act, deft., who has cleared his contempt by filing his answer, cannot be detained in prison for non-payment of the costs of his contempt, but the ct. in ordering his discharge will make it part of the order that he do pay the costs of his contempt & of the motion to discharge him.—JACKSON *v.* MAWBY (1875), 1 Ch. D. 86; 45 L. J. Ch. 53; 24 W. R. 92.

Annotations :—**Distd.** *Re* M—— (1876), 46 L. J. Ch. 24, C. A. **Consd.** Mickelthwaite *v.* Fletcher (1879), 27 W. R. 793; Weldon *v.* Weldon (1885), 10 P. D. 72; Buckley *v.* Crawford, [1893] 1 Q. B. 105; *Re* Evans, Evans *v.* Noton (1893), 68 L. T. 324. **Folld.** Ayres *v.* Ayres (1901), 85 L. T. 648.

See, further, CONTEMPT OF COURT, ATTACHMENT & COMMITTAL; HUSBAND & WIFE.

SUB-SECT. 2.—DEFAULT IN PAYMENT OF SUM RECOVERABLE SUMMARILY.

See 1869 Act, s. 4 (2).

8351. Costs awarded by quarter sessions.]—*Held :* costs, which had been awarded by quarter sessions against one of the parties to an appeal, & which by Summary Jurisdiction Act, 1848 (c. 43), s. 27, & Quarter Sessions Act (Barnes' Act), 1849, c. 45), s. 5 might be enforced before a justice by warrant of distress, & in default of distress by warrant of commitment, were within 1869 Act, s. 4 (2), & the defaulter was not protected from imprisonment.—R. *v.* PRATT (1870), L. R. 5 Q. B. 176; 39 L. J. M. C. 73; 18 W. R. 626; *sub nom. Ex p.* COLE, 21 L. T. 750; 34 J. P. 150.

Annotations :—**Consd.** Buckley *v.* Crawford, [1893] 1 Q. B. 105. **Mentd.** *Re* Edgcome, *Ex p.* Edgcome (1902), 87 L. T. 108, C. A.

SUB-SECT. 3.—DEFAULT BY TRUSTEE.

A. In General.

See 1869 Act, s. 4 (3).

8352. Object of exception—To produce payment of money—Not vindictive.]—The policy of 1869 & 1878 Acts, in leaving a defaulting trustee exposed to the penalty of imprisonment is not vindictive; the object of the penalty is simply to produce payment of the money.—BARRETT *v.* HAMMOND (1879), 10 Ch. D. 285; 48 L. J. Ch. 249; 27 W. R. 471.

Annotation :—**Folld.** Holroyde *v.* Garnett (1882), 20 Ch. D. 532.

8353. —— —— To punish fraudulent trustee—To act as deterrent.]—The object of granting attachments in cases of defaulting trustees is not only to recover the money & to punish fraudulent trustees, but to deter other trustees from committing fraudulent breaches of trust.—*Re* KNOWLES, DOODSON *v.* TURNER (1883), 52 L. J. Ch. 685; 48 L. T. 760.

Annotations :—**Refd.** Isles *v.* T. (1892), 36 Sol. Jo. 502; *Re* Berwick, Berwick *v.* Lane (1899), 81 L. T. 722. **Mentd.** *Re* Gent, Gent-Davis *v.* Harris (1888), 40 Ch. D. 190; Aylesford *v.* Poulett, [1892] 2 Ch. 60; *Re* Smith, Hands *v.* Andrews, [1893] 2 Ch. 1, C. A.

8354. When exception applies—Any default—Whether fraud must be shown.]—On an application, under R. S. C., Ord. 44, r. 2, for leave to issue a writ of attachment against a trustee, to enforce a judgment for the payment of money, it is not necessary, in order to bring the case within 1869 Act, s. 4 (3), to show that the trustee has been guilty of any fraud. Any default, even without fraud, made by a trustee in payment of any sum in his possession or under his control, which he has been ordered to pay, is sufficient to justify the ct. in making an order for attachment.—PRESTON *v.* ETHERINGTON, ETHERINGTON *v.* PRESTON (1887), 37 Ch. D. 104; 57 L. J. Ch. 176; 58 L. T. 318; 36 W. R. 49; 4 T. L. R. 47, C. A.

Annotations :—**Distd.** Buckley *v.* Crawford (1892), 62 L. J. Q. B. 87. **Refd.** Isles *v.* T—— (1892), 36 Sol. Jo. 502; *Re* Smith, Hands *v.* Andrews, [1893] 2 Ch. 1, C. A.; Harper *v.* McIntyre (1908), 52 Sol. Jo. 533. **Mentd.** *Re* Bourne, Davey *v.* Bourne, [1906] 1 Ch. 697, C. A.

8355. To whom exception applies—Peer.]—*Qu.:* whether a trustee, who is a peer, is privileged from arrest under an attachment in pursuance of 1869 Act, s. 4 (3).—AYLESFORD (EARL) *v.* POULETT (EARL), [1892] 2 Ch. 60; 61 L. J. Ch. 406; 66 L. T. 484; 40 W. R. 424; 8 T. L. R. 446; 36 Sol. Jo. 363.

Annotation :—**Refd.** *Re* Smith, Hands *v.* Andrews, [1893] 2 Ch. 1, C. A.

8356. —— Member of Parliament.]—The jurisdiction to attach for non-payment by a person in a fiduciary capacity is of a criminal character, & a member of Parliament will not be exempt from arrest on the ground of parliamentary privilege.—*Re* GENT, GENT-DAVIS *v.* HARRIS (1888), 40 Ch. D. 190; 58 L. J. Ch. 162; 60 L. T. 355; 37 W. R. 151; 5 T. L. R. 89.

Annotations :—**Refd.** *Re* Smith, Hands *v.* Andrews, [1893] 2 Ch. 1, C. A.; Church's Trustee *v.* Hibbard, [1902] 2 Ch. 784, C. A.

8357. To what orders exception applies—Order not specifying any sum.]—An extrix., deft. in an administration action, was ordered to pay into ct. the proceeds of testator's estate, which she had realised, the amount thereof to be verified by affidavit. Not having complied with that order, an order was subsequently made that an attachment should be issued against her, but when the order came to be drawn up the registrar objected that as no sum was specified in the order, the case was not within 1869 Act, s. 4 (3) :—*Held :* the Act must be strictly construed, & the real contempt being the default in making the affidavit, the case was not within the sub-sect., & the order should not be drawn up.—*Re* SPICER, SPICER *v.* SPICER, [1881] W. N. 85.

Annotation :—**Apld.** *Re* Weatherley (1918), 88 L. J. K. B. 482.

8358. —— Order to pay trust money into court.]—A defaulting trustee, who has disregarded an order for payment of trust money into ct., is not protected from attachment by 1869 Act.—YOUNG *v.* DALLIMORE (1870), 22 L. T. 119; 18 W. R. 445.

8359. —— Consent order.]—An order was made by consent on deft. to deliver to a receiver bills & cheques, "or" to pay the money received in respect of them. Deft. said he delivered over the only bill in his possession, & that he had cashed the others, but did not say whether before or after the order, & contended that the neglect to pay over the money, which he admitted he had received, was merely making a default in payment of a sum of money within 1869 Act, s. 4 :—*Held :* that Act had no application, & deft. must be committed.—HARVEY *v.* HALL (1870), L. R. 11 Eq. 31; 23 L. T. 391.

Annotation :—**Distd.** Mickelthwaite *v.* Fletcher (1879), 27 W. R. 793.

8350 i. *Release of prisoner—On what terms*—1872 *Act, s.* 26.]—An attachment for non-payment of money under an order of the Ct. of Ch. is an attachment for non-payment of a debt within the above sect.; & the Ct. of Bkpcy. is invested with jurisdiction, which, in its discretion, it will exercise to discharge bkpts. from custody under such attachment.

Where bkpt. was in custody at the time of obtaining his protection, & the attachment was issued in a suit wherein he was deft., charged by the bill with fraud, & a decree *pro confesso* was had against him, but no application had been made to the Ct. of Ch. on his behalf in respect of the matters, & he stated in general terms that he had a meritorious defence to the bill :—*Held :* before entertaining an application for his discharge, the ct. would require his accounting statement to be filed & vouched by him, & reported upon.—*Re* WALKER (1873), 7 I. L. T. 61, 73, n. —IR.

Sect. 1.—*Abolition of imprisonment for debt: Sub-sect.* 3, *A.*]

8360. —— Order to transfer fund of consols.]—Where a trustee is ordered to transfer a fund of consols admitted to be due from him, & subsequently default is made, a writ of attachment will issue.—DIGBY *v.* TURNER (1873), 28 L. T. 296; 21 W. R. 471.

8361. —— Decree of Irish Court of Chancery.]—1869 Act, s. 4, extends to an application under 41 Geo. 3, c. 90, to commit for disobedience to a decree of the Irish Ct. of Chancery.—FERGUSON *v.* FERGUSON (1875), 10 Ch. App. 661; 44 L. J. Ch. 615, L. JJ.

Annotation :—**Refd.** Brewster *v.* Prior (1887), 3 T. L. R. 590.

8362. —— Order directing payment after service—Order not served.]—An order was made that a trustee should, within seven days after service of the order, pay to his *cestui que trust* pltf., a sum found due to him by the chief clerk's certificate. Pltf. could not find the trustee so as to serve the order, & applied for a writ of *ne exeat*, on the ground that the trustee was about to go out of the jurisdiction :—*Held :* the case did not fall within 1869 Act, s. 4 (3), the trustee not being in default, as the order only directed payment after service & the order had not been served, & as the debt was not due & payable, a writ of *ne exeat* could not be granted.—COLVERSON *v.* BLOOMFIELD (1885), 29 Ch. D. 341; 54 L. J. Ch. 817; 52 L. T. 478; 33 W. R. 889, C. A.

Annotation :—**Refd.** Lewis *v.* Lewis (1893), 68 L. T. 198.

8363. —— "Court of Equity"—"High Court of Justice"—Judicature Act, 1873 (c. 66), s. 76.]—Under Jud. Act, 1873, s. 76, the words "the High Ct. of Justice" should be read in substitution for the words "a Ct. of Equity" in Debtors Act, 1869, s. 4 (3).—MARRIS *v.* INGRAM (1879), 13 Ch. D. 338; 49 L. J. Ch. 123; 41 L. T. 613; 28 W. R. 434.

Annotations :—**Mentd.** Holroyde *v.* Garnett (1882), 20 Ch. D. 532; *Re* Freston (1883), 11 Q. B. D. 545, C. A.; *Re* Knowles, Doodson *v.* Turner (1883), 52 L. J. Ch. 685; Harvey *v.* Harvey (1884), 26 Ch. D. 644; *Re* Gent, Gent-Davis *v.* Harris (1888), 40 Ch. D. 190; Mitchell *v.* Simpson (1889), 23 Q. B. D. 373; *Re* Edye (1890), 63 L. T. 762; Iles *v.* T—— (1892), 36 Sol. Jo. 502; Buckley *v.* Crawford, [1893] 1 Q. B. 105; *Re* Smith, Hands *v.* Andrews, [1893] 2 Ch.1, C. A.; Piddocke *v.* Burt, [1894] 1 Ch. 343; *Re* Berwick, Berwick *v.* Lane (1899), 81 L. T. 722; Bailey *v.* Plant (1900), 2 W. C. C. 160; *Re* Fewster, Herdman *v.* Fewster, [1901] 1 Ch. 447; Church's Trustee *v.* Hibbard, [1902] 2 Ch. 784, C. A.; *Re* Edgcome, *Ex p.* Edgcome, [1902] 2 K. B. 403, C. A.; Gordon *v.* Holland, Holland *v.* Gordon (1913), 82 L. J. P. C. 81, P. C.

8364. Power of court—1869 (Bankruptcy) Act, s. 19.]—Trustees under a liquidation of a partnership under the above Act employed debtor, after his discharge, to receive money on account of the partnership estate, which he applied in paying his separate creditors. Debtor failed to obey an order to refund made by the county ct. judge :—*Held :* he could be committed for contempt under the above sect.—*Re* WATERS, *Ex p.* WATERS (1874), L. R. 18 Eq. 701; 43 L. J. Bcy. 128; 30 L. T. 766; 22 W. R. 796.

8365. Discretion of court.]—The ct. has no discretion to refuse an application for leave to issue a writ of attachment against a person making default in payment of money, in a case falling within 1869 Act, s. 4 (3).—EVANS *v.* BEAR (1874), 10 Ch. App. 76; 31 L. T. 625; 23 W. R. 67, L. JJ.

Annotations :—**Distd.** *Re* Diamond Fuel Co., Metcalfe's Case (1880), 13 Ch. D. 815. **Refd.** *Re* Watchmakers' Alliance & Goode's Stores (1905), 5 Tax Cas. 117. **Mentd.** Ferguson *v.* Ferguson (1875), 10 Ch. App. 661, L. JJ.

See, now, 1878 Act, s. 1.

8366. —— Whether affected by 1883 Act, s. 9.]—By an order made on Apr. 5, 1889, deft. was directed, as trustee, to pay two sums of cash, which he was alleged to have misapplied, into ct. on or before May 6, but he failed to comply with that order. On May 13 a receiving order was made against him on his own petition, & he was adjudicated a bkpt., & he had not obtained his discharge. Pltf. moved for liberty to issue a writ of attachment against him, the notice of motion being dated Apr. 22, 1890 :—*Held :* the property & person of debtor were protected by the above sect., & the ct. had no jurisdiction to direct a writ of attachment to issue against him.—*Re* SIMES, SIMES *v.* NEWBERY (1890), 62 L. T. 721; 38 W. R. 570.

Annotations :—**Dbtd. & N.F.** *Re* Edye (1890), 63 L. T. 762. Neither *Re Wray* (1887), 36 Ch. D. 138, nor *Mitchell* v *Simpson* (1890), 23 Q. B. D. 373, were cited, & I cannot but think that had the learned judge been aware of these decisions he would have followed them (CHITTY, J.). **Consd.** *Re* Smith, Hands *v.* Andrews, [1893] 2 Ch. 1, C. A. **Refd.** Iles *v.* T—— (1892), 36 Sol. Jo. 502.

8367. —— ——.]—In an action to enforce the trusts of a settlement, deft., a solr. & a former trustee, was ordered to pay over to pltfs., the new trustees, a sum of money retained by him. On Mar. 25, 1892, deft. not having paid the money, pltfs. moved for leave to issue a writ of attachment for contempt. The motion stood over by consent until Apr. 26 & again to May 13. On May 11 a receiving order was made against deft. on his own petition. On the motion coming on for hearing :—*Held :* the receiving order did not deprive the Ct. of Ch. of the power of making a committal order, & the ct. had jurisdiction under 1883 Act, s. 10 (2).—ILES *v.* T. (1892), 36 Sol. Jo. 502.

See, further, Sub-sect. 4, *post.*

8368. —— ——.]—The prohibition contained in 1883 Act does not take away the jurisdiction of the ct. to order, under 1869 Act, s. 4 (3), the committal or attachment of a defaulting trustee, against whom a receiving order in bkpcy. has been made.—*Re* SMITH, HANDS *v.* ANDREWS, [1893] 2 Ch. 1; 62 L. J. Ch. 336; 68 L. T. 337; 57 J. P. 516; 41 W. R. 289; 9 T. L. R. 238; 37 Sol. Jo. 247; 2 R. 360, C. A.

Annotations :—**Consd.** *Re* Berwick, Berwick *v.* Lane (1899), 81 L. T. 722. **Refd.** *Re* Edgcome, *Ex p.* Edgcome, [1902] 2 K. B. 403, C. A.; Church's Trustee *v.* Hibbard, [1902] 2 Ch. 784, C. A.; *Re* Bourne, Davey *v.* Bourne, [1906] 1 Ch. 697, C. A.

8369. —— ——.]—Although 1883 Act does in certain circumstances, by s. 9 relieve debtor from every remedy against his person or property, it does not relieve him from the stringency of orders under 1869 Act, s. 4 (3).—CHURCH'S TRUSTEE *v.* HIBBARD, [1902] 2 Ch. 784; 72 L. J. Ch. 46; 87 L. T. 412; 51 W. R. 293, C. A.

PART XXII. SECT. 1, SUB-SECT. 3.—A.

n. *Power of Court—Imprisonment for Debt Limitation Act,* 1908, s. 3 (2) (c).]—Where a trustee has made default in payment of a sum of money ordered to be paid into ct., which sum is proved or admitted to have been in his possession or control, an attachment may be issued against him although he may have spent the money before the date of the order & be unable to pay. Such trustee is a defaulting trustee within the above sect.—ROSE *v.* MACDONALD (1911), 30 N. Z. L. R. 741.—**N.Z.**

8365 i. *Discretion of court—Defaulter holding fund for investment—No criminal offence—Arrest & Imprisonment for Debt Act,* s. 15.]—A. received from B. money, part of which was to be invested & part expended on B.'s farm. A. placed the money to his wife's credit, made no investment, kept no accounts & could not account at all for a large portion, although he said it had been expended on the farm. While an action against A. by B. was pending, A. allowed his wife & sister-in-law to get judgment against him :—*Held :* there was no criminal offence within the above sect.—BULLOCK *v.* COLLINS (1901), 8 B. C. R. 23.—**CAN.**

8370. —— Refusal to exercise.]—Where a trustee, who has been ordered by the ct. to pay over money in respect of which he is liable, does not comply with such order & after the actual delivery of the judgment, but before the date appearing thereon, has executed a deed of partnership with his wife, by which it is agreed to carry on a business as partners in consideration of a sum of money which it was recited she had advanced to him, the ct. will not exercise its discretion in the trustee's favour.—BREWSTER *v.* PRIOR (1887), 3 T. L. R. 590.

8371. —— Grounds for exercising—No good purpose served by sending trustee to prison.]—Where a defaulting trustee, on being served with notice of motion for a writ of attachment, stated by uncontradicted affidavit, that he had no means at present of paying & was not aware when he should be able to pay, the ct. refused to make any order on the motion, on the ground that no good purpose would be served by sending the defaulter to prison.—BARRETT *v.* HAMMOND (1879), 10 Ch. D. 285; 48 L. J. Ch. 249; 27 W. R. 471.

Annotation :—**Folld.** Holroyde *v.* Garnett (1882), 20 Ch. D. 532.

8372. —— —— ——.]—Under the discretion conferred upon the ct. by 1878 Act, it will refuse to grant an application for a writ of attachment against a defaulting trustee, where, owing to the defaulter being wholly without means, no useful object would be gained thereby.—*Re* MACKENZIE (1881), 44 L. T. 618.

8373. —— —— Misapplication erroneous & not fraudulent.]—The policy of 1869 & 1878 Acts, as to the imprisonment of a defaulting trustee, whether vindictive or not, in the case of a fraudulent & dishonest debtor, gives the ct. a discretion in dealing with exceptional cases, & where the misapplication of trust-money has been erroneous, & not fraudulent, leave to issue a writ of attachment ought not to be given when there is a prospect of eventual payment.—HOLROYDE *v.* GARNETT (1882), 20 Ch. D. 532; 51 L. J. Ch. 663; 46 L. T. 801; 30 W. R. 604.

Annotation :—**Refd.** *Re* Gent, Gent-Davis *v.* Harris (1888), 40 Ch. D. 190.

8374. —— —— Trustee unable to pay.]—Where a trustee has committed a fraudulent breach of trust, the fact that he is unable to pay the money, in respect of which he is in default, is not a sufficient ground to induce the ct., in the exercise of its discretion under 1878 Act, to refuse to allow an attachment to issue against him.—*Re* KNOWLES, DOODSON *v.* TURNER (1883), 52 L. J. Ch. 685; 48 L. T. 760.

Annotations :—**Refd.** Iles *v.* T—— (1892), 36 Sol. Jo. 502; *Re* Berwick, Berwick *v.* Lane (1899), 81 L. T. 722. **Mentd.** *Re* Gent, Gent-Davis *v.* Harris (1888), 40 Ch. D. 190; Aylesford *v.* Poulett, [1892] 2 Ch 60; *Re* Smith, Hands *v.* Andrews, [1893] 2 Ch. 1, C. A.

8375. —— —— ——.]—The mere fact that a defaulting receiver is unable to pay is not sufficient to induce the ct. to exercise the discretion given by 1878 Act, & to refuse leave to issue a writ of attachment against him.—*Re* GENT, GENT-DAVIS *v.* HARRIS (1888), 40 Ch. D. 190; 58 L. J. Ch. 162; 60 L. T. 355; 37 W. R. 151; 5 T. L. R. 89.

Annotations :—**Refd.** *Re* Smith, Hands *v.* Andrews, [1893] 2 Ch. 1, C. A.; Church's Trustee *v.* Hibbard, [1902] 2 Ch. 784, C. A.

8376. —— —— —— Trustee having spent funds before order.]—Where a trustee has made default in payment of a sum of money ordered by the ct. to be paid, & admitted to have been in his possession, an attachment may be issued against him, although he may have spent the money before the order & be unable to pay, & such a trustee is within 1869 Act, s. 4 (3).—MIDDLETON *v.* CHICHESTER (1871), 6 Ch. App. 152; 40 L. J. Ch. 237; 24 L. T. 173; 19 W. R. 369, L. C. & L. JJ.

Annotations :—**Consd.** *Re* Diamond Fuel Co., Metcalfe's Case (1880), 13 Ch. D. 815; *Re* Hulkes, Powell *v.* Hulkes (1886), 33 Ch. D. 552; *Re* Smith, Hands *v.* Andrews, [1893] 2 Ch. 1, C. A.; *Re* Edgcome, *Ex p.* Edgcome, [1902] 2 K. B. 403, C. A. **Refd.** *Re* Hincks, *Ex p.* Cuddiford (1876), 24 W. R. 931; Brewster *v.* Prior (1887), 3 T. L. R. 590; *Re* Walker, Walker *v.* Walker (1890), 60 L. J. Ch. 25; *Re* Greer, Napper *v.* Fanshawe, [1895] 2 Ch. 217; Church's Trustee *v.* Hibbard, [1902] 2 Ch. 784, C. A. **Mentd.** Ferguson *v.* Ferguson (1875), 44 L. J. Ch. 615, L. JJ.; Phosphate Sewage Co. *v.* Hartmont (1877), 25 W. R. 743.

8377. —— —— Trustee not guilty of criminal offence—No contumacious refusal to comply with order.]—Where a trustee had failed to comply with an order to pay into ct. large sums, which had been disallowed him on passing his accounts, it was shown that he had by culpable negligence left trust-money entirely to the management of agents, & that he was unable to prove that the sums disallowed had been applied by them for purposes authorised. There was no charge of any dishonesty, & the trustee alleged on oath that the money had in fact been applied on behalf of the *cestui que trust*, though under a mistaken view of the trustee's duties. The trustee had no means of replacing the sums. The ct., in the exercise of its discretion under 1878 Act, s. 1, refused to attach the trustee, because (1) he had not been guilty of anything in the nature of a criminal offence, & (2) it did not appear that there was any contumacious refusal to comply with the order.—AYLESFORD (EARL) *v.* POULETT (EARL), [1892] 2 Ch. 60; 61 L. J. Ch. 406; 66 L. T. 484; 40 W. R. 424; 8 T. L. R. 446; 36 Sol. Jo. 363.

Annotation :—**Refd.** *Re* Smith, Hands *v.* Andrews, [1893] 2 Ch. 1, C. A.

8378. —— —— Affidavit as to application of funds—Sufficiency of affidavit—Married woman trustee.]—The ct. has jurisdiction to issue a writ of attachment against a married woman, who, as legal personal representative of deceased intestate, fails to comply with an order for payment into ct. of a sum of money forming part of the personal estate of intestate.

Where an affidavit, made by the defaulter's solr. to the effect that she had applied the sum appearing by the account to be in her hands, or part of it, in payment of intestate's debts, was insufficient to enable the ct. to exercise the powers conferred by 1878 Act, or to ascertain how the money which came to her hands had been disposed of :—*Held :* the order for the issue of the writ ought to go, but the writ should lie in the office for three weeks to enable the defaulter to make a proper affidavit, showing what had become of the money traced to her hands.—*Re* TURNBULL, TURNBULL *v.* NICHOLAS, [1900] 1 Ch. 180; 69 L. J. Ch. 187; 81 L. T. 439; 48 W. R. 136; 16 T. L. R. 45; 44 Sol. Jo. 59.

8379. —— Interference by Court of Appeal.]—Where a judge has, in the exercise of the discretion given him by 1878 Act ordered a writ of attachment to issue in a case within 1869 Act, s. 4 (3), the Ct. of Appeal will not interfere with the exercise of his discretion.—PRESTON *v.* ETHERINGTON, ETHERINGTON *v.* PRESTON (1887), 37 Ch. D. 104; 57 L. J. Ch. 176; 58 L. T. 318; 36 W. R. 49; 4 T. L. R. 47, C. A.

Annotations :—**Distd.** Buckley v. Crawford (1892), 62 L. J. Q. B. 87. **Refd.** Iles *v.* T—— (1892), 36 Sol. Jo. 502; *Re* Smith, Hands *v.* Andrews, [1893] 2 Ch. 1, C. A.; Harper *v.* McIntyre (1908), 99 L. T. 191. **Mentd.** *Re* Bourne, Davey *v.* Bourne, [1906] 1 Ch. 697, C. A.

8380. —— ——.]—Where the judge has, in exercise of the discretion given him by 1878 Act, ordered a writ of attachment to issue against a person in a fiduciary position, who has made default in the payment of a sum ordered by the ct., the Ct. of Appeal will not interfere with the

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exercise of his discretion, unless he has exercised it wrongly or under a mistake.—CROWTHER *v.* ELGOOD (1887), 34 Ch. D. 691; 56 L. J. Ch. 416; 56 L. T. 415; 35 W. R. 369; 3 T. L. R. 355, C. A.

Annotations:—**Consd.** *Re* Cotton, *Ex p.* Cooke (1913), 108 L. T. 310, C. A. **Refd.** Preston *v.* Etherington (1887), 57 L. J. Ch. 176, C. A.; *Re* Smith, Hands *v.* Andrews, [1893] 2 Ch. 1, C. A. **Mentd.** *Re* Gent, Gent-Davis *v.* Harris (1888), 40 Ch. D. 190; Piddocke *v.* Burt, [1894] 1 Ch. 343.

8381. ——.]—Where an order for an attachment is made in a case falling within 1869 Act, s. 4, the Ct. of Appeal will not interfere with the exercise of the discretion of the judge making the order, unless it can be shown that he has not exercised his discretion in the particular case, or that he has manifestly proceeded on a wrong ground.—*Re* SMITH, HANDS *v.* ANDREWS, [1893] 2 Ch. 1; 62 L. J. Ch. 336; 68 L. T. 337; 57 J. P. 516; 41 W. R. 289; 9 T. L. R. 238; 37 Sol. Jo. 247; 2 R. 360, C. A.

Annotations:—**Refd.** *Re* Berwick, Berwick *v.* Lane (1899), 81 L. T. 722; *Re* Bourne, Davey *v.* Bourne, [1906] 1 Ch. 697, C. A. **Mentd.** Church's Trustee *v.* Hibbard, [1902] 2 Ch. 784, C. A.; *Re* Edgcome, *Ex p.* Edgcome, [1902] 2 K. B. 403, C. A.

8382. Release of trustee—Not until after final examination.]—Leave was given to issue an attachment against deft. for non-payment of money, being a default by a person acting in a fiduciary capacity. He was attached & put in prison. He then filed a declaration of insolvency & was adjudicated bkpt., & applied for his discharge. The ct. refused the application, intimating that bkpt., if so advised, might renew his application after he had passed his final examination:—*Held:* such refusal was right.—LEWES (EARL) *v.* BARNETT (1877), 6 Ch. D. 252; 47 L. J. Ch. 144; 26 W. R. 101, C. A.

Annotation:—**Mentd.** Ross *v.* Gutteridge (1882), 52 L. J. Ch. 280.

8383. —— **On undertaking to pay by instalments.**]—A trustee in a liquidation, who had been committed to prison for non-compliance with an order directing him to pay into ct. a sum of money, part of debtor's property received by him in his character of trustee, was ordered to be released upon his undertaking to pay the amount due by quarterly instalments.—*Re* FRANK, *Ex p.* HEDGER (1880), 42 L. T. 192.

8384. —— **In error—Jurisdiction to rearrest—Period of imprisonment on rearrest.**]—Debtor was imprisoned under an order made for his attachment for default in payment of a sum of money, which he had been ordered to pay, but was by mistake released before the expiration of the one year limited for imprisonment by 1869 Act, s. 4:—*Held:* there was no jurisdiction to make a second order for attachment for the same default, though, *semble:* an order for re-arrest might have been made under the original order for attachment.

In case of an order for re-arrest, the period of imprisonment must end with the twelve months from the date of the original imprisonment, inclusive of the time debtor had been at liberty (MATHEW, L.J.).—CHURCH'S TRUSTEE *v.* HIBBARD, [1902] 2 Ch. 784; 72 L. J. Ch. 46; 87 L. T. 412; 51 W. R. 293, C. A.

B. "Trustee or Person acting in a fiduciary Capacity."

8385. Meaning generally.]—A "person acting in a fiduciary capacity" means a person who stands in a fiduciary relation towards any other person, who may be entitled to call upon him to pay, whether such other person is or is not pltf. or one of the pltfs. in the action, in which the order is made.—MARRIS *v.* INGRAM (1879), 13 Ch. D. 338; 49 L. J. Ch. 123; 41 L. T. 613; 28 W. R. 434.

Annotations:—**Refd.** Holroyde *v.* Garnett (1882), 20 Ch. D. 532; *Re* Gent, Gent-Davis *v.* Harris (1888), 40 Ch. D. 190; Piddocke *v.* Burt, [1894] 1 Ch. 343; Church's Trustee *v.* Hibbard, [1902] 2 Ch. 784, C. A. **Mentd.** *Re* Freston (1883), 11 Q. B. D. 545, C. A.; *Re* Knowles, Doodson *v.* Turner (1883), 52 L. J. Ch. 685; Harvey *v.* Harvey (1884), 26 Ch. D. 644; Mitchell *v.* Simpson (1889), 23 Q. B. D. 373, D. C.; *Re* Edye (1890), 63 L. T. 762; Iles *v.* T—— (1892), 36 Sol. Jo. 502; Buckley *v.* Crawford, [1893] 1 Q. B. 105; *Re* Smith, Hands *v.* Andrews, [1893] 2 Ch. 1, C. A.; *Re* Berwick, Berwick *v.* Lane (1899), 81 L. T. 722; *Re* Fewster, Herdman *v.* Fewster, [1901] 1 Ch. 447; *Re* Edgcome, *Ex p.* Edgcome, [1902] 2 K. B. 403, C. A.; Gordon *v.* Holland, Holland *v.* Gordon (1913), 82 L. J. P. C. 81, P. C.

8386. Relation of trustee & cestui que trust must exist.]—The special remedy afforded by 1869 Act, in respect of default in payment by a trustee, is a remedy intended to be given only as between trustee & *cestui que trust*, & is not a remedy for a mere creditor, where the person, against whom the remedy is sought to be asserted, is not a trustee for such creditor.—*Re* FIRMIN, LONDON & COUNTY BANKING CO., LTD. *v.* FIRMIN (1887), 57 L. T. 45.

8387. ——.]—1869 Act, s. 4 (3), does not apply when default has been made in the payment of an ordinary debt, but only applies where default has been made by a trustee or person in a fiduciary capacity in payment of a sum in his possession or under his control as trustee.—PRESTON *v.* ETHERINGTON, ETHERINGTON *v.* PRESTON (1887), 37 Ch. D. 104; 57 L. J. Ch. 176; 58 L. T. 318; 36 W. R. 49; 4 T. L. R. 47, C. A.

Annotations:—**Refd.** Buckley *v.* Crawford & Townend (1892), 62 L. J. Q. B. 87; Iles *v.* T—— (1892), 36 Sol. Jo. 502; *Re* Smith, Hands *v.* Andrews, [1893] 2 Ch. 1, C. A.; *Re* Bourne, Davey *v.* Bourne, [1906] 1 Ch. 697; Harper *v.* McIntyre (1908), 99 L. T. 191.

8388. ——.]—In Oct., 1889, bkpt.'s trustee applied for the committal of bkpt., a solr., on the ground of his refusal to give information & assistance to the trustee in respect of his property as required by 1883 Act, s. 24. The matter was adjourned to enable bkpt. to give the necessary information, with liberty to the trustee to apply to the ct. in respect of his costs of the application, & in July, 1891, on application of the trustee, an order was made on bkpt. to pay those costs. Bkpt. failed to comply with that order, & application was made for his committal. Bkpt. stated that it was impossible for him to pay the costs, he never having had any means to do so:—*Held:* the jurisdiction of the ct. ought not to be exercised in cases where all that appeared was a mere non-payment of the money bkpt. had been ordered by the ct. to pay, but if the money he had been ordered by the ct. to pay had been a sum, in respect of which he had committed a breach of trust, or if it had been in some way misappropriated, the ct. might have felt inclined to send him to prison as a punishment, but as that was not the case, the application must be dismissed.—*Re* R., *Ex p.* TRUSTEE (1892), 36 Sol. Jo. 296.

8389. Person receiving money by way of fraudulent preference.]—Money paid by way of fraudulent preference is not held by the person receiving it in a fiduciary capacity, so as to render him liable to imprisonment under 1869 Act, s. 4 (3), on his failing to comply with the order of the ct. to pay

p. *Release of trustee—On grounds of ill-health.*]—The Jud. Amendment Act, 1910, s. 4, gives the ct. discretionary power to discharge from custody a defaulting trustee imprisoned under a writ of attachment, where satisfied that owing to ill-health or disease his further incarceration would be dangerous to life.—ROSE *v.* MACDONALD (1911), 30 N. Z. L. R. 741.—N.Z.

the money over to the trustee.—*Re* CHAPMAN & SHAW, *Ex. p.* HOOSON (1872), 8 Ch. App. 231; 42 L. J. Bcy. 19; 28 L. T. 4; 21 W. R. 152, L. JJ.

Annotations:—**Folld.** *Re* Bishop, *Ex p.* Claxton (1891), 7 T. L. R. 610, D. C. **Mentd.** *Re* Hind, *Ex p.* Sharp (1877), 37 L. T. 168.

8390. ——.]—A creditor, who has received money from bkpt. by way of fraudulent preference & has been ordered to repay it to the trustee, is not a person holding money in a fiduciary capacity, & cannot be imprisoned under the sect.—*Re* BISHOP, *Ex p.* CLAXTON (1891), 7 T. L. R. 610; 8 Morr. 221, D. C.

8391. Company promoter.]—A sale by a promoter to his co. was set aside for fraud, & the promoter ordered to repay the purchase-money to the co. The promoter instituted proceedings in liquidation under 1869 Act, s. 125, & a receiver of his property was appointed. No part of the sum ordered to be repaid to the co. was paid. The co. moved to attach the promoter:—*Held:* attachment could not issue because the promoter was not a trustee or "person acting in a fiduciary capacity."—PHOSPHATE SEWAGE CO. *v.* HARTMONT (1877), 25 W. R. 743.

8392. Son managing father's farms—Action by parties interested in father's estate.]—A son in the course of management of one of his father's farms sold part of the farming stock, & received the proceeds. Upon the father's death an action was brought by parties interested in his estate against the son for payment of the money received by him, & for accounts. The son having failed to comply with an order made in the action for payment of a sum of money into ct.:—*Held:* he was a "person acting in a fiduciary capacity" & the ct. not being satisfied that he had not the means of payment, leave was given to pltfs. to issue a writ of attachment against him for non-payment.—MARRIS *v.* INGRAM (1879), 13 Ch. D. 338; 49 L. J. Ch. 123; 41 L. T. 613; 28 W. R. 434.

Annotations:—**Refd.** Holroyde *v.* Garnett (1882), 20 Ch. D. 532; *Re* Gent, Gent-Davis *v.* Harris (1888), 40 Ch. D. 190; Buckley *v.* Crawford, [1893] 1 Q. B. 105; *Re* Smith, Hands *v.* Andrews, [1893] 2 Ch. 1, C. A.; Piddocke *v.* Burt, [1894] 1 Ch. 343; *Re* Berwick, Berwick *v.* Lane (1899), 81 L. T. 722; *Re* Fewster, Herdman *v.* Fewster, [1901] 1 Ch. 447. **Mentd.** *Re* Freston (1883), 11 Q. B. D. 545, C. A.; *Re* Knowles, Doodson *v.* Turner (1883), 52 L. J. Ch. 685; Harvey *v.* Harvey (1884), 26 Ch. D. 644; Mitchell *v.* Simpson (1889), 23 Q. B. D. 373, D. C.; *Re* Edye (1890), 63 L. T. 762; Iles *v.* T—— (1892), 36 Sol. Jo. 502; Church's Trustee *v.* Hibbard, [1902] 2 Ch. 784, C. A.; *Re* Edgcome, *Ex p.* Edgcome, [1902] 2 K. B. 403, C. A.; Gordon *v.* Holland, Holland *v.* Gordon (1913), 82 L. J. P. C. 81, P. C.

8393. Director called on to pay value of promotion shares.]—A director of a co. was ordered under Cos. Act, 1862 (c. 89), s. 165, to pay the full value of shares received by him from the promoter, upon which no money had been paid. Upon motion to commit him to prison for non-payment of the money:—*Held:* his case was not that of a defaulting trustee within 1869 Act, s. 4, but of a shareholder who had not paid the full amount due from him.—*Re* DIAMOND FUEL CO., METCALFE'S CASE (1880), 13 Ch. D. 815; 49 L. J. Ch. 347; 42 L. T. 178; 28 W. R. 435.

Annotation:—**Mentd.** *Re* Bourne, Davey *v.* Bourne, [1906] 1 Ch. 697, C. A.

8394. London agent of country solicitor.]—A London solr. made default in payment of a sum of money, ordered to be paid by him in an action brought by a country solr. against him, as pltf.'s London agent, for an account:—*Held:* deft. came within 1869 Act, s. 4 (3), as a person acting in a fiduciary capacity.—LITCHFIELD *v.* JONES (1887), 36 Ch. D. 530; 57 L. J. Ch. 100; 58 L. T. 20; 36 W. R. 397.

Annotations:—**Refd.** *Re* Gent, Gent-Davis *v.* Harris (1888), 40 Ch. D. 190. **Mentd.** Reid *v.* Burrows, [1892] 2 Ch. 413.

8395. Auctioneer receiving purchase-money.]—An auctioneer, acting on the instructions of the personal representatives of testator, sold & received the purchase-money of property forming part of the estate. Afterwards, not having paid the money to the representatives, he also failed to obey an order of the ct. to pay it to a receiver appointed in an action to administer the estate:—*Held:* he was "a person acting in a fiduciary capacity," & was liable to attachment for disobedience to the order.—CROWTHER *v.* ELGOOD (1887), 34 Ch. D. 691; 56 L. J. Ch. 416; 56 L. T. 415; 35 W. R. 369; 3 T. L. R. 355, C. A.

Annotations:—**Distd.** Piddocke *v.* Burt, [1894] 1 Ch. 343. **Refd.** *Re* Gent, Gent-Davis *v.* Harris (1888), 40 Ch. D. 190; *Re* Cotton, *Ex p.* Cooke (1913), 108 L. T. 310, C. A. **Mentd.** Preston *v.* Etherington (1887), 57 L. J. Ch. 176, C. A.; *Re* Smith, Hands *v.* Andrews, [1893] 2 Ch. 1, C. A.

8396. Defaulter holding fund as trustee—Under directions of court on compromise of action.]—Where, by an order made for the compromise of an action on the admission of debtor that he had a specified sum of money in his hands, debtor was directed to hold the money upon certain trusts:—*Held:* the money was in his possession or under his control as a trustee within 1869 Act, s. 4 (3), & he, having failed to comply with an order to pay the fund into ct., was liable to attachment.—PRESTON *v.* ETHERINGTON, ETHERINGTON *v.* PRESTON (1887), 37 Ch. D. 104; 57 L. J. Ch. 176; 58 L. T. 318; 36 W. R. 49; 4 T. L. R. 47, C. A.

Annotations:—**Folld.** Harper *v.* McIntyre (1908), 99 L. T. 191. **Refd.** Buckley *v.* Crawford & Townend (1892), 62 L. J. Q. B. 87; Iles *v.* T—— (1892), 36 Sol. Jo. 502; *Re* Smith, Hands *v.* Andrews, [1893] 2 Ch. 1, C. A.; *Re* Bourne, Davey *v.* Bourne, [1906] 1 Ch. 697.

8397. Receiver & manager.]—A receiver & manager is a person acting in a fiduciary capacity, & can be attached for default in obeying an order to pay money into ct.—*Re* GENT, GENT-DAVIS *v.* HARRIS (1888), 40 Ch. D. 190; 58 L. J. Ch. 162; 60 L. T. 355; 37 W. R. 151; 5 T. L. R. 89.

Annotations:—**Refd.** Church's Trustee *v.* Hibbard, [1902] 2 Ch. 784, C. A. **Mentd.** *Re* Smith, Hands *v.* Andrews, [1893] 2 Ch. 1, C. A.

8398. Partner receiving funds on behalf of firm.]—One of two partners receiving money on account of the firm does not receive it "in a fiduciary capacity" so as to be within 1869 Act, s. 4 (3).

P., co-partner with B., having been ordered to pay money in his hands to a receiver of the debts & other money payable to the firm of P. & B., made default in payment:—*Held:* P. was not within s. 4 (3) in respect of the money so ordered to be paid, & was protected by the sect.—PIDDOCKE *v.* BURT, [1894] 1 Ch. 343; 63 L. J. Ch. 246; 70 L. T. 553; 42 W. R. 248; 38 Sol. Jo. 141; 8 R. 104.

Annotations:—**Consd.** Rodriguez *v.* Speyer, [1919] A. C. 59, H. L. **Mentd.** Gordon *v.* Holland, Holland *v.* Gordon (1913), 82 L. J. P. C. 81, P. C.

8399. At what time fiduciary relationship ascertained.]—In cases of trustee & person acting in a fiduciary capacity the period to be looked to is that of the act done.—*Re* STRONG (1886), 32 Ch. D. 342; 55 L. J. Ch. 553; 55 L. T. 3; 51 J. P. 6; 34 W. R. 614, C. A.

Annotation:— **Refd.** *Re* Gent, Gent-Davis *v.* Harris (1888), 40 Ch. D. 190.

8400. How fiduciary relationship terminated—Personal order against executor for payment.]—Where the only creditor of deceased debtor has obtained in an administration action a personal order against the exor. for payment of his certified debt, the fiduciary relation, which previously existed between the creditor & exor. is determined, and the creditor cannot subsequently pursue any remedy depending on the continued existence of this fiduciary relation; & he is not entitled to an

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order against the exor. for payment into ct. of money in his hands as such exor., or to the subsequent attachment of the exor. under the punitive jurisdiction reserved to the ct. under 1869 Act, s. 4 (3).—*Re* THOMAS, SUTTON, CARDEN & CO., LTD. *v.* THOMAS, [1912] 2 Ch. 348; 81 L. J. Ch. 603; 106 L. T. 996; 56 Sol. Jo. 571, C. A.

C. "Sum in his Possession or under his Control."

8401. Sum composed of principal & interest not distinguished.]—It must be shown that the money ordered to be paid in had been in the fiduciary's possession or under his control. Where the order directs payment of a sum composed of principal & interest not distinguished, an attachment cannot be issued because so much of the sum as represents interest cannot be said to have been in his possession or under his control.—*Re* HICKEY, HICKEY *v.* COLMER (1886), 55 L. T. 588; 35 W. R. 53.

8402. —— "Proceeds of sale" & interest.]—Where an order is made, directing in the usual form the payment of a principal sum by a defaulting trustee, such trustee is within 1869 Act, s. 4 (3), as such money is regarded as being "in his possession or under his control," & an attachment will issue against him, notwithstanding proof that he has wasted or squandered it.

Where an order was made on a defaulting trustee for payment of one lump sum, which was stated by the order to consist of "proceeds of sale" of certain securities, & of the interest on such proceeds:—*Held:* no attachment could issue, as it was impossible to distinguish between what was principal & what was interest, & impossible to say that the interest had ever been in the trustee's possession or under his control.—MIDDLETON *v.* CHICHESTER (1871), 6 Ch. App. 152; 40 L. J. Ch. 237; 24 L. T. 173; 19 W. R. 369, L. C. & L. JJ.

Annotations:—**Distd.** Ferguson *v.* Ferguson (1875), 44 L. J. Ch. 615; **Consd.** *Re* Edgcome, *Ex p.* Edgcome, [1902] 2 K. B. 403, C. A. **Refd.** *Re* Hincks, *Ex p.* Cuddiford (1876), 24 W. R. 931; Phosphate Sewage Co. *v.* Hartmont (1877), 25 W. R. 743; *Re* Diamond Fuel Co., Metcalfe's Case (1880), 13 Ch. D. 815; Brewster *v.* Prior (1887), 3 T. L. R. 590; *Re* Walker, Walker *v.* Walker (1890), 60 L. J. Ch. 25; *Re* Smith, Hands *v.* Andrews, [1893] 2 Ch. 1, C. A.; *Re* Greer, Napper *v.* Fanshawe, [1895] 2 Ch. 217. **Mentd.** *Re* Hulkes, Powell *v.* Hulkes (1886), 33 Ch. D. 552; Church's Trustee *v.* Hibbard, [1902] 2 Ch. 784, C. A.

8403. Need not be in sole possession—Misapplication by one of two executors.]—In order to bring a trustee within 1869 Act, s. 4 (3), it is not necessary that the money should have been in his sole possession or under his sole control.

Where a sum of money, forming part of the assets of testator's estate, was paid into a bank to the joint account of two exors., with power to one of them to draw cheques, & he drew out the money & misapplied it, & an order was made against both exors. for payment of the money into ct.:—*Held:* the other exor. was within s. 4 (3), & a writ of attachment might be issued against him for non-payment of the money.—EVANS *v.* BEAR (1874), 10 Ch. App. 76; 31 L. T. 625; 23 W. R. 67, L. JJ.

Annotations:—**Refd.** Ferguson *v.* Ferguson (1875), 10 Ch. App. 661, L. JJ.; *Re* Diamond Fuel Co., Metcalfe's Case (1880), 13 Ch. D. 815; *Re* Watchmaker's Alliance & Goode's Stores (1905), 5 Tax Cas. 117.

8404. Money which trustee had neglected to recover.]—A trustee, who has been ordered to pay money which he had neglected to recover, is not within 1869 Act, s. 4 (3), & cannot be committed for default in paying the money.—FERGUSON *v.* FERGUSON (1875), 10 Ch. App. 661; 44 L. J. Ch. 615, L. JJ.

Annotation:—**Refd.** Brewster *v.* Prior (1887), 3 T. L. R. 590.

8405. Promise to make good deficiency of former trustee.]—For the purpose of bringing a trustee within 1869 Act, s. 4 (3), it must appear that money ordered to be paid by him had at some time been in his possession or under his control, & the fact that a trustee has, upon his appointment, promised to make good the deficiency of a former trustee does not make him liable to committal for non-compliance with an order directing him to pay.—*Re* HINCKS, *Ex p.* CUDDEFORD (1876), 45 L. J. Bcy. 127; 34 L. T. 666; 24 W. R. 931.

8406. Costs of motion for order to pay taxed costs.]—A trustee in liquidation was ordered to pay the taxed costs of the solr., & "the costs of the motion," upon which the order was made. On default, he was committed to prison for his contempt of ct. in disobeying the order:—*Held:* the order of committal was wrong, for "the costs of the motion" were not money in his hands as a trustee.—*Re* HIND, *Ex p.* SHARP (1877), 37 L. T. 168.

8407. Debt due by executor personally to deceased.]—An exor. making default in payment of a sum of money found due from him in an administration action, & which he has been ordered to pay into ct., is within 1869 Act, s. 4 (3), notwithstanding that the sum consists of a debt, which had been owing to testator in his life, if the exor. had been in a fiduciary relation to the testator in respect thereof.—*Re* HICKEY, HICKEY *v.* COLMER (1886), 55 L. T. 588; 35 W. R. 53.

8408. ——.]—A debtor, who is appointed exor. by his creditor, & who proves the will, is deemed in equity to have paid the debt to himself as exor., & to have the money in his possession in a fiduciary capacity as assets belonging to testator's estate, &, where an order is made against him in an administration action declaring him accountable for the debt as assets in his hands belonging to testator, & ordering him to pay within a given time, & he makes default, he is liable to attachment under 1869 Act, s. 4; but *semble:* the ct. in the exercise of its discretion will not make an order for attachment against him when he is not morally blameworthy in the matter, as where he never had any means available for payment of the debt, or where, being insolvent, he honestly seeks the protection of the Ct. of Bkpcy.

Where a debtor exor., who had disobeyed an order of a Ct. of Equity for payment of the debt, had, since his appointment as exor., means available for payment, but had denuded himself of his property, & filed a petition in bkpcy. for the purpose of evading payment:—*Held:* the ct. had jurisdiction to make an order for attachment against him, & the order ought to be made.—*Re* BOURNE, DAVEY *v.* BOURNE, [1906] 1 Ch. 697; 75 L. J. Ch. 474; 94 L. T. 750; 22 T. L. R. 417, C. A.

Annotation:—**Refd.** *Re* Thomas, Sutton, Carden *v.* Thomas (1912), 56 Sol. Jo. 571, C. A.

8409. Difference between value of bonds—At time of sale & time of judgment.]—Trustees were found liable for a breach of trust in improperly

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PART XXII. SECT. 1, SUB-SECT. 3.—C.

8401 i. *Sum composed of interest & commission on sale not distinguished—Imprisonment for Debt Limitation Act,* 1908, s. 3, (2) (c).]—An order for payment by a trustee into ct. included a sum for interest, & also commission received by him on the sale of trust property, for which amount he was liable to account to the beneficiaries:—*Held:* (1) the commission was not a sum of money within the possession or control of the trustee within the above sub-sect.; (2) as the amount could be distinguished from the other sums due, the ct. had power to amend the order for attachment by deducting the commission.—ROSE *v.* MACDONALD (1911), 30 N. Z. L. R. 741.—N.Z.

selling certain bonds, forming part of their trust funds. By the judgment in the action they were ordered to make good the value of the bonds at the date of the judgment. The value of the bonds at the date of the judgment was greater than the value of such bonds at the time of the sale :—*Held :* the difference between the value of the bonds at the time of sale & their value at the date of the judgment was not in the possession of defts. or under their control within 1869 Act, s. 4 (3), & the order could not be enforced by attachment.—*Re* WALKER, WALKER *v.* WALKER (1890), 60 L. J. Ch. 25 ; 63 L. T. 237 ; 38 W. R. 766.

8410. Heirlooms in possession of tenant for life—Commission on insurance of life of tenant for life.]—Under the will of B., persons entitled to possession of the B. estates might sell the heirlooms, but were to replace them out of the proceeds of sale by articles of a similar character. F. was co-trustee with C., the tenant for life of the B. estates, & C., with the consent of F., sold the heirlooms, & received the purchase-money, but did not purchase other articles in their place. The purchaser paid F. £200 in connection with the sale. Before F., a solr., was appointed a trustee he received £200 from an insurance co. as commission on policies effected through him on C.'s life as security for trust money lent to C. On the death of C. the B. estates passed to A., who commenced an action for the administration of the estate of C., & an order was made directing F. to pay pltf. the £200 received in connection with the sale of the heirlooms, & also the £200 received from the insurance co. F. failed to comply with that order, & A. applied for leave to issue a writ of attachment against him :—*Held :* the payment of the £200 received as commission from the insurance co. ought not to be enforced by attachment, as the matter was not within 1869 Act, s. 4 (3), but attachment ought to issue in respect of the £200 paid by the purchaser of the heirlooms.—*Re* BERWICK (LORD), BERWICK (LORD) *v.* LANE (1900), 81 L. T. 797, C. A.

8411. Must be actual control of money—Constructive receipt not sufficient.]—Upon an application for leave to issue a writ of attachment against a trustee, who has failed to comply with an order for payment into ct. of money alleged to be "in his possession or under his control," it must be strictly proved that the money so ordered to be paid has been in the actual possession or control of the person sought to be committed. It is not sufficient to prove mere constructive receipt by a solr. or agent on such person's behalf.—*Re* FEWSTER, HERDMAN *v.* FEWSTER, [1901] 1 Ch. 447 ; 70 L. J. Ch. 254 ; 84 L. T. 45 ; 17 T. L. R. 205 ; 45 Sol. Jo. 240.

Annotations :—**Folld.** *Re* Wilkins, Elmsley *v.* Wilkins, [1901] W. N. 202. **Apld.** *Re* Underwood, *Re* Bowles (1903), 51 W. R. 335. **Refd.** Harper *v.* McIntyre (1908), 99 L. T. 191.

8412. —— Evidence of control.]—An admission in the pleadings in an action, in which judgment has gone in the absence of deft. at the trial, cannot, for the purpose of founding an application to attach deft. under 1869 Act, s. 4 (3), as having made default as a trustee when ordered to pay a "sum in his possession or under his control," be put higher than an admission by counsel at the trial or an admission of assets in the certificate of a master in an administration action.

Where deft. charged to his solrs. scheduled debts owing to him in his business with the payment of costs due or to become due, & by a verbal agreement promised pltfs. that if without notice to debtors they would allow him to collect the debts on their behalf, he would pay the proceeds over to them as & when received, & in an action brought against him claiming a declaration that he was a trustee of the proceeds for pltfs., deft. admitted in his statement of defence that he or his agent had collected the book debts, & expended same in discharging liabilities in his business, & in default of his appearance at the trial an order is made that deft. pay a sum being the amount of the book debts in the schedule to pltfs., the ct. will not give leave to issue a writ of attachment. —HARPER *v.* MCINTYRE (1908), 99 L. T. 191 ; 24 T. L. R. 738 ; 52 Sol. Jo. 533.

8413. —— Master's certificate insufficient evidence of control.]—Deft. was the exor. & trustee of testator, &, by the master's certificate, it was certified that deft. had "received personal estate" of an amount stated, & had paid, or was entitled to be allowed on account thereof, a sum mentioned, "leaving a balance due from him of £1,409 19*s.* 3*d.*," & it was further certified that deft. had "received rents & profits of testator's real estate" to an amount stated, & had paid, or was entitled to be allowed on account thereof, a sum mentioned, "leaving a balance due from him of £82 7*s.* 4*d.*" On a motion for the committal of deft. for not lodging in ct. £1,492 6*s.* 7*d.*, or, in the alternative, for leave to issue a writ of attachment against him :—*Held :* the master's certificate was not sufficient evidence that the money ordered to be paid into ct. was or had been in the actual possession or control of deft.—*Re* WILKINS, EMSLEY *v.* WILKINS (1901), 46 Sol. Jo. 14.

Annotation :—**Refd.** Harper *v.* McIntyre (1908), 99 L. T. 191.

SUB-SECT. 4.—DEFAULT BY SOLICITOR.

See 1869 Act, s. 4 (4) ; 1878 Act, s. 1.

8414. General effect of exception.]—1869 Act does not prevent a writ of attachment from issuing against a solr., who has made default in payment of a sum, which he has been ordered by the ct. to pay.—*Re* RUSH (1870), L. R. 9 Eq. 147 ; 21 L. T. 692 ; 18 W. R. 331 ; *subsequent proceedings*, L. R. 10 Eq. 442.

Annotations :—**Folld.** *Re* Barfield & Rush (1871), 19 W. R. 466. **Refd.** *Re* Hope (1872), 7 Ch. App. 523, L. JJ.

See, further, CONTEMPT OF COURT, ATTACHMENT, & COMMITTAL ; SOLICITORS.

8415. Order punitive—No privilege from arrest.]—Disobedience by a solr. to an order of ct. made against him as an officer of the ct. is a contempt of a criminal nature, & an attachment granted to enforce compliance with the order of ct. is process of a punitive & disciplinary character, & no privilege from arrest exists or can be claimed against the execution of the attachment.

F. was a solr., & an order was made at chambers that he should deliver up certain documents & should pay £10 & certain costs. The order was made against F. as an officer of the ct. F. delivered up the documents, but he did not pay the £10 or the costs. An order for the attachment of F.

8411 i. *Must be actual control of money—Imprisonment for Debt Limitation Act*, 1908, *s.* 3 (2) (*c*).]—For the purpose of bringing a trustee within the above sub-sect. it must appear that the money ordered to be paid by him was at some time within his possession or control.—ROSE *v.* MACDONALD (1911), 30 N. Z. L. R. 741.—**N.Z.**

8411 ii. —— *Act No.* 379—*Power of Supreme Court—Habeas corpus.*]—Where an insolvent trustee is committed under the above Act for contempt in disobeying an order to pay over money, the Supreme Ct. will, on *habeas corpus*, ascertain whether there was evidence of the facts on which the warrant purports to have been based. It must be shown that insolvent had the money still under his control at the time when he was ordered to pay.—*Re* GRAY (1876), 2 V. L. R. 241.—**AUS.**

Sect. 1.—*Abolition of imprisonment for debt: Subsect.* 4.]

for contempt of ct. was thereupon made at chambers. F. then paid the £10, but he did not pay the costs. He was arrested under the attachment, whilst he was on his return to his office from a metropolitan police ct., where he had been as advocate attending to defend certain persons at a preliminary inquiry on a charge of treason-felony: —*Held:* he was not entitled to be discharged from custody on the ground of privilege from arrest, the attachment having been granted for a contempt of a criminal nature.—*Re* FRESTON (1883), 11 Q. B. D. 545; 52 L. J. Q. B. 545; 49 L. T. 290; 31 W. R. 804, C. A.

Annotations:—**Consd.** *Re* Dudley (1883), 12 Q. B. D. 44, C. A.; Harvey *v.* Harvey (1884), 26 Ch. D. 644; *Re* Wray (1887), 36 Ch. D. 138, C. A. **Apld.** *Re* Gent, Gent-Davis *v.* Harris (1888), 40 Ch. D. 190; *Re* Grey, [1892] 2 Q. B. 440, C. A. **Consd.** Seldon *v.* Wilde, [1911] 1 K. B. 701, C. A. **Refd.** Seldon *v.* Wilde, [1910] 2 K. B. 9; Scott *v.* Scott, [1913] A. C. 417, H. L. **Mentd.** *Re* Wickham, Marony *v.* Taylor (1887), 35 Ch. D. 272, C. A.; *Re* Evans, Evans *v.* Noton, [1893] 1 Ch. 252, C. A.; Seaward *v.* Paterson (1897), 66 L. J. Ch. 267, C. A.; Haydon *v.* Haydon (1911), 104 L. T. 477, C. A.; Scott *v.* Scott, [1912] P. 241, C. A.

8416. —— **Lack of means no defence.**]—A solr. was ordered, as an officer of the ct., to pay to a client a sum of money, which the solr. had dealt with as his own. The order not having been complied with, an order for attachment was made, although it was proved that the solr. had no means of paying:—*Held:* the attachment was rightly ordered, as the order for payment was punitive, & not a mere civil process, so as to bring the solr. within the protection of 1869 Act, s. 4.—*Re* DUDLEY, *Ex p.* MONET (1883), 12 Q. B. D. 44; 53 L. J. Q. B. 16; 49 L. T. 737; 32 W. R. 264, C. A.

Annotations:—**Consd.** *Re* Wray (1887), 36 Ch. D. 138, C. A.; *Re* Grey, [1892] 2 Q. B. 440, C. A.; Seldon *v.* Wilde, [1911] 1 K. B. 701, C. A. **Refd.** *Re* Strong (1886), 32 Ch. D. 342, C. A.; *Re* Gent, Gent-Davis *v.* Harris (1888), 40 Ch. D. 190; **Mentd.** Godfrey *v.* G. (1895), 73 L. T. 599, C. A.

8417. Jurisdiction of court—Effect of 1883 Act, s. 9—Solicitor becoming bankrupt.]—An attachment against a solr. for his default in the payment of a sum of money, which he has been ordered to pay in his character of an officer of the ct., is not a merely civil process, but is in its nature punitive, & the fact that a receiving order in bkpcy. has been made against the solr., is not of itself a sufficient reason for refusing to issue an attachment against him; but when such an order for the payment of money has been made against a solr. before the making of a receiving order against him, & he has not obeyed it, the ct. has a discretion whether it will order an attachment to issue by way of punishment to the solr., & it will decline to do so, if it is satisfied that the person who asks for the order can derive no benefit from it, & that the making of it will embarrass the bkpcy. proceedings.

1883 Act, s. 9 (1), has no application to proceedings pending against debtor at the date of the receiving order.—*Re* WRAY (1887), 36 Ch. D. 138; 56 L. J. Ch. 1106; 57 L. T. 605; 36 W. R. 67; 3 T. L. R. 708, C. A.

Annotations:—**Apprvd.** Mitchell *v.* Simpson (1889), 23 Q. B. D. 373. **Foll.** *Re* Edye (1890), 63 L. T. 762. **Consd.** *Re* Solicitor (1891), 7 T. L. R. 183; *Re* Smith, Hands *v.* Andrews, [1893] 2 Ch. 1, C. A.; *Re* Berry, Duffield *v.* Williams, [1896] 1 Ch. 939. **Refd.** *Re* Gent, Gent-Davis *v.* Harris (1888), 40 Ch. D. 190; Iles *v.* T—— (1892), 36 Sol. Jo. 502.

8418. —— —— ——.]—The ct. has jurisdiction to order a writ of attachment to issue against a solr. for default in payment of a sum of money, which he has been ordered to pay in his character of an officer of the ct., notwithstanding that he has subsequently become bkpt.—*Re* EDYE (1891), 63 L. T. 762; 39 W. R. 198; *sub nom. Re* A SOLICITOR, 7 T. L. R. 183.

Annotations:—**Refd.** Iles *v.* T—— (1892), 36 Sol. Jo. 502; *Re* Smith, Hands *v.* Andrews, [1893] 2 Ch. 1, C. A.

8419. —— —— ——.]—Where an application is made against a solr. for a writ of attachment for his contempt in failing to comply with an order of the ct., directing him to pay a sum of money received by him on behalf of appct. & certified by a taxing-master's certificate to be due, the ct. is not precluded from issuing the writ by reason of the fact that the solr. is a bkpt.—*Re* NORRIS (1917), 33 T. L. R. 309; *sub nom. Re* N., 61 Sol. Jo. 445.

See, also, No. 8367, *ante.*

8420. "In his character of an officer of the court"—Bills of costs taxed as due to another solicitor.]—Default by a solr. in payment of a bill of costs, found on taxation to be due by him to another solr. whom he had employed to act for him, is "default by a solr. in payment of a sum of money, when ordered to pay same in his character of an officer of the ct. making the order," within 1869 Act, s. 4 (4), & an attachment may be issued against him.—*Re* BARFIELD (1871), 24 L. T. 248.

8421. —— **Costs of unauthorised action.**]—An attorney, having brought an action without any authority to do so from pltf., was ordered to pay deft.'s costs of the action:—*Held:* the liability to pay such costs came within s. 4 (4). —JENKINS *v.* FEREDAY (1872), L. R. 7 C. P. 358; 41 L. J. C. P. 152; 27 L. T. 37; 20 W. R. 781.

8422. —— **Costs found due as unsuccessful litigant.**]—A common order was made against a solr. for delivery of his bill of costs & taxation. He moved to discharge that order, & his application was refused, with costs. He then appealed, & his appeal was dismissed with costs:—*Held:* he could not be attached for non-payment of those costs, as he was ordered to pay them only in the character of an unsuccessful litigant.—*Re* HOPE (1872), 7 Ch. App. 523; 41 L. J. Ch. 797; 26 L. T. 814; 20 W. R. 694, L. JJ.

Annotations:—**Consd.** *Re* Solicitor, [1895] 2 Ch. 66. **Distd.** *Re* N. (1917), 61 Sol. Jo. 445.

8423. —— ——.]—*Re* R., *Ex p.* TRUSTEE, No. 8388, *ante.*

8424. —— **Default in paying instalments—Original order for payment of sum—Subsequent agreement for payment by instalments.**]—An order made against A., a solr., under 1869 Act, for payment of money by a certain day, with notice that in default his property would be liable to sequestration & himself to be arrested & committed to prison, was followed by the issue of a *fi. fa.*, under which the sheriffs took possession. An arrangement was then made by which the sheriffs withdrew

PART XXII. SECT. 1, SUB-SECT. 4.

8417 i. *Jurisdiction of Court—Solicitor becoming bankrupt—Effect of* 1872 *Act, s.* 26 (4).]—Where default has been made by an attorney in payment of a sum of money, when ordered to pay same in his character of an officer of the ct. making the order, within the above sect., a writ of attachment for the non-payment is a matter of right, & the ct. has no jurisdiction to refuse it, notwithstanding that subsequent to the order for payment, the defaulter has been adjudicated bkpt., & has obtained a protection order from the Ct. of Bkpcy., & passed his final examination, without having obtained his certificate of conformity.—*Re* A. B., (1877), 11 I. L. T. 90.—IR.

8417 ii. —— —— *Effect of* 1883 *Act, s.* 57.]—A solr., having been ordered to pay money found to be due from him to a client on taxation of his bill, disobeyed the order, & a writ of attachment was issued for the contempt. Before his arrest he filed a declaration of insolvency:—*Held:* he was protected from arrest by the above sect., &, having been arrested, must be discharged from custody.—*Re* COOKE (1889), 8 N. Z. L. R. 465.—N.Z.

from possession, upon an engagement by A. to pay the amount, costs, charges, & interest, by monthly instalments, & in default that they should re-enter under the original order & proceed with the execution of the warrant as if they had not withdrawn from possession. Default having been made in payment of the instalments :—*Held :* after the arrangement for withdrawing from possession & payment by instalments, A. could not be attached for default.—HARVEY *v.* HALL (1873), L. R. 16 Eq. 324 ; 43 L. J. Ch. 95 ; 28 L. T. 734 ; *sub nom. Re* HALL, HARVEY *v.* HALL, 21 W. R. 783,

Annotations :—**Distd.** Mickelthwaite *v.* Fletcher (1879), 27 W. R. 793 ; *Re* Fereday, [1895] 2 Ch. 437.

8425. —— —— —— ——.]—A solr. received money belonging to a client, & paid it in to his own banking account. Afterwards an order directing him to pay the money to the client was made by the ct. After the making of that order the client signed an agreement to accept payment by instalments. Default was made in payment of the instalments, & a further order for payment was made. That order having been disobeyed, an order for attachment against the solr. was made. No order had been made calling on the solr. to answer affidavits, but the matter had been referred to the master, who had reported that the money was due to the client :—*Held :* the case was within 1869 Act, s. 4 (4), & the solr. was liable to imprisonment, & the order of attachment was rightly made. —*Re* DUDLEY, *Ex p.* MONET (1883), 12 Q. B. D. 44 ; 53 L. J. Q. B. 16 ; 49 L. T. 737 ; 32 W. R. 264, C. A.

Annotations :—**Consd.** *Re* Wray (1887), 36 Ch. D. 138, C. A. ; *Re* Grey, [1892] 2 Q. B. 440, C. A. ; Seldon *v.* Wilde, [1911] 1 K. B. 701, C. A. **Refd.** *Re* Strong (1886), 32 Ch. D. 342, C. A. ; *Re* Gent, Gent-Davis *v.* Harris (1888), 40 Ch. D. 190. **Mentd.** Godfrey *v.* G. (1895), 73 L. T. 599, C. A.

8426. —— —— —— ——.]—After a writ of attachment had been issued at the instance of clients against a solr., for his non-payment of £78, which he had been ordered to pay, the clients, at the request of the solr., agreed to suspend proceedings under the writ for fourteen days, upon the solr. paying £25 on account. That was done, but the solr. did not make any further payment within the extended time, & he was arrested. Upon a motion by the solr. for his discharge from custody :—*Held :* by giving time & accepting part payment, the clients had not waived their right to enforce the writ of attachment.—*Re* FEREDAY, [1895] 2 Ch. 437 ; 73 L. T. 56 ; 13 R. 639.

8427. —— **Sums due to country solicitor.**]—A solr., the London agent of a country solr., made default in payment of a sum ordered to be paid by him in an action for an account of his agency :—*Semble :* deft. was not liable to imprisonment under 1869 Act, s. 4 (4) as a solr. ordered to pay in his capacity as officer of the ct.—LITCHFIELD *v.* JONES (1887), 36 Ch. D. 530 ; 57 L. J. Ch. 100 ; 58 L. T. 20 ; 36 W. R. 397.

Annotations :—**Apld.** *Re* Gent, Gent-Davis *v.* Harris (1888), 40 Ch. D. 190. **Distd.** Reid *v.* Burrows, [1892] 2 Ch. 413.

8428. Costs of application for return of excess costs—Gross assets found not to exceed £300.]—Where a solr. was ordered under 1886 Rules, r. 112 to repay to the trustee, by reason of the gross proceeds of the assets not exceeding £300, a sum paid to him as costs on the higher scale together with the costs of the order, & the solr. repaid the amount so received by him in excess, but failed to pay the costs, & application was made for his committal, the ct., in the absence of authority, refused to make an order to commit, being doubtful whether resp. had been ordered to pay the money in his character of solr.—*Re* APELT, *Ex p.* BYRNE (1889), 6 Morr. 102.

See, now, 1915 Rules, rr. 103 (2), 114.

8429. —— **Qualified signature of consent order.**]—A solr. by a consent order undertook to pay certain costs, but failed to do so :—*Held :* as deft. had signed the minutes of the order drawn up on the undertaking in the following manner : " Deft. in person, & a solr. of the Supreme Ct.," which words were not on the consent order, he signed merely as a litigant & did not come within 1869 Act, s. 4 (4).—FARLEY *v.* BUCKLER (1893), *Times*, October 30th.

8430. —— **Order for taxation & payment of balance due—Order for payment of costs of taxation.**]—An order was made against a solr. for taxation of his bill of costs & payment, within four days of certificate, of the balance, if any, due from him, costs of taxation being reserved. A balance was found due from him. A subsequent order directed that the costs of taxation should be paid by the solr. :—*Held :* both sums were payable by the solr., as an officer of the ct., within 1869 Act, s. 4 (4), on default in payment, a writ of attachment might issue against him in respect of both sums.—*Re* A SOLICITOR, [1895] 2 Ch. 66 ; 64 L. J. Ch. 467 ; 43 W. R. 490 ; 39 Sol. Jo. 329.

Annotation :—**Folld.** *Re* N. (1917), 61 Sol. Jo. 445.

8431. —— —— ——.]—Where a solr. was ordered to pay the costs of a taxation of costs of an originating summons, taken out by his client for (1) the solr. to deliver his bill of costs, & (2) an account to be taken of money due to the client, & on such order both costs & such money were found due, & the solr. made default in payment of same, & the client moved to attach him :—*Held :* the costs were due from the solr. in his character as an officer of the ct., & were within 1869 Act, s. 4 (4), & it was an order, for the disobedience of which the solr. might be attached.—*Re* NORRIS (1917), 33 T. L. R. 309 ; *sub nom. Re* N., 61 Sol. Jo. 445.

8432. —— **At what date character to be ascertained—Date of order.**]—A solr. was struck off the roll & ordered to pay such sum as should be found due from him by the chief clerk within a month from the date of the certificate. He made default, & an attachment was applied for against him :—*Held :* (1) though the solr. was struck off the roll at the same time as he was ordered to pay, he was a solr. when the order for payment was made, & it was made against him in his character of an officer of the ct. because there was no other jurisdiction to make the order ; (2) the time when the character of solr. was to be ascertained for the purpose of 1869 Act, s. 4 (4), must be at latest the date of the order against him, & the attachment must issue.—*Re* STRONG (1886), 32 Ch. D. 342 ; 55 L. J. Ch. 553 ; 55 L. T. 3 ; 51 J. P. 6 ; 34 W. R. 614 ; 2 T. L. R. 549, C. A.

Annotation :—**Mentd.** *Re* Gent, Gent-Davis *v.* Harris (1888), 40 Ch. D. 190.

8433. Release from imprisonment—Jurisdiction of court to order.]—A solr., who had made default in payment of a sum of money due from him as solr., was adjudicated bkpt., & after his adjudication was arrested under a writ of attachment issuing out of the Ct. of Exch. He applied to the Ct. of Bkpcy. to order his discharge. The Lords Justices declined to interfere with the writ of attachment issued by the Ct. of Exch., & refused the application.—*Re* DEERE (1875), 10 Ch. App. 658 ; 44 L. J. Bcy. 120 ; 33 L. T. 115 ; 23 W. R. 866, L. JJ.

Annotations :—**Consd.** *Re* Wray (1887), 36 Ch. D. 138. **Expld. & Distd.** *Re* Smith, Hands *v.* Andrews, [1893] 2 Ch. 1, C. A.

Sect. 1.—*Abolition of imprisonment for debt: Subsects.* 4, 5 & 6, *A.*]

8434. —— On expiry of twelve months—Order of court necessary.]—Where a solr. has been committed to prison for disobeying an order to pay money into ct., on the expiration of twelve months he can be discharged only after obtaining an order of the ct.—*Re* THOMPSON'S ESTATE, NALTY *v.* AYLETT (1874), 43 L. J. Ch. 721; 30 L. T. 783; 22 W. R. 857.

SUB-SECT. 5.—DEFAULT IN PAYMENT OF PORTION OF SALARY.

8435. Whether personal service of order necessary—Indorsement of effect of non-compliance.]—An order was made against bkpt. for the payment by him by monthly instalments of a portion of his salary to the trustee for the benefit of his creditors. A sealed copy of the order was served on bkpt. by being sent by post by registered letter to his address. Bkpt. having made default in payment of the instalments under the order, the trustee applied in the county ct. to commit him for contempt of ct. The county ct. judge held, as the sealed copy of the order had not been indorsed with a notice stating that, unless bkpt. obeyed the order, he would be guilty of a contempt of ct. & liable to be committed to prison, & had not been personally served upon him, as required by C. C. R. Ord. 25, r. 58, the ct. had no jurisdiction to commit:—*Held:* the above rule did not apply in bkpcy., & the county ct. judge sitting in bkpcy. had power to make an order of committal.—*Re* PICKARD, *Ex p.* OFFICIAL RECEIVER, [1912] 1 K. B. 397; 81 L. J. K. B. 330; 105 L. T. 832; 56 Sol. Jo. 144; 19 Mans. 58.

Annotation:—**Consd.** Savill *v.* Dalton, [1915] 3 K. B. 174, C. A.

SUB-SECT. 6.—COMMITTAL FOR JUDGMENT DEBTS.

A. Judgment Summons.

See 1869 Act, s. 5, 1883 Act, s. 169, repealing 1869 Act, s. 5 (1) (b), & *see, also,* 1869 Bankruptcy Act, s. 103, 1914 Act, s. 107.

8436. Power of High Court to issue—Against party outside jurisdiction—Not limited by 1883 Act, s. 103 (4).]—The High Ct. has power to issue a judgment summons upon a judgment of the High Ct., although the judgment debtor does not reside within the bkpcy. jurisdiction.

The judge in bkpcy. is a judge of the High Ct., & the jurisdiction is the jurisdiction of the High Ct., & extends over the whole of England. The jurisdiction given by 1883 Act, s. 103 (4), is not an exclusive but a concurrent jurisdiction (CAVE, J.).—*Re* STONE, *Ex p.* NICHOLSON, *Re* PHILBY, *Ex p.* NICHOLSON (1884), 1 Morr. 177.

8437. —— Amount sought less than £50.]—No judgment summons is to be issued out of the High Ct. on any judgment where the amount sought to be recovered is less than £50 at the time of application for issue, except in divorce cases, or in very exceptional circumstances.—PRACTICE NOTE, [1918–19] B. & C. R. 126.

8438. Power of county court to issue—Against alleged partner—Of firm against which judgment recovered in High Court.]—Where judgment has been recovered in the High Ct. against a firm, the county ct. has jurisdiction to issue a judgment summons thereon against a person alleged to be a partner in the firm, as C. C. R. Ord. 25, rr. 14 (*b*), 17, so far as they provide for the issuing of such a summons, are not *ultra vires.*—LUMLEY *v.* OSBORNE, [1901] 1 K. B. 532; 70 L. J. K. B. 416; 84 L. T. 461; 49 W. R. 374; 45 Sol. Jo. 277, D. C.

8439. —— Against one joint debtor—Committal order in existence against co-debtor.]—In a county ct. action against three defts. upon a joint & several promissory note, judgment was given against all defts. jointly. Upon default in payment of the judgment debt a judgment summons was issued against all three defts., but service could only be effected on one, against whom a committal order was made, but suspended on payment of certain monthly instalments. Application was subsequently made for leave to issue a judgment summons against one of the other defts., but was refused by the county ct. judge, on the ground that he had no jurisdiction to give leave to issue a judgment summons against one joint debtor while a committal order was still in existence against his co-deft., to which no return had been made:—*Held:* the county ct. judge had jurisdiction to allow the summons to issue.—R. *v.* BIRMINGHAM COUNTY COURT JUDGE, [1902] 2 K. B. 283; 71 L. J. K. B. 881; 87 L. T. 296; 51 W. R. 75; 18 T. L. R. 698.

8440. Power of Mayor's Court to issue—Against debtor outside City of London.]—*Held:* the jurisdiction of the Mayor's Ct. under 1869 Act, s. 5, was confined to cases, in which debtor was at the time of the issuing of the summons resident or carrying on business within its limits.—WASHER *v.* ELLIOTT (1876), 1 C. P. D. 169; 45 L. J. Q. B. 144; 34 L. T. 56; 24 W. R. 432.

Annotations:—**Consd.** Schuller *v.* Wood (1894), 64 L. J. Q. B. 243, D. C. **Mentd.** *Re* Ives, *Ex p.* Addington (1886), 16 Q. B. D. 665.

8441. —— ——.]—The jurisdiction conferred on the Mayor's Ct. by Mayor's Ct. Act, 1857, s. 36, where judgment has been signed for a debt not exceeding £20, to issue & serve a judgment summons upon debtor residing or carrying on business beyond the limits of the City of London, is not affected by 1869 Act.—SCHULLER *v.* WOOD (1894), 64 L. J. Q. B. 243; 11 T. L. R. 153; 15 R. 91, D. C.

8442. Power of court—Whether affected by discharge under Insolvent Debtors Act—County Courts Act, 1846 (c. 95), ss. 98, 99.]—A discharge under Insolvent Debtors Act does not prevent the party being committed by a county ct. judge, upon a judgment summons, under County Cts. Act, 1846, ss. 98, 99, in respect of an unsatisfied judgment, though inserted in the sched.—GEORGE *v.* SOMERS (1855), 16 C. B. 539; 3 Saund. & M. 80; 24 L. J. C. P. 185; 25 L. T. O. S. 145; 19 J. P. 391; 139 E. R. 870; *sub nom. Re* GEORGE *v.* SOMERS, *Ex p.* SOMERS, 3 C. L. R. 851; *sub nom. Ex p.* SUMMERS, 3 W. R. 487.

Annotation:—**Refd.** Copeman *v.* Rose (1857), 7 E. & B. 679.

See, now, 1914 Act, s. 28.

PART XXII. SECT. 1, SUB-SECT. 6.—A.

8436 i. *Power of Court to issue—Against Party outside jurisdiction—Appearance of counsel for party.*]—A judgment summons was issued against debtor residing out of the jurisdiction without leave of the ct.:—*Held:* it had been issued without jurisdiction, & the defect was not cured by the appearance of debtor by counsel.—MCLEAN *v.* KENT, 2 J. R. N. S. 113.—**N.Z.**

q. *Power of court—Whether affected by* 1883 *Act.*]—Debtor did not appear on the hearing of a judgment summons, the non-appearance being unexplained. The magistrate made an order for payment, or in default imprisonment. Debtor became bkpt. The ct., in the absence of anything to show fraud or an equivalent thereto on the part of debtor, refused to make an order that the proceedings be continued.—*Re* HAWKINS (1892), 11 N. Z. L. R. 137.—**N.Z.**

r. *Within what time application should be made.*]—The lapse of six years since the making of an order to pay

8443. *S. P.* GEORGE *v.* SOMERS (1855), 11 Exch. 202 ; 3 Saund. & M. 82 ; 24 L. J. Ex. 247 ; 156 E. R. 803 ; *sub nom. Re* A ROCHESTER COUNTY COURT PLAINT, GEORGE *v.* SUMMERS, 25 L. T. O. S. 164 ; *sub nom. Re* GEORGE *v.* SUMMERS, *Ex p.* SUMMERS, 19 J. P. 392 ; 3 C. L. R. 854, n. ; *sub nom. Ex p.* SUMMERS, 3 W. R. 487.

Annotation :—**Refd.** *Re* Edney, *Ex p.* Edney (1868), 18 L. T. 244.

See, now, 1914 Act, s. 28.

8444. —— —— **County Courts Act, 1856 (c. 108), s. 2.**]—An order for discharge granted by the Insolvent Ct., comprising a judgment debt in the county ct., takes away from the latter ct. the power of committing to prison deft. by a warrant upon a judgment summons issued for non-payment of a debt.

A. sued B. in the county ct. for a debt & recovered judgment payable by instalments. B. then petitioned the Insolvent Debtor's Ct. & filed his petition, wherein he included the debt of A. He was afterwards duly discharged by that ct. Subsequently A. took out a judgment summons against him for non-payment of the instalments, & at the hearing B. gave due proof of his discharge by the Insolvent Ct. Notwithstanding that, the judge committed him to prison. B. applied for a prohibition :—*Held :* as soon as the order for discharge by the Insolvent Ct. was proved to the satisfaction of the county ct. judge, his jurisdiction to commit was at an end.—COPEMAN *v.* ROSE (1857), 7 E. & B. 679 ; 26 L. J. Q. B. 251 ; 119 E. R. 1397 ; *sub nom.* COOKMAN *v.* ROSE, 2 Saund. & M. 199 ; 29 L. T. O. S. 123 ; 3 Jur. N. S. 866 ; 5 W. R. 576.

8445. Who may apply—Assignee of judgment debt.]—*Semble :* the assignee of a judgment debtor is entitled to apply under 1869 Act, s. 5.—EAST END BENEFIT BUILDING SOCIETY *v.* SLACK (1891), 60 L. J. Q. B. 359, D. C.

8446. Form of affidavit—Application for leave to issue—Debtor not residing in county court district.]—Where a judgment debtor does not dwell or carry on business within the district of the county ct. in which the judgment was obtained, the affidavit upon the application for leave to issue a judgment summons under 1869 Act against debtor must contain the material allegations set forth in C. C. R. App. Form 52A.—MCINTOSH *v.* SIMPKINS, [1901] 1 K. B. 487 ; 70 L. J. Q. B. 268 ; 84 L. T. 21 ; 49 W. R. 241 ; 17 T. L. R. 195 ; 45 Sol. Jo. 218, C. A.

Annotations :—**Mentd.** Alderson *v.* Palliser, [1901] 2 K. B. 833, C. A. ; Lumley *v.* Osborne, [1901] 70 L. J. K. B. 416, D. C.

8447. —— —— —— **Waiver of irregularity by debtor.**]—The requirements of C. C. R. Ord. 25, r. 14 (*a*), as to the form of affidavit on an application for leave to issue a judgment summons against debtor, who does not dwell or carry on business & is not employed within the district of the ct., cannot be waived by debtor.—ALDERSON *v.* PALLISER, [1901] 2 K. B. 833 ; 70 L. J. K. B. 935 ; 85 L. T. 210 ; 49 W. R. 706 ; 17 T. L. R. 742 ; 45 Sol. Jo. 722, C. A.

Annotation :—**Mentd.** Channel Coaling Co. *v.* Ross & Marshall (1906), 76 L. J. K. B. 145, D. C.

8448. Summons against alleged partner—Of firm against which judgment recovered in High Court.]—It is essential that the affidavit in support of an application for a judgment summons against a person alleged to be a partner in a firm, against which judgment has been recovered in the High Ct., should state the sources of information & grounds of belief of the document in accordance with C. C. R. Ord. 25, Form 52C.—LUMLEY *v.* OSBORNE, [1901] 1 K. B. 532 ; 70 L. J. K. B. 416 ; 84 L. T. 461 ; 49 W. R. 374 ; 45 Sol. Jo. 277, D. C.

8449. Form of summons—In whose name—In name of creditor's solicitor.]—Debtor had been co-resp. in a divorce suit, in which petitioner obtained a decree for divorce with costs to be paid by co-resp. The costs were taxed, & by an Order of the Divorce Ct., debtor was ordered to pay the amount of the taxed costs to the solr. for petitioner. The order was in common form & in accordance with the usual practice. Default being made in payment of the costs, the solr. took out a judgment summons in his own name against debtor for the amount of the costs :—*Held :* the summons was irregular, as it should have been taken out in the name of petitioner.—*Re* COX-SINCLAIR, *Ex p.* JONES, [1913] W. N. 263.

8450. Service of summons—Substituted service.]—The practice of granting orders for substituted service of judgment summonses, upheld.

General Rules of 1869 Act, r. 2, has not been repealed. C. C. R., r. 40, does not affect General Rules, r. 2, which govern the procedure in this ct. (PHILLIMORE, J.).—*Re* BRACHER, *Ex p.* BRACHER (1913), 135 L. T. Jo. 333.

8451. Hearing of summons—No jurisdiction unless C. C. R. Ord. 25, r. 9, complied with.]—An assignee of a judgment debt took out a judgment summons under 1869 Act, s. 5, in the name of the judgment creditor, without having previously obtained leave under the above rule. The county ct. judge refused to make any order, on the ground that an assignee of a judgment debt was not entitled to apply on a judgment summons :—*Held :* having failed to comply with the above rule, the county ct. judge had no jurisdiction to hear the summons.—EAST END BENEFIT BUILDING SOCIETY *v.* SLACK (1891), 60 L. J. Q. B. 359, D. C.

8452. Attendance of Debtor—Residing outside jurisdiction—Tender of expenses.]—When the High Ct. issues a judgment summons upon a judgment of the High Ct., & the judgment debtor does not reside within its bkpcy. jurisdiction, debtor need not appear personally, unless his expenses have been tendered by the creditor.—

by a ct. if petty sessions is not a bar to a proceeding to enforce that order under 1915 Act, inasmuch as such proceeding is not an "action" within Supreme Ct. Act, 1915, s. 79.—COOPER & SONS *v.* DAWSON, [1916] V. L. R. 381.—**AUS.**

s. *Necessity for—As to ability to pay.*]—No affidavit is necessary as to debtor's ability to pay before issuing a judgment summons.—CULLING *v.* BREMNER, 2 J. R. N. S. 206.—**N.Z.**

t. —— *As to judgment being unsatisfied.*]—A judgment summons will not be issued out of the Supreme Ct. without an affidavit that a judgment has been recovered & remains unsatisfied.—CULLING *v.* BREMNER, 2 J. R. N. S. 206.—**N.Z.**

8446 i. *Form of affidavit—Intitlement of affidavit—Waiver of irregularity.*]—*Held :* wrong intituling of an affidavit in support of an application for a summons is a mere irregularity which is waived by payment under the order.—CRESSWELL *v.* MCARTHUR & CO., [1893] 12 N. Z. L. R. 730.—**N.Z.**

u. *Service of order for payment—Must be personal.*]—Before proceedings can be taken under 1890 Act, Part III., upon an order for payment of money made by a ct. of petty sessions, the order or a copy thereof must be served upon debtor in person.—WARD *v.* MILLER (1904), 29 V. L. R. 997.—**AUS.**

8450 i. *Service of summons—Must be personal.*]—A summons to debtor under 1890 Act, s. 4, must be served personally.—TRENCHARD & CO. *v.* MCMAHON (1905), V. L. R. 227.—**AUS.**

a. *Hearing of summons — Examination of witnesses*—1890 *Act,* s. 22.]—Under the above sect. witnesses other than the defaulting debtor may be summoned & examined either for or against such debtor, as in cases of summary jurisdiction.—ALTSON *v.* DUNNE (1900), 26 V. L. R. 372.—**AUS.**

b. —— *Travelling expenses of debtor.*]—A judgment debtor summoned to appear under Imprisonment for Debt Abolition Act, 1874, is entitled to have his travelling expenses paid.—CULLING *v.* BREMNER, 2 J. R. N. S. 206.—**N.Z.**

Sect. 1.—*Abolition of imprisonment for debt: Subsect.* 6, *A., B. & C.*]

Re STONE, *Ex p.* NICHOLSON, *Re* PHILBY, *Ex p.* NICHOLSON (1884), 1 Morr. 177.

8453. —— —— —— What are reasonable expenses.]—The "reasonably sufficient" sum for travelling expenses payable under C. C. R. Ord. 25, r. 26, to a judgment debtor, who does not reside in the district of the county ct., from which a judgment summons is issued, means a sum sufficient to pay for the journey from debtor's residence to the ct. & back again.—WARD *v.* NIELD, [1917] 2 K. B. 832; 87 L. J. K. B. 54; 117 L. T. 447; [1917] H. B. R. 225, D. C.

8454. —— Application of fine for failure to attend.]—A county ct. judge has no jurisdiction to apply in reduction of the judgment debt the fine, which, by County Cts. Act, 1888 (c. 43), s. 11, as applied by C. C. R. Ord. 25, r. 31 (3*a*), a judgment debtor becomes liable to for failure to attend the hearing of the judgment summons.—R. *v.* SNAGGE, [1909] 1 K. B. 644; 78 L. J. K. B. 562; 100 L. T. 311; 25 T. L. R. 313; 53 Sol. Jo. 285, C. A.

8455. Appeals—To what court—Effect of 1883 Act, s. 103.]—The jurisdiction of the High Ct. under 1869 Act, s. 5, has been, by virtue of 1883 Act, s. 103, & orders under it, assigned to the Judge in Bkpcy., & the exercise of it delegated to the Bkpcy. Registrars; & an appeal from an order of a registrar, approved by the Judge in Bkpcy., will not lie to the Div. Ct., but will be regulated by 1883 Act, s. 104.—GENESE *v.* LASCELLES (1884), 13 Q. B. D. 901; *sub nom. Re* LASCELLES, *Ex p.* GENESE, 53 L. J. Q. B. 578; 32 W. R. 794; 1 Morr. 183, D. C.

8456. —— —— From order on summons wrongly entitled.]—On an appeal from an order of a county ct. on a judgment summons erroneously entitled "In Bkpcy.":—*Held:* no appeal lay to the Div. Ct. in Bkpcy.—*Re* WATKINS, *Ex p.* WATKINS (1886), 3 Morr. 146, D. C.

8457. Costs—Necessity for showing cause for bringing proceedings in High Court.]—Where a judgment summons has been issued in the High Ct. upon a judgment of the High Ct., although the judgment debtor does not reside within its bkpcy. jurisdiction, no costs will be allowed to his creditor, unless he can show good cause why the proceedings were taken in the High Ct.—*Re* STONE, *Ex p.* NICHOLSON, *Re* PHILBY, *Ex p.* NICHOLSON (1884), 1 Morr. 177.

B. "In Pursuance of any Order or Judgment."

8458. Order for payment of costs.]—An order for the payment of costs is a debt within 1869 Act, s. 5.—HEWITSON *v.* SHERWIN (1870), L. R. 10 Eq. 53; 22 L. T. 576; 18 W. R. 802.

Annotations:—**Refd.** Linton *v.* Linton (1885), 15 Q. B. D. 239, C. A.; *Re* Ives, *Ex p.* Addington (1886), 16 Q. B. D. 665; Buckley *v.* Crawford, [1893] 1 Q. B. 105.

8459. Arrears of alimony.]—Arrears of alimony are a debt within 1869 Act, s. 5, though they do not constitute a debt at law.—LINTON *v.* LINTON (1885), 15 Q. B. D. 239; 54 L. J. Q. B. 529; 52 L. T. 782; 33 W. R. 714; *sub nom. Re* LINTON, *Ex p.* LINTON, 49 J. P. 597; 2 Morr. 179, C. A.

Annotations:—**Consd.** *Re* Fryer, *Ex p.* Fryer (1886), 17 Q. B. D. 718, C. A.; Tangye *v.* Tangye, [1914] P. 201. **Refd.** *Re* Otway, *Ex p.* Otway (1888), 58 L. T. 885; *Re* Stillwell, Brodrick *v.* Stillwell, [1916] 1 Ch. 365. **Mentd.** *Re* Hinks, *Ex p.* Verdi (1886), 3 Morr. 218; Haddon *v.* Haddon (1887), 18 Q. B. D. 778; Morgan *v.* Hardy (1887), 18 Q. B. D. 646, C. A.; *Re* Henderson, *Ex p.* Henderson (1888), 20 Q. B. D. 509, C. A.; *Re* Tatham, Bensaude *v.* Hastings (1892), 37 Sol. Jo. 27; Buckley *v.* Crawford, [1893] 1 Q. B. 105; *Re* Hawkins, *Ex p.* Hawkins, [1894] 1 Q. B. 25; Watkins *v.* Watkins, [1896] P. 222, C. A.; Kerr *v.* Kerr, [1897] 2 Q. B. 439; Victor *v.* Victor, [1912] 1 K. B. 247, C. A.

8460. Alimony pendente lite.]—An order for alimony *pendente lite* followed by a further order for permanent alimony having been made in the Divorce Ct., & the sum of £130, being due from the husband under those orders, a judgment summons in respect thereof was issued by the wife:—*Held:* she was entitled to come to the ct. under 1869 Act, s. 5, & an order directing payment of the sum due by instalments of £10 a month should be made.—*Re* OTWAY, *Ex p.* OTWAY (1888), 58 L. T. 885; 36 W. R. 698; 4 T. L. R. 489; 5 Morr. 115.

8461. Order against married woman—Whole separate property subject to restraint—No payment of income since date of judgment.]—An order of committal under 1869 Act, s. 5, for default in payment of a judgment debt, cannot be made against a married woman, where all the separate property to which she is entitled is subject to restraint on anticipation not created by herself, & it is not shown that she has received any payment of income since the date of the judgment.—MEAGER *v.* PELLEW (1885), 14 Q. B. D. 973; 53 L. T. 67; *sub nom. Re* PELLEW, *Ex p.* MEAGER, 33 W. R. 573, C. A.

8462. —— Judgment limited to separate property not subject to restraint—Sufficient income received from property subject to restraint.]—Judgment for a debt & costs was recovered against

c. *Costs—Award of professional costs.*]—Professional costs cannot be awarded against deft. on the hearing of a judgment summons under Imprisonment for Debt Abolition Act, 1874.—HURREY *v.* BOOTH & WILSON (1886), 5 N. Z. L. R. 251.—**N.Z.**

PART XXII. SECT. 1, SUB-SECT. 6.—B.

8458 i. *Order for payment of costs.*]—Deft. was convicted on Sept. 11, 1917, of an offence punishable summarily. Deft. had on Sept. 7, voluntarily sequestrated his estate in insolvency. An order *nisi* to review the order convicting him was obtained by deft., but was on Nov. 14 discharged, & deft. was ordered to pay the costs of the order *nisi* & the order discharging it. Deft. failed to pay such costs. Upon motion to attach deft. for contempt in disobeying the order to pay costs:—*Held:* as the obligation to pay the costs arose after sequestration of deft.'s estate Insolvency Act, 1915, s. 173, had no application.—BIGGS *v.* WALLACE (1918), V. L. R. 502.—**AUS.**

8458 ii. ——.]—R., as agent of S., obtained out of ct. a sum larger than the costs to which S. was entitled. An order was made for the repayment of the excess with costs. Upon an application to commit R. for default in payment it sufficiently appeared that R. had means to pay:—*Held:* an order should be made for his committal.—*Re* BREMNER (1889), 6 Man. L. R. 73.—**CAN.**

8459 i. *Arrears of alimony.*]—Where, in an order for payment of alimony, the periods for payment are specified, an absolute order for an attachment under 1872 Act may be made, without any preliminary order for payment by instalments.—DALY *v.* DALY (1886), 17 L. R. Ir. 372.—**IR.**

8460 i. *Alimony pendente lite.*]—In an alimony action an order for *interim* alimony payable monthly was made. Deft. having made default an application was made to the ct. to commit him for contempt:—*Held:* the order was simply one for payment of money within 1869 Act, & could not be enforced by attachment.—GALLEY *v.* GALLEY (1905), 1 W. L. R. 155.—**CAN.**

8461 i. *Order against married woman.*]—A judgment against a married woman by virtue of Married Woman's Property Act creates no general personal liability, but merely charges her separate estate, & even if liable to be examined, such person is not liable to be committed to gaol.—*Re* MCLEOD *v.* EMIGH (1888), 12 P. R. 450.—**CAN.**

8461 ii. ——.]—A married woman, against whom a judgment has been obtained under Married Women's Property Act is not a judgment debtor within County Cts. Act, s. 147.—GREENSHIELDS & CO., LTD. *v* REEVES (1909), 15 B. C. R. 19.—**CAN.**

8462 i. —— *Judgment limited to separate property not subject to restraint.*]—Where an order was made that a married woman should pay by instalments the amount of a judgment against her, out of her separate estate not subject to restraint against anticipation, or which, being no subject, was liable to execution under Married Woman's Property Act, 1882, s. 19, the ct., upon default in payment of the instalments, made an order for

a married woman, execution being, by the terms of the judgment, limited to her separate property not subject to any restraint upon anticipation, unless by reason of Married Women's Property Act, 1882, (c. 75) such property should be liable to execution notwithstanding such restraint. Upon an application for an order of committal against her under 1869 Act, s. 5, the only evidence of her ability to pay was that since the date of the judgment she had received sufficient income of separate property subject to a restraint upon anticipation: —*Held:* no order could be made against her upon that evidence, because s. 5 did not apply to the judgment.—DRAYCOTT *v.* HARRISON (1886), 17 Q. B. D. 147; *sub nom.* DARRACOTT *v.* HARRISON, 34 W. R. 546, D. C.

Annotations:— **Apprvd.** Scott *v.* Morley (1887), 20 Q. B. D. 120, C. A. **Consd.** Hood Barrs *v.* Cathcart, [1894] 2 Q. B. 559. **Mentd.** *Re* Lumley, *Ex p.* Hood Barrs, [1894] 3 Ch. 135, C. A.

8463. —— Married Women's Property Act, 1882 (c. 75), s. 1 (2).]—A judgment obtained against a married woman, under the above subsect. cannot be enforced by committal under 1869 Act, s. 5, although she has separate property available for payment & refuses to pay.—SCOTT *v.* MORLEY (1887), 20 Q. B. D. 120; 57 L. J. Q. B. 43; 57 L. T. 919; 52 J. P. 230; 36 W. R. 67; 4 T. L. R. 56; *sub nom. Re* MORLEY, *Ex p.* MORLEY, SCOTT *v.* MORLEY, 4 Morr. 286, C. A.

Annotations:—**Consd.** Hyde *v.* Hyde (1888), 13 P. D. 166, C. A.; Holtby *v.* Hodgson (1889), 24 Q. B. D. 103, C. A.; *Re* Hewett, *Ex p.* Levene, [1895] 1 Q. B. 328; Softlaw *v.* Welch, [1899] 2 Q. B. 419, C. A.; Oxley *v.* Link, [1914] 2 K. B. 734. **Refd.** *Re* Allen, [1894] 2 Q. B. 924; Hill *v.* Ailesbury (1894), 10 T. L. R. 487; Mason *v.* Fulham Corpn. (1910), 102 L. T. 188. **Mentd.** *Re* Gardiner, *Ex p.* Coulson (1887), 20 Q. B. D. 249; Downe *v.* Fletcher (1888), 21 Q. B. D. 11; Foster *v.* Wheeler (1888), 38 Ch. D. 130, C. A.; Axford *v.* Reid (1889), 22 Q. B. D. 548, C. A.; Galmoye *v.* Cowan & Brown (1889), 58 L. J. Ch. 769; Hemingway *v.* Braithwaite (1889), 61 L. T. 224, D. C.; Eddowes *v.* Argentine Loan & Mercantile Agency Co. (1890), 62 L. T. 602; Jay *v.* Robinson (1890), 25 Q. B. D. 467, C. A.; Bird *v.* Barstow (1891), 36 Sol. Jo. 41, C. A.; Braumstein *v.* Lewis (1891), 7 T. L. R. 246; Cox *v.* Bennett (1891), 64 L. T. 380; Pelton *v.* Harrison, [1891] 2 Q. B. 422, C. A.; Surman *v.* Wharton, [1891] 1 Q. B. 491; Aylesford *v.* G. W. Ry. Co., [1892] 2 Q. B. 626, D. C.; Harting *v.* White (1892), 37 Sol. Jo. 132; Hood Barrs *v.* Cathcart, [1894] 2 Q. B. 559, C. A.; Pillers & Pershouse *v.* Edwards (1894), 71 L. T. 788, C. A.; Robinson, King *v.* Lynes, [1894] 2 Q. B. 577; Loftus *v.* Heriot, [1895] 2 Q. B. 212, C. A.; Moran *v.* Place (1896), 74 L. T. 223; Whiteley *v.* Edwards (1896), 65 L. J. Q. B. 457, C. A.; *Re* Handford, *Ex p.* Handford, [1899] 1 Q. B. 566, C. A.; *Re* Wheeler's Settlmt. Trusts, Briggs *v.* Ryan, [1899] 2 Ch. 717; Barnett *v.* Howard, [1900] 2 Q. B. 784, C. A.; *Re* Turnbull, Turnbull *v.* Nicholas, [1900] 1 Ch. 180; Evans *v.* Jenkins (1903), 47 Sol. Jo. 737; Brown *v.* Dimbleby, [1904] 1 K. B. 28, C. A.; Bolitho *v.* Gidley, [1905] A. C. 98, H. L.; Masson, Templier *v.* De Fries, [1909] 2 K. B. 831, C. A.; Studley *v.* Studley (1913), 82 L. J. P. 65, C. A.; *Re* Clark, *Ex p.* Pope & Owles, [1914] 3 K. B. 1095, C. A.; Shaw *v.* Allen (1914), 30 T. L. R. 631; British Union & National Insce. *v.* Rawson, [1916] 2 Ch. 152; Lea Bridge District Gas Co. *v.* Malvern (1917), 116 L. T. 311.

See, also, No. 8479, *post.*

8464. —— Order wrongly obtained.]—A married woman, imprisoned in default of complying with an order for the payment of costs, was released on a writ of *habeas corpus*, the judgment given against her with costs being good only to the extent of separate estate possessed by her.—*Re* WALTER (1891), 55 J. P. 551; 7 T. L. R. 445, D. C.

See, further, HUSBAND & WIFE.

8465. Order for damages in divorce court.]—The jury having found a verdict for £1,000 damages against co-resp. in a divorce action, the ct. made an order under Matrimonial Causes Act, 1857 (c. 85), s. 33, that co-resp. should pay the amount of the damages to petitioner for settlement upon the wife or children. Default having been made in complying with that order petitioner applied to the judge, to whom bkptcy. business was assigned, for the committal of the co-resp. under 1869 Act, s. 5. Co-resp. had means to pay part of the amount of the damages:—*Held:* there was jurisdiction to make an order under s. 5 for payment of the amount of the damages by instalments, & order made accordingly.—*Re* FRYER, *Ex p.* FRYER (1886), 17 Q. B. D. 718; 55 L. J. Q. B. 478; 55 L. T. 276; 34 W. R. 766; 2 T. L. R. 860; 3 Morr. 231, C. A

Annotations:—**Refd.** Bates *v.* Bates (1888), 37 W. R. 230; Kerr *v.* Kerr (1897), 77 L. T. 29, D. C. **Mentd.** *Re* Otway, *Ex p.* Otway (1888), 58 L. T. 885.

8466. Judgment of High Court of Ireland—Registered in England.]—The High Ct. of Justice in England has no jurisdiction under 1869 Act, s. 5, to commit to prison a person, who makes default in payment of a sum due under a judgment of the High Ct. of Justice in Ireland, registered in England, under Judgments Extension Act, 1868 (c. 54).—*Re* WATSON, *Ex p.* JOHNSTON, JOHNSTON *v.* WATSON, [1893] 1 Q. B. 21; 62 L. J. Q. B. 85; 67 L. T. 519; 41 W. R. 34; 37 Sol. Jo. 8; 4 R. 90, C. A.

Annotations:—**Consd.** Thompson *v.* Gill, [1903] 1 K. B. 760, C. A. **Refd.** *Re* Bkpcy. Notice, [1898] 1 Q. B. 383, C. A.; Bailey *v.* Plant (1900), 2 W. C. C. 160.

8467. Award under Workmen's Compensation Act, 1897 (c. 37).]—An order for committal under 1869 Act, s. 5, is a method of enforcing an award within Workmen's Compensation Act, 1897, Sched. 2 (8). —BAILEY *v.* PLANT, [1901] 1 K. B. 31; 70 L. J. Q. B. 63; 83 L. T. 459; 65 J. P. 52; 49 W. R. 103; 17 T. L. R. 48; 45 Sol. Jo. 57; 3 W. C. C. 209, C. A.; *subsequent proceedings*, 17 T. L. R. 449, D. C.

C. "Means to pay."

8468. Duty of judge to consider.]—The jurisdiction by means of a committal order is a new class of jurisdiction; the judge has to consider the means of the judgment debtor, the instalments paid under the order are paid into ct., & the judge has the opportunity of knowing how much of the judgment debt has been received on behalf of the judgment creditor (LORD ALVERSTONE, C.J.).—R. *v.* BIRMINGHAM COUNTY COURT JUDGE, [1902] 2 K. B. 283; 71 L. J. K. B. 881; 87 L. T. 296; 51 W. R. 75; 18 T. L. R. 698.

8469. Proof of means necessary.]—A judgment creditor made default in an undertaking

committal.—JOHNSTONE *v.* BROWNE (1887), 20 L. R. Ir. 443.—**IR.**

e. —— *Debt contracted before marriage.*]—A married woman was sued for a debt contracted before marriage, & judgment was given against her personally:—*Held:* the judgment was personal & not proprietary, having regard to her capacity to contract when she incurred the liability, & an application to discharge her from custody under an order made in the division ct. for her committal for failure to attend upon an after-judgment summons refused.—*Re* TEASDALL *v.* BRADY (1898), 18 P. R. 104.—**CAN.**

PART XXII. SECT. 1, SUB-SECT. 6.—C.

8468 i. *Duty of judge to consider—Discretion of court—1915 Act, s. 5.*]—When the necessary conditions specified by the above Act have been established, the judge must determine judicially whether an order should be made, but he has a discretion to determine whether, upon the whole of the circumstances proved, the occasion is a proper one for exercise of the power of ordering imprisonment, or whether the creditor's vindictive motive in obtaining the summons & the inability of the judgment debtor to pay the debt are not circumstances, which should lead the judge to determine that the occasion is not a proper one for the exercise of the power.—NEW MARCH *v.* ATKINSON (1918), 25 C. L. R. 381.—**AUS.**

8468 ii. —— —— 1872 *Act, s. 6.*]—Where, under the above sect., the question whether deft. was possessed of means to pay depended on whether or not a bill of sale which he had given was fraudulent & void, motion was refused.—SWEENY *v.* GOULDING (1881), 15 I. L. T. 47.—**IR.**

8469 i. *Proof of means necessary—1890 Act, s. 22 (2).*]—An order of commitment under the above subsect. cannot be made upon the ground alone that deft. has neglected to pay the

Sect. 1.—*Abolition of imprisonment for debt: Subsect.* 6, *C. & D.*]

contained in an order for sale, under R. S. C. Ord. 57, r. 12, of goods seized. The undertaking was "to make good any deficiency of sale" to claimant under a bill of sale:—*Held:* under 1869 Act, s. 4, in the absence of proof of means to pay, an order could not be made for a writ of attachment.—BUCKLEY *v.* CRAWFORD, [1893] 1 Q. B. 105; 62 L. J. Q. B. 87; 67 L. T. 681; 57 J. P. 89; 41 W. R. 239; 9 T. L. R. 85; 37 Sol. Jo. 67; 5 R. 125, D. C.

8470. ——.]—An order for committal can only be made when there is a contumacious debtor, who has the means, or has had the means, to pay the debt, & his conduct is in the nature of contempt (VAUGHAN WILLIAMS, L.J.).—*Re* EDGCOME, *Ex p.* EDGCOME, [1902] 2 K. B. 403; 71 L. J. K. B. 722; 87 L. T. 108; 50 W. R. 678; 18 T. L. R. 734; 46 Sol. Jo. 649; 9 Mans. 227, C. A.

Annotation:—**Mentd.** Church's Trustee *v.* Montague, Hibbard (1902), 87 L. T. 412, C. A.

8471. ——.]—A county ct. judge would do wrong if merely because both parties were willing to give time, he should adjudicate that the man had had means & had made default; at the same time, if the whole conduct of the parties before him was such as to recognise that the man had had means, the county ct. judge might well adjudicate without any specific proof of it.—STONOR *v.* FOWLE (1887), 13 App. Cas. 20; 57 L. J. Q. B. 387; 58 L. T. 1; 52 J. P. 228; 36 W. R. 742; 4 T. L. R. 109, H. L.; *revsg.* S. C. *sub nom.* R. *v.* BROMPTON COUNTY COURT JUDGE (1886), 18 Q. B. D. 213; & *sub nom.* REEVES *v.* FOWLE, 56 L. J. Q. B. 49, C. A.; *subsequent proceedings, sub nom.*, R. *v.* STONOR (1888), 57 L. J. Q. B. 510, D. C.

Annotations:—**Refd.** *Re* Berkshire County Ct. Case (1887), 4 T. L. R. 40; *Re* Nuthall, Ford *v.* Nuthall (1891), 64 L. T. 241, C. A. **Mentd.** Harris *v.* Slater (1888), 21 Q. B. D. 359; *Re* Watson, *Ex p.* Johnston, Johnston *v.* Watson, [1893] 1 Q. B. 21, C. A.; Hulbert & Crowe *v.* Cathcart, [1894] 1 Q. B. 244; Bailey *v.* Plant (1900), 2 W. C. C. 160; Saunders *v.* Swansea Finance Co. (1905), 21 T. L. R. 317; *Re* Oddy, Major *v.* Harness, [1906] 1 Ch. 93, C. A.; Haydon *v.* Haydon, [1911] 2 K. B. 191, C. A.

See, further, sub-sect. 6, D, *post.*

8472. Strict proof necessary—Summons issued against debtor out of jurisdiction.]—The High Ct. has power to issue a judgment summons upon a judgment of the High Ct., although the judgment debtor does not reside within its bkpcy. jurisdiction, but in such case strict proof of means must be given.—*Re* STONE, *Ex p.* NICHOLSON, *Re* PHILBY, *Ex p.* NICHOLSON (1884), 1 Morr. 177.

8473. What are "means to pay"—Gifts—Not necessarily derived from earnings—Or fixed income.]—For the purpose of determining whether a judgment debtor has had "the means to pay" the judgment debt, with the view of making an order for his committal, money derived from a gift may be taken into account. It is not necessary that the "means to pay" should have been derived from debtor's earnings, or from a fixed income (COTTON & LINDLEY, L.JJ.).—*Re* PARK, *Ex p.* KOSTER (1885), 14 Q. B. D. 597; 52 L. T. 946; 33 W. R. 606; 2 Morr. 35, C. A.

8474. —— Debtor living luxuriously—Establishment maintained by wife.]—Deft. was committed to prison for six weeks for default in payment of an instalment of £10 pursuant to an order under 1869 Act, upon an affidavit by pltf. that deft. was residing in a large well-furnished house, keeping horses, carriages, a groom, & other servants, & living in the style of a country gentleman of means, that he had been seen on several occasions at different towns & places with his horse & carriage, & always appeared to have money at his command, & that pltf. was informed & believed that he had ample means to pay the debt & the costs in the action:—*Held:* the order of commitment must be affirmed, although deft. swore that all the furniture, horses, carriages, & effects at the house abovementioned belonged to his wife, & were bought & maintained by her separate money & estate, that the groom & other servants were the servants of his wife & maintained at her sole expense, that he had no horse or carriage or any other property of his own, nor had he money at his command that would enable him to attend ct. to answer the application, & his wife declined to supply him with any, & that he was unable to pay the debt & costs in the action.—HARPER *v.* SCRIMGEOUR (1880), 5 C. P. D. 366; 29 W. R. 264.

Annotation:—**Consd.** Chard *v.* Jervis (1882), 9 Q. B. D. 178, C. A.

8475. —— —— —— Debtor undischarged bankrupt.]—Pltf. moved to commit deft. for default in payment of a judgment debt of £29 for goods supplied to him, the application being supported by an affidavit that deft. kept up a large establishment, & was to all appearance a man of means. Deft. made an affidavit stating that he was an undischarged bkpt., had no money, & was unable to pay pltf.'s demand, & that his wife's property

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debt; it must have been proved that he has had the means & ability to pay.—WATSON *v.* RYAN (1892), 18 V. L. R. 198.—**AUS.**

8469 ii. ——1872 *Act, s.* 6.]—Costs by the final order in a cause having been awarded to be paid by pltf. to deft., & default in payment having been made, on application for an order proof of pltf.'s means must be shown.—STURGEON *v.* ROBINSON (1873), 8 I. L. T. 13.—**IR.**

8469 iii. ——.]—It must be shown that deft. could pay the debt, & no order will be made where it is shown that deft. has no means.—FOSTER *v.* STACKPOOLE (1878), 12 I. L. T Jo. 35.—**IR.**

8469 iv. *S. P.* M'LAUGHLAN *v.* BROWN (1878), 12 I. L. T. Jo. 89.—**IR.**

8469 v. *S. P.* SOMMET *v.* DORNEY (1873), 7 I. L. T. Jo. 584.—**IR.**

8469 vi. —— *Date at which means to pay must be proved*—1872 *Act, s.* 6.]—Where an order is applied for under the above sect., it must be shown that debtor either has or has had since the date of the order or judgment, means to pay the debt.—ANON. (1874), 8 I. L. T. 206.—**IR.**

8469 vii. *S. P.* DAVIS *v.* SIMMONDS (1884), 14 L. R. Ir. 364.—**IR.**

8469 viii. —— —— ——.]—In order to get a committal order pltf. must prove that debtor has means to pay at the date of the instalment order; the fact that six months previously he received a large sum of money is not of itself sufficient proof of means.—CURRY *v.* M'ELVANNA (1910), 44 I. L. T. 108.—**IR.**

h. *What are "means to pay"—Refusing to earn money—R. S. O.*, 1897 (*c.* 60), *s.* 247 (5).]—"Ability to pay," in the above subsect. covers the case of a dishonest debtor, who can by working earn the means to pay the debt, & contumaciously refuses to do anything.—*Re* KAY *v.* STORRY (1904), 24 C. L. T. 313; 8 O. L. R. 45; 3 O. W. R. 784.—**CAN.**

k. —— *Official salary.*]—Where an official salary is the only source of income possessed by a govt. official, a committal order may be made.—*Re* HYDE *v.* CAVAN (1899), 31 O. R. 189.—**CAN.**

l. —— —— *& pension.*]—A motion that pltf. should pay the costs of a judgment of non-suit & the costs of the motion, was granted, such payment to be made within a month where pltf. had a pension from Govt. & a salary, & he did not appear on the motion.—WHITE *v.* POWER (1874), 8 I. L. T. Jo. 375.—**IR.**

m. —— *Uncertain profit from contract.*]—Upon an application to commit two persons for non-payment of a judgment, it appeared that they were two members of a firm engaged in carrying out several contracts. One contract was completed & a profit had been made which had not been divided, but had been used in the work under the other contracts. It was uncertain whether profit or loss would accrue from the other contracts:—*Held:* the facts did not establish that debtors had had means to pay the debt.—SAUL *v.* BATEMAN (1889), 6 Man. L. R. 189.—**CAN.**

n. —— *Where continuous & increasing liability.*]—Debtor, a bkpt., owed forty-nine weeks' board. His son, for whom he worked, had previously paid his father's board:—

was settled to her separate use. The ct. made an order committing deft. for six weeks, or until payment, & that order was affirmed by a Divisional Ct. Deft. appealed, & filed a further affidavit showing that he was living in a very small way, & that the expenses of the establishment were all paid by his wife out of her separate estate. The Ct. of Appeal being satisfied that deft. had no means of payment discharged the order for committal.—CHARD *v.* JERVIS (1882), 9 Q. B. D. 178; 51 L. J. Ch. 429; 51 L. J. Q. B. 442; 30 W. R. 504, C. A.

Annotations :—**Consd.** Crowther *v.* Elgood (1887), 34 Ch. D. 691, C. A. **Refd.** Debenham *v.* Wardroper (1883), 48 L. T. 235, D. C.

8476. —— Need not be means to pay whole debt.]—Where a judgment debtor makes default in payment of the judgment debt, the ct. has power of committal under 1869 Act, s. 5, if proof is given that such debtor has had the means of paying part of the debt, even though he has not had the means of paying the whole amount.—*Re* FRYER, *Ex p.* FRYER (1886), 17 Q. B. D. 718; 55 L. J. Q. B. 478; 55 L. T. 276; 34 W. R. 766; 2 T. L. R. 860; 3 Morr. 231, C. A.

Annotations :—**Refd.** Bates *v.* Bates (1888), 37 W. R. 230; Kerr *v.* Kerr (1897), 77 L. T. 29, D. C. **Mentd.** *Re* Otway, *Ex p.* Otway (1888), 58 L. T. 885.

8477. Appeals—Interference by Court of Appeal.]—When a judge of first instance who has made an order for the committal of a defaulting debtor under 1869 Act, s. 5 has had the proper materials before him & has satisfied himself that debtor has the means of payment, the Ct. of Appeal will not interfere with the decision.—ESDAILE *v.* VISSER (1880), 13 Ch. D. 421; 28 W. R. 281, C. A.

Annotation :—**Consd.** Chard *v.* Jervis (1882), 9 Q. B. D. 178, C. A.

D. Order for Payment by Instalments.

8478. Power to make—After receiving order made.]—An order for payment of a judgment debt by instalments cannot be made against debtor under 1869 Act, s. 5, where a receiving order has been made for the protection of his estate, & the debt is provable in the bkpcy.—*Re* NUTHALL, FORD *v.* NUTHALL (1891), 64 L. T. 241; 55 J. P. 565; 7 T. L. R. 373; 8 Morr. 106, C. A.

Annotation :—**Mentd.** *Re* Edgcome, *Ex p.* Edgcome (1902), 87 L. T. 108.

8479. Against whom order may be made.]—An order for payment by instalments under 1869 Act, s. 5, may be made on a married woman.—DILLON *v.* CUNNINGHAM (1872), L. R. 8 Exch. 23; 42 L. J. Ex. 11; 27 L. T. 830.

Annotations :—**Mentd.** Atwood *v.* Chichester (1878), 38 L. T. 48, C. A.; Mitchell *v.* Simpson (1889), 23 Q. B. D. 373, D. C.; Buckley *v.* Crawford, [1893] 1 Q. B. 105, D. C.; *Re* Allen (1894), 63 L. J. M. C. 267, D. C.

8480. When made—Without proof of means.]—An order for payment by instalments under 1869 Act, s. 5, may be made without any proof of means.—DILLON *v.* CUNNINGHAM (1872), L. R. 8 Exch. 23; 42 L. J. Ex. 11; 27 L. T. 830.

Annotations :—**Refd.** Mitchell *v.* Simpson (1889), 23 Q. B. D. 373; Buckley *v.* Crawford, [1893] 1 Q. B. 105, D. C. **Mentd.** Atwood *v.* Chichester (1878), 38 L. T. 48, C. A.; *Re* Allen (1894), 63 L. J. M. C. 267, D. C.

8481. —— Debtor thereby driven into bankruptcy— & forfeiture of income incurred.]—The ct. being satisfied that debtor had the means to pay, ordered payment of the debt by instalments, although the payment of such instalments would, it was alleged, drive debtor into bkpcy. & cause a forfeiture of the income from which such instalments were obtainable.—*Re* IMPERIAL MERCANTILE

Held : as it was a continuous & increasing liability it was not beyond doubt that there was no reasonable expectation of paying, & committal refused.—MCKENZIE *v.* CURRY (1909), 7 E. L. R. 235.—CAN.

o. *Examination as to means*—1915 *Act.*]—Mere production of a certificate showing that no order was made upon a previous examination of debtor under the above Act, as to his means is not a bar to an examination at a later date.—COOPER & SONS *v.* DAWSON, [1916] V. L. R. 381.—AUS.

p. —— *Examination of debtor—Viva voce examination before hearing*—1872 *Act, s.* 6.]—A motion for a *viva voce* examination of debtor for the purpose of proving means, before the hearing of an application for committal under the above sect. was refused.—WILLIAMS *v.* FEE (1878), 12 I. L. T. 138.—IR.

q. —— *Admissibility of evidence.*]—*Held :* hearsay evidence was admissible with respect to the income of a dispensary doctor.—JOHNSON *v.* SANDIFORD (1897), 31 I. L. T. Jo. 392.—IR.

8477 i. *Appeals—By prohibition.*]—The question whether debtor has means to pay is one of fact, & the decision of a judge cannot be reviewed in prohibition.—*Re* HYDE *v.* CAVAN (1899), 19 C. L. T. 359; 31 O. R. 189.—CAN.

8477 ii. ——.]—In the absence of evidence to the contrary it must be assumed that there was evidence of conditions justifying an order of committal, & prohibition will not lie.—*Re* KAY *v.* STORRY (1904), 24 C. L. T. 313; 8 O. L. R. 45; 3 O. W. R. 784.—CAN.

PART XXII. SECT. 1, SUB-SECT. 6.—D.

a. *By what court—Judge sitting in camerâ*—1872 *Act.*]—A motion for an instalment order, under the above Act, should be made to a judge sitting *in camerâ.*—O'DONNELL *v.* SMITH (1873), 8 I. L. T. 32.—IR.

b —— *Judge in chambers*—1872 *Act.*]—A motion for an instalment order under the above Act should be made to a judge in chambers, & not to the ct. *in banco.*—ANON. (1874), 8 I. L. T. 206.—IR.

c. —— —— ——.]—A judge has jurisdiction in consolidated chamber to make an instalment order under the above Act.—REARDON *v.* HAYES (1874), 8 I. L. T. 116.—IR.

d. —— *County Court.*]—An instalment order may be made by a county ct. for the purpose of realising the amount of a decree made by a petty sessions ct.—M'GOVERN *v.* FERGUSON (1916), 50 I. L. T. 2.—IR.

8479 i. *Against whom order may be made—Married woman.*]—An instalment order will not be made against a married woman, whose only separate estate is subject to restraint on anticipation, even though, since the date of the judgment against her, she has received income of the separate estate.—MORGAN *v.* EYRE (1887), 20 L. R. Ir. 541.—IR.

f. —— *Customs' pensioner.*]—An instalment order will not be made against a Customs' pensioner, whose only property consists of an inalienable pension, no part of which has been received by him since the date of the judgment.—BANK OF SCOTLAND CO. *v.* CUNNINGHAM, [1899] 2 I. R. 780.—IR.

g. —— *Infant.*]—When damages have been recovered against an infant for a tort committed by him, & he has means to pay, he may be committed for default in payment of an instalment.—SMITH *v.* HAMILTON (1899), 33 I. L. T. 91.—IR.

h. —— *Officer in army.*]—A committal order for default in payment of an instalment of a judgment debt ordered to be paid by the judgment debtor by instalments will be granted against debtor, though he is an officer in the army, & the only income of which he is proved to be in receipt is his pay as such officer.—HAMILTON *v.* CONINGHAM, [1903] 2 I. R. 564, 569.—IR.

k. —— *Prison official on pension.*]—An instalment order is applicable to prison officers on pensions.—BLAIR *v.* COGLAN (1898), 33 I. L. T. 20.—IR.

l. —— *Royal Irish Constabulary Constable.*]—An instalment order was made against a constable in the Royal Irish Constabulary.—FITZMAURICE *v.* LYONS (1892), 26 I. L. T. Jo. 348.—IR.

8480 i. *When made—Without proof of means.*]—An instalment order may be made without proof of means.—LEAMY *v.* MURPHY (1880), 7 L. R. Ir. 188.—IR.

8480 ii. ——.]—Costs having been awarded to be paid, & default in payment having been made, on an application for an order for payment by instalments, proof of pltf.'s means must be shown.—STURGEON *v.* ROBINSON (1873), 8 I. L. T. 13.—IR.

8480 iii. ——.]—An instalment order will not be made, if it appear to the ct. that he has no means to pay.—WILLIAMSON *v.* BRYANS (1880), 8 L. R. Ir. 25.—IR.

n. —— *Transaction speculative—Usurious interest.*]—Where the transaction was a pure speculation & usurious interest was charged, the ct. refused to make an instalment order.—COHEN *v.* RYAN (1897), 31 I. L. T. 161.—IR.

o. —— *Failure to pay taxed costs*—1872 *Act.*]—Pltf. not having proceeded to trial, deft. obtained an order directing him to proceed, or

Sect. 1.—Abolition of imprisonment for debt: Subsect. 6, D. & E.]

CREDIT ASSOCN, LTD., LEWIS'S CASE (1873), 42 L. J. Ch. 379 ; 28 L. T. 396 ; 21 W. R. 505.

8482. Form of order—Provision for imprisonment on default.]—An order under 1869 Act, s. 5, will not be made for payment of instalments, debtor to be imprisoned on default.—*Re* THE DEBTORS' ACT (1870), 22 L. T. 666.

Annotations :—**Apprvd.** R. *v.* Brompton County Ct. Judge (1886), 18 Q. B. D. 213, C. A. **Refd.** Stonor *v.* Fowle (1887), 58 L. T. 1, H. L.

8483. —— —— Court satisfied as to debtor's means.]—The ct. being satisfied that debtor had the means to pay, ordered payment of the debt by instalments, or in default, committal to prison. —*Re* IMPERIAL MERCANTILE CREDIT ASSOCN., LTD., LEWIS'S CASE (1873), 42 L. J. Ch. 379 ; 28 L. T. 396 ; 21 W. R. 505.

8484. —— —— Jurisdiction of court.]—Where a judgment summons issues under 1869 Act, s. 5, the ct. has no power to order payment by instalments, & that a committal shall issue for non-payment of any instalment.—R. *v.* BROMPTON COUNTY COURT JUDGE (1886), 18 Q. B. D. 213 ; 51 J. P. 547 ; *sub nom.* REEVES *v.* FOWLE, 56 L. J. Q. B. 49 ; 55 L. T. 663 ; 35 W. R. 130 ; 3 T. L. R. 143, C. A. ; *revsd.* on other grounds, *sub nom.* STONOR *v.* FOWLE (1887), 13 App. Cas. 20, H. L. ; *subsequent proceedings, sub nom.* R. *v.* STONOR (1888), 57 L. J. Q. B. 510, D. C.

Annotations :—**Refd.** *Re* Berkshire County Ct. Case (1887), 4 T. L. R. 40, D. C. **Mentd.** Harris *v.* Slater (1888), 21 Q. B. D. 359, D. C. ; *Re* Nuthall, Ford *v.* Nuthall (1891), 64 L. T. 241, C. A. ; Re Watson, *Ex p.* Johnston, Johnston *v.* Watson, [1893] 1 Q. B. 21, C. A. ; Hulbert & Crowe *v.* Cathcart, [1894] 1 Q. B. 244, D. C. ; Bailey *v.* Plant (1900), 2 W. C. C. 160 ; Saunders *v.* Swansea Finance Co. & Home (1905), 21 T. L. R. 317, C. A. ; *Re* Oddy, Major *v.* Harness, [1906] 1 Ch. 93 ; Haydon *v.* Haydon, [1911] 2 K. B. 191, C. A.

See C. C. R. Ord. 25, r. 46 (2).

8485. Effect of order—As to creditor—Right to issue execution on High Ct. judgment—Without getting county court order discharged.]—A creditor, who has obtained a judgment in the High Ct. & afterwards obtained from the county ct. judge an order for payment of the debt by instalments, cannot put in motion the High Ct. procedure & issue execution without going to the county ct. judge & getting the order made by him discharged.—MONTGOMERY & CO. *v.* DE BULMERS, [1898] 2 Q. B. 420 ; 67 L. J. Q. B. 768 ; 78 L. T. 671 ; 47 W. R. 22 ; 42 Sol. Jo. 590, C. A.

Annotations :—**Consd.** *Re* A Debtor (No. 112 of 1903), *Ex p.* Rock Red Brick Co. (1904), 90 L. T. 64, D. C. **Refd.** Woodham Smith *v.* Edwards, Haslam (1908), 77 L. J. K. B. 1056, C. A. **Mentd.** White Son & Pill *v.* Stennings (1911), 104 L. T. 876.

8486. —— —— High Court judgment for payment by instalments — Execution.] — Where judgment has been recovered in the High Ct. for a sum of money, & an order has been made by the judge in bkpcy. under 1869 Act, s. 5 for payment of the judgment debt by instalments, execution may issue under R. S. C. Ord. 42, r. 24, for the amount of instalments which have become due & are unpaid :—*Semble :* the power to order the issue of execution as provided by Execution Act, 1844 (c. 96), s. 61, can be exercised by any judge of the High Ct. & is not confined to the judge in bkpcy.—WOODHAM SMITH *v.* EDWARDS, [1908] 2 K. B. 899 ; 77 L. J. K. B. 1056 ; 99 L. T. 710 ; 24 T. L. R. 864 ; 52 Sol. Jo. 680 ; 15 Mans. 322, C. A.

8487. —— —— Right to have order discharged —On failure to pay instalments.]—A creditor, who has obtained an order under 1869 Act, for payment of a judgment debt by instalments, is entitled, on default in payment of the instalments, to have the order discharged, in order to enable him to take other proceedings for recovery of the debt.—*Re* MITCHELL, *Ex p.* COHEN (1910), 54 Sol. Jo. 252.

8488. Rescission or variation of order—Jurisdiction of county court—Order of High Court on judgment of county court.]—The power given to inferior cts. by 1869 Act to rescind or vary orders, does not enable an inferior ct. to rescind or vary an order of a superior ct. on a judgment of the latter.—WASHER *v.* ELLIOTT (1876), 1 C. P. D. 169 ; 45 L. J. Q. B. 144 ; 34 L. T. 56 ; 24 W. R. 432.

Annotations :—**Expld.** *Re* Ives, *Ex p.* Addington (1886), 16 Q. B. D. 665. **Mentd.** Schuller *v.* Wood (1894), 64 L. J. Q. B. 243, D. C.

8489. —— —— Order by High Court for payment by instalments.]—Where the High Ct. has simply made an order for payment of costs, or given judgment for payment of a sum of money, a county ct. can, by virtue of 1869 Act, s. 5, & 1883 Act, s. 103 (4), enforce that order or judgment by directing payment of the amount thereof by instalments, but a county ct. cannot rescind or vary an order of the High Ct. for the payment of a judgment debt by instalments, since in such a case the High Ct. has considered & adjudicated upon the question of debtor's ability to pay forthwith.—*Re* IVES, *Ex p.* ADDINGTON (1886), 16 Q. B. D. 665 ; 55 L. J. Q. B. 246 ; 54 L. T. 877 ; 34 W. R. 593 ; 3 Morr. 83.

Annotations :—**Refd.** Montgomery *v.* De Bulmes, [1898] 2 Q. B. 420, C. A. ; Woodham Smith *v.* Edwards, Haslam (1908), 77 L. J. K. B. 1056, C. A.

E. Order of Committal.

8490. Jurisdiction to grant—On failure to excuse default—Further examination necessary if time given & further default.]—A party ordered to pay a sum recovered against him in the county ct., who has made default, &, upon being examined upon a judgment summons, shows no sufficient

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that, in default, the action be dismissed with costs. Pltf. neglecting to proceed, the action was dismissed with costs. On motion by deft. :—*Held :* as the costs constituted a debt within the above Act, the costs, as taxed, together with the costs of the motion, should be paid by instalments.—HOLLAND *v.* READ (1874), 8 I. L. T. 168.—IR.

p. —— *Debtor being assignee of debt due by creditor.*]—Upon an application for an instalment order, deft. put in an affidavit that he was the assignee of a judgment debt due by pltf. for costs out of another decided action. The bill of costs had been only partially taxed, but the amount already allowed on taxation exceeded the sum due by deft. to pltf. The order was refused.—KENNEDY *v.* CONNICK (1912), 46 I. L. T. 67.—IR.

8483 i. *Form of order—Provision for imprisonment on default—Court satisfied as to debtor's means.*]—Where an order is made for payment of a debt by instalments, & it has not been shown that debtor could have paid the whole debt, the ct. will not, in the alternative, order debtor to be imprisoned in default of payment of any of those instalments.—*Re* SPRING (1885), 4 N. Z. L. R. 233.—N.Z.

r. —— *"Decree" & "order."*]—An instalment order was entered on the form of a "Decree payable by instalments," & not on a form of "Order for instalments under Debtors Act" :—*Held :* the decree for instalments should be treated as an order for instalments.—SEABROKE *v.* BYRNE (1895), 29 I. L. T. Jo. 128.—IR.

s. —— *Provision for imprisonment on default.*]—On an application for an instalment order, the ct. will, in the first instance, make an order merely for payment within a specified time & in case of default, an order for commitment.—DILLANE *v.* O'CONNELL (1873), I. R. 7 C. L. 585.—IR.

t. —— *For one instalment only.*]—The order should be made for a single instalment, even though several instalments are in arrear.—MCTAGGART *v.* HOWARD, [1903] 2 I. R. 557 ; 37 I. L. T. 39.—IR.

PART XXII. SECT. 1, SUB-SECT. 6.—E.

a. *Jurisdiction to grant — Requisites under Arrest & Imprisonment for Debt Act, R. S. B. C., c. 12, ss. 15, 16.*]—Debtor cannot be committed for contempt for disobedience of an instalment order, where the circumstances referred to in the above sects.

excuse for such default, may be committed to prison forthwith, but if the judge orders him to pay the money at a future day, or, in default, to be committed, & the party again makes default, he cannot be committed without being examined as to the cause of such second default.—ABLEY *v.* DALE (1850), 10 C. B. 62; 1 L. M. & P. 626; 20 L. J. C. P. 33; 15 J. P. 147; 14 Jur. 1069; 138 E. R. 26; *subsequent proceedings* (1851), 11 C. B. 378.

Annotations :—**Refd.** Hayward *v.* Hayward (1854), Kay, App. xxxi.; *Ex p.* Summers (1855), 3 W. R. 487; *Re* Wilson (1857), 30 L. T. O. S. 138.

8491. —— Mayor's Court—Debtor not residing or trading in London—When summoned on judgment.]—The power of committing debtor in case of default cannot be exercised by the Mayor's Ct. of London, if debtor does not reside or carry on business within the City of London at the time he is summoned on such judgment.—WASHER *v.* ELLIOTT (1876), 1 C. P. D. 169; 45 L. J. Q. B. 144; 34 L. T. 56; 24 W. R. 432.

Annotations :—**Consd.** Schuller *v.* Wood (1894), 64 L. J. Q. B. 243, D. C. **Refd.** *Re* Ives, *Ex p.* Addington (1886), 16 Q. B. D. 665.

8492. —— Without making order for payment.]—A county ct. judge has jurisdiction to make an order for committal against a judgment debtor, on the hearing of a judgment summons, & he is not bound in the first instance merely to make an order for payment.—HOWE *v.* SMALE (1888), 5 T. L. R. 24, D. C.

8493. —— Order on judgment summons not personally served on debtor.]—When a judgment summons has been personally served upon a judgment debtor, & an order has been made thereon that debtor shall pay a sum of money within a prescribed time, there is jurisdiction to make an order of commitment, under 1869 Act, for non-payment of that sum of money, although the order has not been personally served upon debtor.

It is the summons, & not the order to pay, which must be served personally (VAUGHAN WILLIAMS, L.J.).—HAYDON *v.* HAYDON, [1911] 2 K. B. 191; 80 L. J. K. B. 672; 104 L. T. 477; 27 T. L. R. 321, C. A.

8494. —— On default of payment of composition—Composition agreed after order to pay by instalments.]—A judgment having been recovered against deft. for a sum of money & remaining unsatisfied, pltf. applied to a judge at chambers to commit deft. to prison under 1869 Act, s. 5. The judge made an order for payment of the debt by monthly instalments. After three of such instalments had been paid, proceedings were taken by deft. for the purpose of making a composition with his creditors under 1869 Bkpcy. Act, & a resolution of the creditors was duly passed accepting a composition upon deft.'s debts, payable by two instalments. Default was made in the payment of the first instalment of the composition to pltf., & instalments under the judge's order having by that time become due & not having been paid, pltf. applied again at chambers for the committal of deft. to prison for non-compliance with the judge's order :—*Held :* the effect of the default in payment of the composition was to remit pltf. to the position he occupied before the proceedings in respect of the composition took place, & the order might be made for deft.'s committal to prison for non-compliance with the judge's order.—NEWELL *v.* VAN PRAAGH (1874), L. R. 9 C. P. 96; 43 L. J. C. P. 94; 29 L. T. 891; 22 W. R. 377.

Annotations :—**Mentd.** Edwards *v.* Hancher (1875), 1 C. P. D. 111; Tea Co. *v.* Jones (1880), 43 L. T. 255.

Jurisdiction to make receiving order in lieu of order for committal.]—*See* Part IV., Sect 1, *ante*.

8495. Application for—At what time—When debtor makes default—Order for payment by instalments.]—Where an order was made under 1869 Act, s. 5, for payment by instalments :—*Held :* an application for commitment must be made when debtor makes default in payment.—*Re* THE DEBTORS' ACT (1870), 22 L. T. 666.

Annotations :—**Apprvd.** R. *v.* Brompton County Ct. Judge (1886), 18 Q. B. D. 213, C. A. **Refd.** Stonor *v.* Fowle (1887), 58 L. T. 1, H. L.

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do not exist.—ROYAL BANK OF CANADA *v.* MCLENAN, [1918] 2 W. W. R. 225; 41 D. L. R. 27; 25 B. C. R. 183.—**CAN.**

b. —— *Requisites under* 1872 *Act, s.* 6.]—Before an order for committal can be made under the above sect. there must be (1) an order for payment of the debt in one sum or by instalments, (2) default in payment according to the terms of the order for payment, & (3) evidence of means of the defaulter to pay, satisfactory to the judge.—KIRBY *v.* SMYTH (1876), 10 I. R. Eq. 417.—**IR.**

c. —— *Requisites under Imprisonment for Debt Limitation Act,* 1900, *s.* 3.]—The effect of the above sect. is that, except in the cases excepted by 1874 Act, s. 3, & in the case of a debt incurred by fraud an order for imprisonment for default in payment of a judgment debt cannot be made, unless it is proved or admitted that the judgment debtor has, at the date of the hearing of the judgment summons, money of his own which he has refused to pay to the judgment creditor.—CORONNO *v.* BURGESS (1903), 23 N. Z. L. R. 25.—**N.Z.**

d. —— *Discretion of court.*]—A judge's powers are confined to making the order & enforcing it. He has a discretion to refuse to commit.—PALM *v.* THOMPSON (1910), 15 W. L. R. 433.—**CAN.**

e. —— *On default—Without defendant showing cause.*]—An order was made that deft. should pay the judgment debt within a fixed period, & in default that he should be committed to gaol :—*Held :* the part of the order as to imprisonment was bad, & deft. was entitled to show cause why he did not pay.—*Re* WOLTZ *v.* BLAKELY (1886), 11 P. R. 430.—**CAN.**

8494 i. —— *On default of payment of composition.*]—Deft. who had been ordered to pay pltfs. their debt by instalments, & made default in so doing, compounded with his creditors, who agreed to accept a composition, to be paid to them through the official assignee, as trustee. Pltfs., who had been returned by deft. as fully secured, were not tendered or paid any part of the composition, as they had not valued their security & proved for the balance. Pltfs. having moved to commit deft. to prison for default in paying the instalments ordered by the ct. :—*Held :* the default, if any, committed by the trustee in not tendering the composition to the pltfs. was not default by debtor.—NATIONAL BUILDING & LAND INVESTMENT CO. *v.* ANON. (1882), 17 I. L. T. 12.—**IR.**

g. —— *Justices in petty sessions—Married woman*—1890 *Act, s.* 22.]—Justices in petty sessions have no jurisdiction to make an order of committal under the above sect. against a married woman.—O'KEEFE *v.* O'DONOUGHUE (1895), 21 V. L. R. 528.—**AUS.**

h. —— *Magistrate — Debtor becoming bankrupt.*]—Where debtor incurs a debt dishonestly & then becomes bkpt., a magistrate has power to make an order on a judgment summons for his committal to prison.—*Re* DOUBLEDAY (1888), 6 N. Z. L. R. 199.—**N.Z.**

k. —— *After death of plaintiff.*]—Where original pltf. was dead, but the original decree had been renewed in the name of the administratrix, & all the instalments on foot of the order had become due before pltf.'s death :—*Held :* a committal order could be granted.—CONDON *v.* SADLIER (1897), 31 I. L. T. Jo. 139.—**IR.**

l. *Application for—Under what rules of court.*]—To obtain an order under 1869 Act it is necessary to proceed under the rules of ct. applicable to the Supreme & District Cts. of Saskatchewan & not under the English County Ct. Act & Rules.—PEARCE *v.* KERR (1908), 9 W. L. R. 504.—**CAN.**

m. —— *By whom—Not creditor guilty of laches.*]—PALM *v.* THOMPSON (1910), 15 W. L. R. 433.—**CAN.**

n. —— *Notice of—Small Debts Court.*]—A notice by a judgment creditor's solr. of an application to a magistrate of a small debts ct. for an order to commit a judgment debtor, because of failure to pay instalments ordered to be paid on the return of a judgment summons, is a nullity. A judgment debtor by appearing pursuant to such notice does not waive his right to object at any stage.—*Re* SMALL DEBTS ACT, *Re* WAXSTOCK (1903), 9 B. C. R. 433.—**CAN.**

o. —— *Necessity for affidavit.*]—Unless a decree or order directing payment of money contain within it a statement that the payment may be enforced by attachment an attachment cannot issue without the special leave of the ct. obtained on motion *ex p.* When it sufficiently appears to

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8496. —— By whom—Party entitled to damages in divorce court.]—Damages awarded by a jury in a divorce suit against co-resp., & ordered by the ct. to be paid to the husband for him to pay same into ct. for purposes of settlement, will not constitute the husband a good "judgment creditor" capable of applying for an order of committal against such co-resp., as a judgment debtor, under 1883 Act, s. 103 (5).—*Re* FRYER, *Ex p.* FRYER (1886), 17 Q. B. D. 718; 55 L. J. Q. B. 478; 55 L. T. 276; 34 W. R. 766; 2 T. L. R. 860; 3 Morr. 231, C. A.

Annotations:—**Mentd.** Bates *v.* Bates (1888), 37 W. R. 230; *Re* Otway, *Ex p.* Otway (1888), 58 L. T. 885; Kerr *v.* Kerr (1897), 77 L. T. 29.

8497. The hearing—In open court—What is open court.]—A county ct. judge sat for the purpose of hearing summonses for committal under 1869 Act, s. 5, & for all business except jury cases, in a small room, which he also used at other times as his private room; it communicated with a larger room, where were the usual raised bench & jury-box, by a door which was kept open during the hearing of the summonses, & the names of the parties were, if necessary, called in the larger room. The public had access to the smaller room as well as the larger:—*Held:* orders for committal made in such circumstances were not made in open ct., & they could not be enforced.—KENYON *v.* EASTWOOD (1888), 57 L. J. Q. B. 455.

8498. —— Whether in debtor's absence—Debtor not heard as to ability to pay.]—On a judgment summons a county ct. judge, in the absence of debtor through ill-health, made an order for his committal for non-payment. Prohibition granted, on the ground that debtor was entitled to be heard on the question of his ability to pay.—PITCHER *v.* BOURN (1894), 10 T. L. R. 245, D. C.

Annotation:—**Dbtd.** Johnstone *v.* Kiernan (1894), 10 R. 313, D. C. There is nothing in the report to show on what ground the judgment proceeded, & it seems that a fundamental objection to prohibition was never raised at all. (WRIGHT, J.)

8499. —— —— ——.]—A county ct. judge has jurisdiction to make a committal order under 1869 Act, notwithstanding the non-appearance of debtor, & a prohibition will not be granted to restrain the proceedings thereunder, upon the ground that debtor had not an opportunity of being heard as to his ability to pay.—JOHNSTONE *v.* KIERNAN (1894), 10 R. 313, D. C.

8500. The order—Form of —Order for committal until payment of sum— & gross sum for costs.]—Debtor had been ordered to pay into ct. a sum under £50, found due from him to pltf. in a cause, & had made default in payment. On a motion under 1869 Act, s. 5, an order was made for his committal to prison, until he should pay the sum, in payment of which he had made default, & also a gross sum for costs fixed by the ct. in lieu of taxed costs.—ROGERS *v.* ROGERS (1871), 23 L. T. 796; 19 W. R. 317, 374.

8501. —— —— Direction for suspension on payment of instalments.]—Judgment having been recovered against deft. in a county ct., an order for payment of £20 was made. Deft. having made default in payment thereof a judgment summons was taken out, & the judge having heard evidence & being satisfied as to deft.'s means, made an order to commit him to prison for ten days, but directed that the warrant should be suspended, if debtor paid instalments of £4 a month, the first payment to be made in fourteen days:—*Held:* the order was in reality an order for commitment in respect of the past default in payment of the £20, & not an anticipatory order for commitment in respect of any future default, & the order was valid under 1869 Act, s. 5.—STONOR *v.* FOWLE (1887), 13 App. Cas 20; 57 L. J. Q. B. 387; 58 L. T. 1; 52 J. P. 228; 36 W. R. 742; 4 T. L. R. 109, H. L.; *revsg.* S. C. *sub nom.* R. *v.* BROMPTON COUNTY COURT JUDGE (1886), 18 Q. B. D. 213; & *sub nom.* REEVES *v.* FOWLE, 56 L. J. Q. B. 49, C. A.; *subsequent proceedings, sub nom.* R. *v.* STONOR (1888), 57 L. J. Q. B. 510, D. C.

Annotations:—**Refd.** *Re* Berkshire County Ct. Case (1887), 5 T. L. R. 40, D. C.; *Re* Nuthall, Ford *v.* Nuthall (1891), 64 L. T. 241, C. A.; *Re* Watson, *Ex p.* Johnston, Johnston *v.* Watson (1893), 1 Q. B. 21, C. A.; Bailey *v.* Plant (1900), 2 W. C. C. 160; Saunders *v.* Swansea Finance Co. (1905), 21 T. L. R. 317. **Mentd.** Harris *v.* Slater (1888), 21 Q. B. D. 359; Hulbert & Crowe *v.* Cathcart, [1894] 1 Q. B. 244; *Re* Oddy, Major *v.* Harness, [1906] 1 Ch. 93, C. A.; Haydon *v.* Haydon, [1911] 2 K. B. 191, C. A.

the ct. that the debt comes within such of the exceptions to 1872 Act, s. 5, as are cognizable by the Ct. of Ch., an order for the issuing of an attachment may be made without affidavit; otherwise an affidavit, showing the above facts must be filed.—KELLY *v.* KELLY (1874), 8 I. R. Eq. 497.—**IR.**

p. —— *Service & filing of affidavits in support of.*]—Deft. having been ordered to pay $25 a month, pltf. moved to commit deft. for contempt in not paying the instalments ordered:—*Held:* (1) copies of the affidavits in support of the motion having been served with the notice of motion & the affidavits filed before the return-day, the motion was regularly made; (2) it was not necessary that the affidavits should be filed before the notice of motion was served.—PALM *v.* THOMPSON (1910), 15 W. L. R. 433.—**CAN.**

q. —— *On more than one instalment.*]—Where an order to pay a debt by instalments has been made, a committal order cannot be made for non-payment of several instalments.—LANGFORD *v.* LARACY (1884), 18 I. L. T. 39.—**IR.**

r. —— ——.]—A committal order can be applied for on more than one instalment.—JOHNSON *v.* SANDIFORD (1897), 31 I. L. T. Jo. 392.—**IR.**

8498 i. *The hearing—Defendant not served with notice.*]—The ct. will refuse to order the arrest of deft. for non-compliance with an order for payment of a debt by instalments, when no notice of the motion has been served on him.—JOHNSTON *v.* ACKLAM (1876), 10 I. L. T. Jo. 575.—**IR.**

8498 ii. —— ——.]—A member of a partnership, against which a judgment has been recovered in the firm name, who has not been personally served & has not admitted himself or been adjudged a partner, cannot be proceeded against by an order for committal for non-attendance on a judgment summons.—*Re* REID *v.* GRAHAM (1894), 26 O. R. 126.—**CAN.**

t. —— *What evidence admissible.*]—Depositions of debtor taken upon an examination, as to his means to satisfy a judgment, may be used against him on an application to commit, as may his cross-examination upon an affidavit filed by him in answer to such an application.—MCMONAGLE *v.* ORTON (1890), 6 Man. L. R. 350.—**CAN.**

a. *The order — What constitutes—Judge's indorsement.*]—A judge's indorsement on the judgment summons is the order upon such summons, & a subsequent order is illegal.—*Re* MCLEOD *v.* EMIGH (1888), 12 P. R. 450.—**CAN.**

b. —— *Form of — Grounds on which made must appear.*]—FINLAYSON *v.* MCDONALD (1882), 1 N. Z. L. R. 238.—**N.Z.**

c. —— —— *Alleged contempt must be shown—Period of imprisonment —1872 Act, s. 6.*]—An order is bad *ex facie*, if it does not show that the alleged contempt is of such a nature as to justify a committal under the exceptions in the above sect., & if it does not also expressly declare that the period of imprisonment shall not exceed one year.—*Re* BRYNE (1880), 6 L. R. Ir. 455.—**IR.**

d. —— —— *Sheriff's fees.*]—A creditor, who obtains in the county ct. a committal order against debtor, on which debtor is subsequently arrested, is not entitled to include in the order the sheriff's fees paid on the execution of the order.—BARRETT *v.* GOODMAN (1893), 32 L. R. Ir. 213.—**IR.**

e. *S. P.* MCTAGGART *v.* HOWARD, [1903] 2 I. R. 557.—**IR.**

f. —— —— *Under Imprisonment for Debt Abolition Act.*]—When a judgment debtor is ordered to pay a judgment debt on or before a certain specified day, & in default to be imprisoned, an order made in form A. appended to the rules, under the above Act, is bad.—ELIOTT *v.* GRANT (1882), 2 N. Z. L. R. 64.—**N.Z.**

g. —— —— *Must show debtor's residence.*]—*Re* WEATHERLY (1867), 4 P. R. 28.—**CAN.**

h. —— —— *Not invalidated by omission of place of payment.*]—

8502. —— —— ——.]—Pltfs. having obtained a judgment in the City of London Ct. against deft. for £41 for goods supplied to him, transferred the case into the B. county ct. & took out a judgment summons, on which an order was made for payment of the debt at the rate of £4 a month. On debtor's failure to pay the first instalment a summons was taken out under 1869 Act, s. 5, for his committal, & the judge made an order for committal for fourteen days, "warrant to remain in the office for fourteen days," the order did not mention the sum to be paid to avoid arrest, nor the amount of the future instalments, but there was a verbal direction to the registrar that, on payment of £1 within the fourteen days, the warrant was not to be issued, & so as to instalments of £1 for every twenty-eight days. The judgment debtor not having paid the £1 & the fourteen days being about to expire, & motion was made for a prohibition to the county ct. judge to prevent him from issuing the warrant for arrest:—*Held:* there was no ground for a prohibition, & the application should be dismissed.—*Re* BERKSHIRE COUNTY COURT CASE (1887), 4 T. L. R. 40, D. C.

8503. —— —— Minute of order not sufficient.]—On the hearing of a judgment summons in a county ct. the judge committed deft., but suspended the order. The only written document which had, been drawn up, was in the books of the county ct. in the form given in the C. C. R. sched. among the forms of books, which, by Ord. 2, r. 2, the registrar was directed to keep headed "Book H—Summonses for Commitment, Interpleader & Minutes of Orders thereon." Deft. applied for a prohibition, on the ground that the order did not show on its face the ground on which it was issued as required by 1869 Act, s. 5 (1) (*a*):—*Held:* (1) the minute of the order in Book H, which did not show on its face the ground on which the order was issued, was not the order within 1869 Act; (2) as the order, if it were afterwards drawn up as directed by C. C. R., Ord. 25, r. 33, would sufficiently comply with the Act, the application for a prohibition must be refused.—HARRIS *v.* SLATER (1888), 21 Q. B. D. 359; 57 L. J. Q. B. 539; 37 W. R. 56.

Annotation:—**Consd.** Saunders *v.* Swansea Finance Co. (1905), 21 T. L. R. 317, C. A.

8504. —— —— —— "Present ability."]—A. having recovered judgment by default in the S. county ct. on Oct. 14, 1901, against B., & £12 3*s.* 9*d.* remaining due upon the judgment, in Dec., 1902, a judgment summons was taken out, & on Dec. 16, the S. county ct. judge made an order upon the summons, the following minute of which was entered by the registrar in Book H, for payment of "10*s.* in twenty-eight days or fourteen days, then 10*s.* a month, present ability." On Aug. 7, 1903, on the application of A., an order of commitment was issued by the registrar of the county ct. That order, after reciting the judgment of Oct. 14, 1901, against B., & that B. had made default in paying part of the amount of the judgment, & that a judgment summons was issued, & that at the hearing of the summons on Dec. 16, 1902, it was proved to the satisfaction of the ct. that B. had means to pay the amount remaining unpaid & refused to pay it, directed that for such default B. should be committed to prison for fourteen days, unless he should sooner pay the sum stated below. The order was stated as "Given under the seal of the ct., Dec. 16, 1902," & as "Issued, Aug. 7, 1903":—*Held:* (1) as the word "month" in the memorandum of the order of Dec. 16, 1902, entered by the registrar in Book H, meant a lunar month of twenty-eight days, & not a calendar month, there had been default on Aug. 7, 1903, in payment of the instalments within the successive periods of twenty-eight days, & the order of commitment was free from objection (2) the words "present ability" were the governing factor in the whole order; (3) the memorandum in Book H was only a step towards the formal order, which was afterwards to be drawn up.—SAUNDERS *v.* SWANSEA FINANCE CO., LTD., & HOME (1905), 21 T. L. R. 317, C. A.

8505. —— Rectification of—Order drawn up as attachment for contempt.]—Where a judge made an order for the committal of a defaulting party under 1869 Act, & the order was drawn up by the registrar in the presence of debtor in the form of an attachment for contempt, from which debtor appealed:—*Held:* although a man who made default in payment of a sum of money, which he had been ordered by the ct. to pay, could not be attached for contempt, but must be proceeded against under 1869 Act, s. 5, the order might be rectified, & appeal dismissed.—ESDAILE *v.* VISSER (1880), 13 Ch. D. 421; 28 W. R. 281, C. A.

Annotation:—**Mentd.** Chard *v.* Jervis (1882), 9 Q. B. D. 178, C. A.

8506. —— Effect of—On judgment debtor's right to sue high bailiff for failure to serve judgment summons.]—So long as a committal order stands, an action will not lie at the suit of a judgment debtor against the high bailiff of the county ct. for not having served him with the judgment summons upon which the order is made.

Any such action against the high bailiff, by virtue of Public Authorities Protection Act, 1893 (c. 61), must be brought within six months of the "act, neglect, or default" complained of, & must be brought within six months of the time when the bailiff made the return of the service of

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FINLAYSON *v.* MCDONALD (1882), 1 N. Z. L. R. 238.—N.Z.

k. —— —— *Whether order may be conditional—Must be absolute.*]—WALLACE *v.* WARD (1903), 9 B. C. R 450.—CAN.

l. *S. P.* CHICHESTER *v.* GORDON (1866), 25 U. C. R. 527.—CAN.

m. —— —— —— *May be conditional.*]—SOMMET *v.* DORMOY (1873), I. R. 7 C. L. 528.—IR.

n. —— —— —— *Order for payment within stated period or for committal on default—Valid.*]—PECK *v.* MCDOUGALL (1868), 27 U. C. R. 353.—CAN.

o. —— —— *Minute of order conclusive.*]—Where a registrar is present & takes a minute of an order, it is conclusive, even though the judge's recollection differs.—WALLACE *v.* WARD (1903), 9 B. C. R. 450.—CAN.

p. —— *How drawn up—In open court.*]—It is not necessary that an order should be drawn up in open ct., nor is it necessary that the grounds, upon which it is made, should be stated in open ct.—FINLAYSON *v.* MCDONALD (1882), 1 N. Z. L. R. 238.—N.Z.

8505 i. —— *Rectification of.*]—The ct. will not exercise its power of amendment, unless it be proved clearly to the satisfaction of the ct. that sufficient grounds were proved before the ct. below, on which that ct. would have been justified in drawing up the order of commitment free from defect.—WATSON *v.* RYAN (1892), 18 V. L. R. 198.—AUS.

q. —— *Effect of errors in*—1874 *Act.*]—An order was drawn up committing debtor to prison, if an instalment was not paid. There were mistakes as to amount & date in the order, which did not follow the rules under the above Act:—*Held:* the order was not thereby invalidated.—CRESSWELL *v.* MCARTHUR & CO. (1893), 12 N. Z. L. R. 730.—N.Z.

r. —— *Service of—Order made in debtor's absence.*]—Where an order to commit a party is made in his absence, he must be served with a copy of the order before arrest.—WALLACE *v.* WARD (1903), 9 B. C. R. 450.—CAN.

s. —— *Continuation of proceedings under—Order not made on the merits.*]—After bkpcy. the ct. will not order proceedings taken under an order made under 1874 Act to be continued where such order has not been made on the merits & on terms which debtor had not consented to.—*Re* BARÉ (1891), 10 N. Z. L. R. 219.—N.Z.

Sect. 1.—*Abolition of imprisonment for debt : Subsect.* 6, *E. Sect.* 2.]

the judgment summons & the county ct. judge acted upon it.

The date of the arrest on the committal order is not the date of the "act, neglect, or default."—TURLEY *v.* DAW (1906), 94 L. T. 216 ; 22 T. L. R. 231.

See, further, PUBLIC AUTHORITIES & PUBLIC OFFICERS.

8507. —— —— How long in force.]—*Held :* an order of commitment by a superior ct. under 1869 Act, s. 5, need not be executed within a year from its date, but remains in force as long as the judgment which it is issued to enforce.—HERMITAGE *v.* KILPIN (1874), L. R. 9 Exch. 205 ; 43 L. J. Ex. 127 ; 30 L. T. 873 ; 22 W. R. 661.

See, now, C. C. R., Ord. 25, r. 46 (4), *& further*, No. 8512, *post.*

8508. —— —— Debt not discharged by imprisonment.]—Imprisonment under a committal order is for a fixed time not exceeding six weeks & is a punishment for the contempt, & the suffering of that imprisonment in no way discharges the debt (VAUGHAN WILLIAMS, L.J.).—*Re* EDGCOME, *Ex p.* EDGCOME, [1902] 2 K. B. 403 ; 71 L. J. K. B. 722 ; 87 L. T. 108 ; 50 W. R. 678 ; 18 T. L. R. 734 ; 46 Sol. Jo. 649 ; 9 Mans. 227, C. A.

Annotation :—**Mentd.** Church's Trustee *v.* Montague, Hibbard (1902), 87 L. T. 412, C. A.

—— **Effect of subsequent receiving order on.**]—*See* No. 1562, *ante.*

8509. Appeal—From order in chambers.]—A refusal by a judge at chambers to make an order to commit deft. to prison for default of payment of a judgment debt is a matter within Jud. Act, 1873, s. 50, & subject to appeal.—DEBENHAM *v.* WARDROPER (1883), 48 L. T. 235, D. C.

8510. —— To what court.]—An appeal from an order of the judge, to whom bkpcy. business is assigned, upon an application under 1869 Act, s. 5, lies directly to the Ct. of Appeal, & not to a Divisional Ct.—GENESE *v.* LASCELLES (1884), 13 Q. B. D. 901 ; *sub nom. Re* LASCELLES, *Ex p.* GENESE (1884), 53 L. J. Q. B. 578 ; 32 W. R. 794 ; 1 Morr. 183, D. C.

8511. Enforcement of order—Imprisonment of debtor at once—"Attachment for debt"—Sheriffs Act, 1887 (c. 55), s. 14 (1).]—A judgment debtor arrested by virtue of an order of commitment under 1869 Act, s. 5, is not a person arrested by virtue of an "attachment for debt" within Sheriffs Act, 1887, s. 14 (1), & such debtor may, notwithstanding that enactment, be taken to prison within twenty-four hours of his arrest.—MITCHELL *v.* SIMPSON (1890), 25 Q. B. D. 183 ; 59 L. J. Q. B. 355 ; 63 L. T. 405 ; 55 J. P. 36 ; 38 W. R. 565 ; 6 T. L. R. 341, C. A.

Annotations :—**Mentd.** *Re* Edye (1890), 63 L. T. 762 ; *Re* A Solicitor (1891), 7 T. L. R. 183 ; Iles *v.* T. (1892), 36 Sol. Jo. 502 ; *Re* Watson, *Ex p.* Watson, Johnston *v.* Watson (1892), 67 L. T. 519, C. A. ; *Re* Smith, Hands *v.* Andrews, [1893] 2 Ch. 1, C. A. ; Bailey *v.* Plant (1900), 2 W. C. C. 160.

8512. Successive orders—Debt not payable by instalments.]—A judgment debtor having made default in payment of the judgment debt, which had been recovered against him in the county ct., & which he had been ordered to pay forthwith, the county ct. judge made an order for his commitment to prison for forty days. Debtor was arrested thereon, but was subsequently discharged on the ground of his being privileged at the time of such arrest, as a witness returning from the sessions. Debtor was again, & whilst the order for committal was still in force, summoned upon a judgment summons, & a second order for his committal for the same default in not paying the judgment debt was made by the county ct. judge : —*Held :* (1) the judge had no power to make such second order, as the first had not been executed ; (2) where a judgment debt was not payable by instalments there was no power under 1869 Act, s. 5, to commit debtor more than once for default in not paying such debt.—HORSNAIL *v.* BRUCE (1873), L. R. 8 C. P. 378 ; 42 L. J. C. P. 140 ; 28 L. T. 705 ; 37 J. P. 518 ; 21 W. R. 597.

Annotations :—**Apprvd.** Evans *v.* Wills (1876), 1 C. P. D. 229 ; **Distd.** R. *v.* Stonor (1888), 57 L. J. Q. B. 510, D. C. **Refd.** Church's Trustee *v.* Hibbard, [1902] 2 Ch. 784, C. A.

8513. —— —— Committal for default in payment of each instalment where debt payable by instalments.]—Where debtor has once been committed upon a judgment summons under 1869 Act, s. 5, for non-payment of a debt, though for a period short of six weeks (the limit imposed by that sect.), a second warrant of commitment cannot issue against him in respect of the same debt, but where the order or judgment makes the debt payable by instalments, debtor may be committed for the full period of six weeks for default in payment of each instalment.—EVANS *v.* WILLS (1876), 1 C. P. D. 229 ; 45 L. J. Q. B. 420 ; 34 L. T. 679 ; 40 J. P. 552 ; 24 W. R. 883.

Annotations :—**Distd.** R. *v.* Stonor (1888), 57 L. J. Q. B. 510, D. C. **Mentd.** R. *v.* London County JJ., [1894] 1 Q. B. 453, C. A.

8514. —— No arrest or imprisonment on first order.]—Deft. in a county ct. having made default in payment of £20 due under a judgment, an order was made to commit him to prison. He was never arrested nor imprisoned under the order, which, according to C. C. R., Ord. 25, r. 33, expired when a year had elapsed from its date. Upon motion for prohibition :—*Held :* as no arrest nor imprison-

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8510 i. *Appeal*—1872 *Act.*]—An appeal lies from a committal order made by a county ct. judge under the above Act.—BRODERICK *v.* WILKINSON (1881), 15 I. L. T. 58.—**IR.**

t. —— *On what grounds—Rejection of evidence.*]—The refusal of evidence is not ground for prohibition. That the judge refused to allow deft. to make explanations as to his dealing with money lent by & repaid to him after judgment, is not a ground for prohibition against proceeding upon an order for committal.—*Re* REID *v.* GRAHAM (1894), 25 O. R. 573 ; *revsd. in part*, 26 O. R. 126.—**CAN.**

w. *Enforcement of order—Bankruptcy of debtor.*]—An order was made against debtor, upon the grounds that since the judgment he had sufficient means to satisfy it & had not done so. He filed his petition, having no assets. The ct. gave leave to enforce the order of imprisonment against him. In such case, the ct. will not re-try the case, unless there are exceptional circumstances.—*Re* MILLS (1891), 9 N. Z. L. R. 288.—**N.Z.**

y. —— ——.]—Bkpcy. is an absolute bar to further proceedings under 1874 Act, after the bkpcy. of debtor.—*Re* WATKINSON, *Ex p.* WILSON (1893), 11 N. Z. L. R. 810.—**N.Z.**

a. —— —— *Debt incurred dishonestly*—1883 *Act*, s. 57.]—Where debtor incurs a debt dishonestly & subsequently becomes bkpt., a magistrate has power to make an order for his committal to prison, & the Supreme Ct. will, under the above sect., give leave to enforce the order.—*Re* DOUBLEDAY (1888), 6 N. Z. L. R. 199.—**N.Z.**

b. —— *Order for payment "forthwith."*]—A debtor must have such time as in the circumstances of the particular case may be reasonable for compliance with the order before he can be held to be in default, & this is so, even if the order be for payment "forthwith."—ACKROYD *v.* BISHOP (1891), 9 N. Z. L. R. 250.—**N.Z.**

c. —— *Warrant—Form of.*]—Where a warrant of commitment purporting to be made under 1874 Act contains a recital at variance with its provisions, the fact that such warrant is in the prescribed form will not make it valid. The warrant must at least show on the face of it, by a recital, however brief, that it is based on a valid order of committal.—R. *v.* PHILLIPS, *Re* CALDER (1889), 7 N. Z. L. R. 749.—**N.Z.**

d. *Successive orders—Debtor committed twice for same debt.*]—Where a person has been once committed for the whole of a debt he cannot be again committed for same.—ANON. (1896), 30 I. L. T. Jo. 37.—**IR.**

ment had ever taken place upon the order before its expiration, & as deft. was still in default, the county ct. judge had power to make a second order of commitment.—R. *v.* STONOR (1888), 57 L. J. Q. B. 510; 59 L. T. 669; *sub nom. Re* BROMPTON COUNTY COURT JUDGE, *Ex p.* REEVES, 4 T. L. R. 534, D. C.

SECT. 2.—ARREST OF DEBTOR ABOUT TO LEAVE JURISDICTION AND ABSCONDING DEBTOR.

See, also, 1869 Act, s. 6, R. S. C. Ord. 69, 1914 Act, s. 23.

8515. 1869 Act, s. 6—Only before judgment.]—The above sect. applies only to actions in which judgment has not been signed, & upon final judgment being obtained, the order is annulled.

Pltfs. arrested deft. for a debt of £1,500 under a judge's order, obtained under 1869 Act, s. 6. Deft. paid into ct. £1,500, which he borrowed from his attorney & a friend, & thereupon was released. He afterwards obtained leave to go abroad to prepare his defence to the action. He subsequently submitted to final judgment for the sum of £1,500: —*Held:* the object of s. 6 was merely to secure the presence of deft. in England until judgment, & upon judgment being signed, deft. was entitled to have the sum of £1,500 paid out of ct. to him.—YORKSHIRE ENGINE CO. *v.* WRIGHT (1872), 21 W. R. 15.

Annotation:—**Apld.** Hume *v.* Druyff (1873), 42 L. J. Ex. 145.

8516. —— Discretion of court—Arrest of army officer under orders for service abroad.]—Pltf. in an action having applied, under the above sect., for an order for the arrest of deft., an officer in the army about to leave England with his regiment:—*Held:* as there was no affidavit on the part of pltf. to show anything which would satisfy the ct. that pltf. would be prejudiced by the absence of deft., & the ct. had a discretion to exercise as to issuing such an order against an officer, under which he would be arrested & perhaps deprived of his commission, & as the application had been delayed until deft. was just about to leave the ct. would not order the arrest, & thereby allow one of the parties to put an unfair pressure upon the other.—HASLUCK *v.* LEHMAN (1890), 6 T. L. R. 435, C. A.

8517. —— —— Manager of operatic company leaving England with another company.]—Debtor, manager of pltfs., an operatic co., being about to set off to America in charge of another operatic co., pltfs. applied, under 1869 Act, s. 6, for an order for his arrest upon an affidavit by pltfs.' chairman stating that deft. had admitted owing them £150, but declined to pay over such sum, that he was about to leave England for America, that he was of small means, that between £30,000 & £40,000 of pltfs.' money had passed through his hands, & that on an account being taken further sums beyond the £150 would be found due, that the account could not be investigated nor discovery obtained in the absence of deft., that he would be a material witness in support of the pltfs.' claim in the action, as the only means they had of proving the £150 was due was from admissions to be extracted from him, that he had furnished incomplete accounts, & that his absence would prejudice pltfs. in prosecuting the action & in obtaining judgment & payment. The order for arrest was made on Oct. 30, & early next morning deft. was arrested in Liverpool. His solrs. in London paid £250 into ct., & obtained an order at chambers discharging deft. from custody. On a summons for the discharge of the order of Oct. 30, it was ordered that the summons should be amended, & so much as asked for the rescinding of the order of Oct. 30 should be discharged:—*Held:* the ct. would not interfere with the exercise of the judge's discretion as to the order of arrest, having regard to all the allegations in the affidavit. —COMEDY OPERA CO. *v.* CARTE, [1879] W. N. 210.

8518. —— When writ of ne exeat regno will be granted.]—A writ of *ne exeat regno* can be granted in those cases only which fall within the above sect.—HANDS *v.* HANDS (1881), 43 L. T. 750.

8519. —— ——.]—Upon evidence that deft., who has been ordered by decree in an administration suit to pay into ct. on or before a certain day the balance admitted by his answer to be due from him to the estate, is about to leave the country, a writ of *ne exeat* may be obtained against him by his co-defts., the exors., although the day to which the time for payment was extended has not arrived.—SOBEY *v.* SOBEY (1873), L. R. 15 Eq. 200; 42 L. J. Ch. 271; 27 L. T. 808; 21 W. R. 309.

Annotation:—**Consd.** Colverson *v.* Bloomfield (1885), 29 Ch. D. 341, C. A.

8520. —— When debtor entitled to discharge.] —Deft. who has been arrested & imprisoned before final judgment, under 1869 Act, s. 6, is entitled to be discharged under s. 4, after final judgment has been obtained, notwithstanding that the judgment is still unsatisfied, & that the absence of deft. from England may, as by hindering his oral examination under C. L. P. Act, 1854, s. 60, with regard to debts owing to him, prejudice pltf. in obtaining the fruits of the judgment.—HUME *v.* DRUYFF (1873), L. R. 8 Exch. 214; 42 L. J. Ex. 145; 29 L. T. 64.

8521. 1883 Act, s. 25 (1) (a)—Application to debtor absconding before bankruptcy notice or petition.]—The power given by 1883 Act, s. 25 (1) (*a*), as amended by 1890 Act, s. 7, to grant a warrant, in certain circumstances, for the arrest of debtor, "who has absconded or is about to abscond," is not limited as to time, & applies to the case of debtor absconding before a bkpcy.

PART XXII. SECT. 2.

e. 1872 *Act, s. 7—Object of Act.*]—The object of the Act is to secure the presence of deft. within the jurisdiction, so that the proceedings of pltf. in prosecuting his action may be rendered of avail up to the marking of final judgment, when the order for the arrest will be annulled.—HESTER *v.* BYRNE (1874), 8 I. L. T. 53.—IR.

f. Grounds for arrest.]—A creditor must show as well as the existence of the debt & intention to abscond, some other fact or circumstance which, coupled with those facts, points to an intent to defraud.—PHAIR *v.* PHAIR (1900), 19 P. R. 67.—CAN.

g. ——.]—A justice of the peace will not issue a warrant for the arrest of debtor about to quit Ireland, unless it is shown, by the sworn information upon which he acts, that debtor had been adjudicated bkpt., or that he had presented a petition for arrangement.—SCOTT *v.* MCVICKERS (1876), I. R. 10 C. L. 453.—IR.

h. ——.]—An order to arrest deft. should not be made except on affidavits which show in what way the absence of deft. from Ireland will materially prejudice pltfs. in the prosecution of their action.—LINDSAY *v.* HUGHES (1876), 10 I. L. T. 63.—IR.

k. —— *Absence of intention to leave—Undertaking not to sue.*]—A married woman was arrested upon an affidavit stating that she intended to leave Ireland. An application for her discharge was granted, it not being shown that she had such intention to leave Ireland, & on her undertaking not to bring an action.—WILLIS *v.* DOWDALL (1876), 10 I. L. T. Jo. 564.—IR.

l. Discharge from custody—Payment of debt—1872 *Act, s.* 78.]—Debtor, arrested under the above sect., after a debtor's summons has been granted, will not be detained in custody after payment of debt, when it does not appear that a petition in bkpcy., founded on the proceedings under a debtor's summons, can be presented against him.—*Re* COCHRANE (1875), 9 I. L. T. 192.—IR.

Sect. 2.—Arrest of debtor about to leave jurisdiction and absconding debtor. Sect. 3: Sub-sect. 1.]

notice has been issued or a bkpcy. petition presented.—R. *v.* NORTHALLERTON COUNTY COURT JUDGE, [1898] 2 Q. B. 680; 68 L. J. Q. B. 24; 79 L. T. 327; 47 W. R. 68; 15 T. L. R. 9; 43 Sol. Jo. 10; 5 Mans. 300, C. A.; *sub nom.* SKINNER *v.* NORTHALLERTON COUNTY COURT JUDGE, [1899] A. C. 439, H. L.

Annotation:—**Mentd.** Savill *v.* Dalton, [1915] 3 K. B. 174, C. A.

8522. Execution of warrants—Right to break open locked door.]—Where a warrant is issued for the arrest of an absconding debtor, who has failed to surrender to bkpcy. proceedings taken against him, debtor cannot avoid the execution of the warrant by sheltering himself behind a locked door. Such a warrant of arrest is an authority to the officer charged with its execution to break the door & go in & arrest debtor inside the house where he is known to be.—*Re* VON WEISSENFELD, *Ex p.* HENDRY (1892), 36 Sol. Jo. 276; 9 Morr. 30.

Annotation:—**Mentd.** *Re* Hirth, *Ex p.* Official Receiver (1899), 68 L. J. Q. B. 287, C. A.

See, also, No. 5670, *ante.*

SECT. 3.—BANKRUPTCY OFFENCES.

SUB-SECT. 1.—FAILURE TO DISCOVER OR DELIVER UP, CONCEALMENT, FRAUDULENT REMOVAL, EMBEZZLEMENT & FRAUDULENT TRANSFER OF, & ABSCONDING WITH PROPERTY.

See, 1869 Act, s. 13, 1914 Act, ss. 154, 159.

See, also, Part XIX., *ante.*

Offences in relation to property, *generally, see* CRIMINAL LAW & PROCEDURE.

8523. Non-disclosure—Burden of proof—Book showing property produced at last examination.]—On an indictment against a bkpt. for concealing his effects, if the evidence is that bkpt. on his last examination stated that a book given in by him contained an account of all his effects, it is incumbent on the prosecutor to produce the book, or account for it, that it may be seen whether that book mentions the property or not.—R. *v.* EVANI (1825), 1 Mood. C. C. 70.

Annotation:—**Distd.** Courtivron *v.* Meunier (1851), 6 Exch. 74.

8524. —— 1842 Act, s. 32—Act of concealment before final examination.]—*Held:* under the above sect. bkpt. was punishable as a felon, if, with intent to defraud, & before his final examination, he did an act of concealment.—COURTIVRON *v.* MEUNIER (1851), 6 Exch. 74; 20 L. J. Ex. 104; 15 J. P. 660; 15 Jur. 275; 155 E. R. 459.

Annotation:—**Distd.** Nash *v.* R. (1864), 4 B. & S. 935.

8525. —— 1861 Act, s. 221—Act of concealment not complete till examination finished.]—An indictment under the above sect. alleged that deft., having been adjudged bkpt. by the Ct. of Bkpcy. for the L. District, being then the ct. duly authorised & competent to adjudicate upon his examination in the ct., with intent to defraud & defeat the rights of his creditors, did not fully & truly discover to the best of his knowledge & belief all his property, to wit, all his personal property, in money & in goods, & did not as to part of his property, not being part fully & *bonâ fide* before sold or disposed of in the way of his trade or business & not laid out in the ordinary expense of his family, fully & truly discover, to the best of his knowledge & belief how & to whom, & for what consideration, & when he had disposed of, assigned, or transferred such part thereof, to wit, etc.:—*Held:* (1) supposing the indictment to charge two offences, no objection on that ground could be taken to it in a ct. of error, & if one of them were no offence in law, judgment on the indictment would still be good after verdict; (2) supposing the indictment bad for want of certainty, the objection was cured by 7 Geo. 4, c. 64, s. 21, as the offence was sufficiently described in the words of the Act. *Qu.:* whether it was cured by 14 & 15 Vict. c. 100, s. 25. *Semble:* the offence by bkpt. in not discovering his property on examination was not complete until the examination was ended.—NASH *v.* R. (1864), 4 B. & S. 935; 3 New Rep. 564; 33 L. J. M. C. 94; 9 L. T. 716; 28 J. P. 246; 10 Jur. N. S. 819; 12 W. R. 421; 9 Cox, C. C. 424; 122 E. R. 710.

Annotations:—**Refd.** Heymann *v.* R. (1873), L. R. 8 Q. B. 102. **Mentd.** R. *v.* Thompson, [1914] 2 K. B. 99, C. C. A.

8526. —— 1869 Act, s. 11 (1) (2) (4) (6)—Intention to defraud essential.]—An intention to defraud is the essence of the offences relating to the non-disclosure of his property by bkpt. to the trustee.—R. *v.* WISEMAN (1901), 71 L. J. K. B. 128; 85 L. T. 791; 66 J. P. 40; 50 W. R. 333; 18 T. L. R. 177; 20 Cox, C. C. 144; 9 Mans. 13, C. C. R.

8527. —— —— "Property" not limited to property at commencement of bankruptcy.]—Under 1869 Act, s. 11, a bkpt. commits a misdemeanor if he does not truly discover to the trustee all his property, & how, when, & for what consideration he disposed of any part of it, except what is used in trade, & in ordinary expense of his family, & this disclosure is not restricted to the property in possession of bkpt. at the commencement of the bkpcy.—R. *v.* MICHELL (1880), 50 L. J. M. C. 76; 43 L. T. 572; 45 J. P. 239; 14 Cox, C. C. 490, C. C. R.

8528. —— —— Admissibility of evidence—To negative fraudulent intention.]—Evidence that debtor at a private meeting of his creditors, held shortly before his bkpcy., disclosed all his property, is admissible for the purpose of negativing any intent to defraud, upon an indictment under 1869 Act, s. 11 (1) (2) (4) (6), charging him with not fully & truly discovering to the trustee all his property.—R. *v.* WISEMAN (1901), 71 L. J. K. B. 128; 85 L. T. 791; 66 J. P. 40; 50 W. R. 333; 18 T. L. R. 177; 20 Cox, C. C. 144; 9 Mans. 13, C. C. R.

8529. —— 5 Geo. 2, c. 30—Proof that failure not due to design to defraud.]—Where there was

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PART XXII. SECT. 3, SUB-SECT. 1.

m. *Non-disclosure—Omission from schedule—Property disclosed at second meeting—5 Vict. No.* 17, *s.* 73.]—Insolvent intentionally omitted a horse & cart from his schedule, with intent to defraud his creditors. At his second meeting, he disclosed the fact of his having such property:—*Held:* he was rightly convicted of fraudulent insolvency.—R. *v.* HARRIS (1866), 5 N. S. W. S. C. R. 66.—AUS.

n. —— —— *Contingent interest under will.*]—Insolvent had the possibility of an interest under a will, which was omitted from his schedule of assets, as being of no value:—*Held:* such omission was not an act of fraud.—*Re* JONES (1868), 4 P. R. 317.—CAN.

o. —— —— *Intention to defraud essential—Small book debts.*]—Insolvent omitting to insert book debts owing to him, however small, in his statement, with intent to defraud his creditors, is guilty of a misdemeanour.—R. *v.* MCLEAN (1877), 1 P. & B. 377.—CAN.

8524 i. —— —— *Offence complete before final examination—1867 Act.*]—An indictment, which alleged the filing of a petition by bkpt., & an adjudication, & that he filed his statement of affairs from which, with intent to defraud, he unlawfully omitted property:—*Held:* (1) good; (2) the offence was complete before the final examination, although the statement might be amended up to that time.—EARNSHAW *v.* R. (1870), 1 C. A. 381.—N.Z.

a conviction for not "truly disclosing & discovering" under the above Act, but debtor had appeared before the comrs. & had sworn that his refusal to reveal a certain part of his property was not in order to defraud his creditors, but because, under legal advice, he disputed the validity of the commission :—*Held :* the conviction was wrong.—R. *v.* PAGE (1819), 1 Brod. & Bing. 308 ; 7 Price, 616 ; Russ. & Ry. 392 ; 3 Moore, C. P. 656 ; 129 E. R. 741, Ex. Ch.

8530. —— Form of indictment—Variance between indictment & petition—As to petitioning creditor.]—On an indictment against bkpt. for concealing his effects, an acquittal will be directed where there is a variance between his statement as to to who is the petitioning creditor in the indictment, & the petition itself, on which the commission issued.—R. *v.* EVANI (1825), 1 Mood. C. C. 70.

Annotation :—**Mentd.** Courtivron *v.* Meunier (1851), 6 Exch. 74.

See, further, Part XIX., *ante*.

8531. Failure to deliver up—1883 Act, s. 104—Right to appeal.]—Notwithstanding the provision of Jud. Act, 1873 (c. 66), s. 47, that no appeal shall lie from any judgment of the High Ct. in any criminal cause or matter, save for some error of law apparent upon the record, an appeal lies by virtue of 1883 Act, s. 104 (2) to the Ct. of Appeal from an order of the High Ct. committing bkpt. under 1883 Act, s. 24 (2), for wilfully failing to deliver up possession of his property.—*Re* ASHWIN, *Ex p.* ASHWIN (1890), 25 Q. B. D. 271 ; 59 L. J. Q. B. 417 ; 7 Morr. 175, C. A. ; *subsequent proceedings* (1891), 8 Morr. 130.

8532. Fraudulent removal—1869 Act, s. 11 (1) (3) (4) (6)—Conspiracy to remove—No averment of adjudication.]—An indictment charged deft. & others with conspiring contrary to the above Act, & within four months next before the presentation of a bkpcy. petition against deft., fraudulently to remove part of the property of deft. To that there was a plea of not guilty, & a verdict of guilty & judgment. Error was brought, on the ground that there was no allegation that deft. was ever adjudged bkpt. :—*Held :* (1) the fact of deft. having been adjudged a bkpt. was not necessary to complete the offence of conspiracy ; (2) it was complete, if the persons charged had agreed to remove the goods in contemplation of an adjudication being obtained ; (3) though not expressly alleged, must be taken, after verdict, to have been proved before the jury, & the defect was cured by verdict.—HEYMANN *v.* R. (1873), L. R. 8 Q. B. 102 ; 28 L. T. 162 ; 37 J. P. 565 ; 21 W. R. 357 ; 12 Cox, C. C. 383.

Annotations :—**Refd.** White *v.* R. (1876), 13 Cox, C. C. 318. **Mentd.** R. *v.* Goldsmith (1873), L. R. 2 C. C. R. 74, C. C. R. ; R. *v.* Aspinall (1876), 2 Q. B. D. 48, C. A. ; Bradlaugh *v.* R. (1878), 3 Q. B. D. 607, C. A. ; R. *v.* Silverlock, [1894] 2 Q. B. 766, C. C. R. ; R. *v.* Munslow, [1895] 1 Q. B 758, C. C. R.

8533. —— 1869 Act, s. 11 (5)—Bill of sale void for want of registration—Property transferred to trustees.]—On Dec. 21, 1872, prisoner executed an assignment of the property upon his farm to trustees for the benefit of certain creditors. The assignment was not registered as a bill of sale, & prisoner continued in occupation of the farm, & in possession of the property assigned, under an agreement with the trustees, by which he was to hold possession as their bailiff. On Oct. 14–16, & 17, 1873, prisoner fraudulently removed stock from the farm of more than £10 in value, forming part of the property assigned. Prisoner was indicted under the above sub-sect. for having within four months next before the commencement of the liquidation fraudulently removed part of his property of the value of £10 & upwards :—*Held :* though the assignment not having been registered as a bill of sale, was void as against the trustee in liquidation, still, inasmuch as, at the time of the fraudulent removal the assignment was in force & the property in the stock removed in the trustees under the assignment, he could not properly be convicted.—R. *v.* CREESE (1874), L. R. 2 C. C. R. 105 ; 43 L. J. M. C. 51 ; 29 L. T. 897 ; 38 J. P. 229 ; 22 W. R. 375 ; 12 Cox, C. C. 539, C. C. R.

Annotation :—**Distd.** R. *v.* Humphris, [1904] 2 K. B. 89, C. C. R.

8534. Concealment or removal—1869 Act, s. 13 (3)—"Any person"—"Intent to defeat or delay his creditors."]—A judgment was obtained against R. for £18 4*s.* 8*d.* on Nov. 8, 1881. On the night of that day he, with the assistance of the other two prisoners, removed his goods, with the object of defeating & delaying the execution creditor. R. & the other two prisoners were indicted & convicted for removing the goods, with intent to defraud R.'s creditors. The chairman left the question of intention to defeat the creditors to the jury, ruling that there was evidence of an intention to defraud the creditors generally :—*Held :* (1) the ruling of the chairman was wrong, & the conviction could not be sustained ; (2) the words "any person" in s. 13 meant any person, & was not confined to bkpts. or persons who had liquidated their affairs in bkpcy.—R. *v.* ROWLANDS (1882), 8 Q. B. D. 530 ; 51 L. J. M. C. 51 ; 46 L. T. 286 ; 46 J. P. 437 ; 30 W. R. 444 ; 15 Cox, C. C. 31, C. C. R.

8530 i. —— —— *Sufficiency of indictment—Omission of necessary averments.*]—An indictment under Fraudulent Debtors Act, 1875, s. 2 (6), for omitting to specify property in a statement of assets filed under 1876 Act, neither averred the materiality of the omissions, nor showed on its face that they must have been material : —*Held :* bad.—R. *v.* VALE (1882), 1 N. Z. L. R. C. A. 154.—**N.Z.**

8532 i. *Fraudulent removal*—1892 *Act.*]—Prisoner was indicted under s. 137 (18) (*b*) of the above Act, with fraudulently removing property of the value of £10 or upwards within two years previous to his bkpcy. :—*Held :* (1) the removal of the tools of his trade of that value was itself sufficient to render the prisoner guilty ; (2) the right given to bkpt. under s. 121 to select & retain as his own property tools & household effects to the value of £25 did not arise until after his adjudication.—R. *v.* ROWAN (1907), 26 N. Z. L. R. 1300.—**N.Z.**

8532 ii. —— *Where transaction open—1872 Act, s.* 13.]—A criminal prosecution was instituted against debtor for making away with his property after a decree of the county ct. had been obtained against him :—*Held :* a prosecution was not proper where the alleged transaction was in the course of business in the open market, & without attempt at concealment or disguise.—R. (HUNTER) *v.* COSTELLO (1893), 27 I. L. T. Jo. 402.—**IR.**

8534 i. *Concealment or removal—After sequestration*—1871 *Act No.* 379, *s.* 154 (IV.).]—The offence of concealment or removal of "his property" may be committed by insolvent after, & notwithstanding, the sequestration.—R. *v.* TEMPEST (1877), 3 V. L. R. 329.—**AUS.**

8534 ii. —— *Before* 58 *Vict. c.* 23.]—Acts of concealment or removal of property with intent to defeat or defraud creditors, committed before 58 Vict. c. 23, are not punishable under R. S. O. 1897 (c. 147), s. 36.—*Re* LUCAS TANNER & CO. (1900), 32 O. R. 1.—**CAN.**

8534 iii. —— *Intention to diminish assets*—35 *Vict. c.* 7, *s.* 7.]—Insolvent with a view of fraudulently diminishing his assets, sold a portion of his property & concealed other portions with the intention of diminishing the sum to be divided amongst his creditors :—*Held :* he was guilty of fraud, & had brought himself within the penal provisions of the above sect.—*Re* RUSSELL'S INSOLVENCY (1862), 4 Nfld. L. R. 699.—**NFLD.**

q. —— *Of books — Evidence.*]—Where the Crown proves that a book was in existence & in possession of insolvent shortly before insolvency, & that though called upon to produce it he has failed so to do or to explain its absence, there is evidence of the concealment or removal of such book which the jury is entitled to consider —R. *v.* SHAMOSEWITZ & SCHATZ (1915), App. D. 682.—**S. AF.**

Sect. 3.—*Bankruptcy offences: Sub-sects.* 1 & 2.]

8535. Embezzlement—1849 Act, s. 251—What amounts to embezzlement—Personal estate to value of £10.]—Bkpts. were indicted under the above sect. for embezzling part of their personal estate to the value of £10 with intent to defraud their creditors. The adjudication of bkpcy. was on June 21, & on June 17 bkpts. had received several bank notes & on same day crossed over to Belgium, where they remained some time. The notes were afterwards received in London from places in Belgium. Bkpts. returned to England, & when before the Bkpcy. Ct. gave no account of the disposal of the notes:—*Held:* (1) no offence had been committed in England; (2) non-accounting, though evidence of fraudulent appropriation was not part of the crime of embezzlement; (3) on the trial of such indictment no inference unfavourable to bkpts. ought to be drawn from the fact that when before the comr. they refused to be examined, on the ground that they might by their answers criminate themselves. *Semble:* the meaning of the words "personal estate to the value of £10" was £10 in one sum, & the disposal of several smaller sums at different times, amounting in the aggregate to a larger sum than £10, would not be embezzlement within the Act (ALDERSON, B.).—R. *v.* DAVISON & GORDON (1855), 7 Cox, C. C. 158.

Annotation:—**Mentd.** R. *v.* Rogers (1877), 3 Q. B. D. 28, C. C. R.

See, further, CRIMINAL LAW & PROCEDURE.

8536. Fraudulent transfer of property—1869 Act, s. 13 (2)—"Creditor"—Charge given to defeat plaintiff in breach of promise action.]—Deft. to a breach of promise action, who before judgment creates a charge over all his property with intent to defraud pltf. in the action, is not guilty of a misdemeanour under the above sub-sect., pltf. not being a "creditor" within that sub-section until judgment.—R. *v.* HOPKINS, [1896] 1 Q. B. 652; 65 L. J. M. C. 125; 44 W. R. 585; 12 T. L. R. 346; 40 Sol. Jo. 460; 4 Mans. 134, C. C. R.

8537. —— —— "Transfer"—Acts not amounting to.]—Debtor, after making default in the instalments payable under an arrangement with his creditors & in being sued by some of his creditors for the balance, sold his connection as a travelling draper, alleged to be worth £800, for £150, & used the proceeds partly in the defence of the creditors' actions, & partly in his family's support. He was afterwards adjudicated bkpt.:—*Held:* (1) the sale of the connection was not a transfer of the whole of his property, & the purchaser was not a party to any fraud; (2) bkpt. was not guilty of a misdemeanour under the above sub-sect.—*Re* CRANSTON, *Ex p.* CRANSTON (1892), 8 T. L. R. 564; 9 Morr. 160, D. C.

8538. —— —— —— Fictitious transfer.]—In the above sub-sect. the word "transfer" includes a fictitious transfer.

Deft. at the beginning of 1908, was solvent, & had a considerable surplus of assets, but by July or Aug. he was hopelessly insolvent, there being a large excess of liabilities. About that time he disposed of retail premises in C. Road, which was transferred to A., an impecunious person. Some of the money, which was paid in respect of the transfer or handed over, had been obtained from B., a tobacconist & money-lender, & also a relation of deft., a short time before, & about that time deft. had been paying money to B., which he said was in repayment of loans, which were entirely denied to the accountant by deft. The lease was disposed of to C., also a relation, & deft. remained in the house for some considerable time, & about a year after he was again in possession, the place being carried on by his wife. Deft. having been convicted on counts, which alleged a fraudulent or collusive or bogus transfer or delivery of the stock & business in C. Road to A.:—*Held:* the above facts were evidence that there was a delivery & a bogus delivery or transfer, & the business was not genuinely transferred to A.—R. *v.* RICHMAN (1910), 4 Cr. App. Rep. 233, C. C. A.

8539. —— Form of indictment—Repugnancy.]—An indictment, which charged that bkpt. was possessed of certain real estate, & that upon his examination, being sworn, he feloniously did not then & there discover when he disposed of, assigned, & transferred the real estate:—*Held:* (1) bad, because it did not appear by the indictment that he ever had disposed of the property; (2) the

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8535 i. *Embezzlement—Evidence of intent to defraud creditors generally.*]—Deft. was indicted with, while insolvent, unlawfully embezzling a portion of his estate with intent to defraud his creditors:—*Held:* it was not necessary to show that the creditors intended to be defrauded were creditors who had proved, but it was sufficient to show an intent to defraud creditors generally.—R. *v.* HIGHES (1865), 5 N. S. W. S. C. R. 71.—**AUS.**

8535 ii. —— *Proof of sequestration—5 Vict. No.* 17—25 *Vict. No.* 8.]—Deft. was charged for that he "being insolvent" unlawfully etc., with intent to defraud his creditors, did embezzle his estate:—*Held:* the order for sequestration of deft.'s estate, under the hand of the Chief Comr., was sufficient proof of the sequestration.—R. *v.* HIGHES (1865), 5 N. S. W. S. C. R. 71.—**AUS.**

8537 i. *Fraudulent transfer of property—"Gift delivery or transfer"*—1871 *Act, s.* 157 (*ii*).]—Insolvent, shortly before his insolvency, granted a sub-lease of a theatre of which he was lessee, & which formed his only available means of support, with the theatrical properties & effects, to a relative, as a trustee for him:—*Held:* this was not such a "gift, delivery, or transfer" as to amount to a misdemeanour under the above sect.—*Re* AARONS (1880), 6 V. L. R. 56.—**AUS.**

s. —— *Intent to defraud—Nature of fraud*—1890 *Act* (*No.* 1100), *s.* 22.]—Debtor assigned money payable under a fire insurance policy to his mother, to whom he was indebted, under pressure from her to be applied in payment of her debt:—*Held:* "intent to defraud" in the above sect. referred to actual, not constructive, fraud.—FEDERAL GROCERY CO. *v.* NOBLE (1896), 22 V. L. R. 318.—**AUS.**

t. —— —— *Evidence*—1 & 2 *Edw. VII., No.* 14, *s.* 523.]—D. was indicted for transferring his property to J. & delivering money to B., with intent to defraud his creditors. D. bought the property, paying a deposit therefor & obtaining a mtge. thereon. His other assets were current bills lodged with a bank as security in connection with his account. He was also indebted to other creditors. Being pressed by them he sold it to J. for cash & a bill, J. undertaking the liability to the bank. Afterwards the property was sold by J. at a profit. The purchaser paid off the mtge., & D. received the balance of the purchase-money over the mtge. & in addition the proceeds of the current bills in the bank. This balance he disposed of by a refund to J. of the cash paid for the property & in paying off alleged loans made by B. & members of his family:—*Held:* there was evidence that the transfer was made with intent to defraud.—R. *v.* DAWSON (1903), 6 W. A. L. R. 119.—**AUS.**

a. —— —— *Whether debt due to creditor at time of sale.*]—It is not essential to the offence of assigning & selling property with intent to defraud creditors that the debt to the creditor should, at the time of sale, etc., be actually due.—R. *v.* HENRY (1891), 21 O. R. 113.—**CAN.**

b. —— *Accepted by creditor in full discharge of debt*—22 *Vict. c.* 96.]—A. was indicted under the above Act for assigning property to defraud creditors:—*Held:* a transfer made to a creditor, who accepted the same in full satisfaction & discharge of his debt, did not render the assignor less liable.—R. *v.* POTTER (1860), 10 C. P. 39.—**CAN.**

c. —— *Receiving bankrupt's assets—What constitutes offence—5 Vict., No.* 17, *s.* 74.]—It is not necessary under the above sect. to a charge of receiving the assets of insolvent, that prisoner should have so received them for his own benefit, if he knew that the owner was insolvent, & intended to assist in defrauding insolvent's creditors. To render the offence complete the owner must be actually insolvent, but sequestration is not necessary.—R. *v.* SNELGROVE (1855), 2 Legge, 904.—**AUS.**

d. *Absconding with property—Whether bankrupt's responsibility for bankruptcy question for jury.*]—C. had been charged with departing from A. & taking with him money & goods

words " at the time of his said examination " were not equivalent to the words in the statute " upon such examination."—R. *v.* HARRIS (1849), 1 Den. 461; T. & M. 177; 19 L. J. M. C. 11; 14 L. T. O. S. 296; 13 J. P. 716; 13 Jur. 990; 3 Cox, C. C. 565, C. C. R.

Annotation :—**Mentd.** R. *v.* Faderman (1850), 19 L. J. M. C. 147, C. C. R.

8540. Absconding with property—1869 Act, s. 12—Quitting England before petition presented—Infant.]—An infant trader quitted England, & whilst abroad a petition, upon which he was adjudicated a bkpt., was filed. He was arrested, brought to England, indicted & convicted under the above sect. for having feloniously, within four months before the presentation of a bkpcy. petition against him, quitted England & taken with him £20 & upwards, which ought by law to have been divided amongst his creditors, with intent to defraud :—*Held :* the conviction could not be sustained, as the debts of the creditors, who proved, were void by Infants Relief Act, 1874 (c. 62), none of them being for necessaries. *Qu. :* whether the sect. applied, when the person adjudged bkpt. had quitted England before the presentation of the petition.—R. *v.* WILSON (1879), 5 Q. B. D. 28; 49 L. J. M. C. 13; 41 L. T. 480; 44 J. P. 105; 28 W. R. 307; 14 Cox, C. C. 378, C. C. R.

Annotations :—**Apld.** *Re* Jones, *Ex p.* Jones (1881), 50 L. J. Ch. 673, C. A. **Refd.** R. *v.* Macdonald (1885), 1 T. L. R. 561, C. C. R. **Mentd.** Leslie *v.* Sheill, [1914] 3 K. B. 607, C. A.

8541. —— —— "His property"—Deed of assignment.]—On Apr. 24, 1903, prisoner, a hay & coal merchant, executed a deed of assignment of all his property for the benefit of his creditors, which deed was on Apr. 27 registered under Deeds of Arrangement Act, 1887 (c. 57). The deed was also executed by a person as trustee, but not by any of the creditors, none of whom ever knew of its existence. On Apr. 25 the trustee took possession of prisoner's premises & stock & carried on his business, but otherwise did nothing to carry out the trusts of the deed. At the time prisoner signed the deed he had in his possession £120 in cash which he had collected from various debtors. He did not pay this sum to the trustee, & on Apr. 28 quitted England taking the £120 with him. On Apr. 30 a bkpcy. petition was presented against prisoner, on which he was subsequently adjudicated bkpt. Prisoner was indicted under the above sect. for having within four months next before the presentation of the bkpcy. petition quitted England & taken with him £120, being part of his property which ought by law to be divided amongst his creditors. Prisoner was convicted :—*Held :* (1) no irrevocable trust had been created as to the £120; (2) at the date when prisoner quitted England the £120 was his property, & not the trustees under the deed; (3) prisoner was properly convicted.—R. *v.* HUMPHRIS, [1904] 2 K. B. 89; 73 L. J. K. B. 464; 90 L. T. 555; 68 J. P. 325; 52 W. R. 591; 20 T. L. R. 425; 48 Sol. Jo. 509; 20 Cox, C. C. 620; 11 Mans. 139, C. C. R.

8542. —— —— Appeal—Leave to call further evidence.]—On an appeal against a conviction under the above sect. & an application for leave to call further evidence :—*Held :* (1) witnesses were only allowed to be called when additional facts had come to light since the date of trial; (2) the appeal must be dismissed, as the jury were justified in not accepting applt.'s statement, & it was for the jury to consider the evidence, they having been duly cautioned with regard to it.—R. *v.* PITCHFORTH (1908), 1 Cr. App. Rep. 249, C. C. A.

See, generally, CRIMINAL LAW & PROCEDURE.

8543. —— Scotch debtor absconding to England—Order for arrest.]—The estates of A. were sequestered at Edinburgh, & B. was duly appointed trustee. A. failed to appear for his public examination & absconded from Scotland & a warrant was granted. The trustee ascertained that A. was in London, & applied *ex p.* to the English Bkpcy. Ct. for assistance. The ct. made an order for the arrest of bkpt.—*Re* DOBSON, *Ex p.* CRAIG, [1903] W. N. 155.

—— When debtor may be arrested.]—*See* Sect. 2, *ante*.

SUB-SECT. 2.—PAWNING, PLEDGING, OR DISPOSING OF PROPERTY OTHERWISE THAN IN ORDINARY WAY OF TRADE.

8544. 1861 Act, s. 221—Constitutes offence—What must be proved—Evidence.]—A bkpt. trader, being indicted under the above sect. for conspiring with B., & also with pawning & disposing of goods with intent to cheat & defraud his creditors, etc., & it appearing that B. had a place of business in Paris, & that goods were obtained there on credit & disposed of in London by pawning :—*Held :* (1) the questions for the jury were, whether the premises in Paris were really used as an independent place of business for buying & selling, or only as ancillary to the place of business in London, & merely for the purpose of getting hold of goods to be disposed of in London, & whether B. & prisoner acted together for the purpose of obtaining & disposing of such goods, with intent to cheat & defraud the creditors; (2) the jury finding on those questions against prisoner, he was guilty on the counts grounded on the pawning & disposing of goods, but not on the counts for conspiracy to obtain the goods; (3) the trading, etc., must be proved, & the adjudication was not sufficient evidence of the bkpcy.

Prisoner was indicted for obtaining goods within three months of the filing of his petition for adjudication under the false colour & pretence of carrying on business in the ordinary course of trade, & under the same sect. with pawning & disposing of such goods with intent to defraud. Prisoner carried on business at No. 6, Bread Street, in the City of London, in partnership with B., & the firm had a house in Paris, where B. principally was. B. was in the habit of buying large quantities of goods in Paris & transmitting them to London, where they were received in Bread Street, & immediately afterwards pawned or disposed of considerably below the wholesale invoice price. Amongst other creditors was N., a Frenchman, domiciled in Paris, & who afterwards, upon a declaration of insolvency filed by prisoner, became petitioning creditor. Upon his petition

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exceeding the value of £20, within four months of his bkpcy. The judge did not ask the jury to find whether the accused was responsible for his bkpcy. : *Held :* it was not necessary.—R. *v.* CAMERON (1905), 7 W. A. L. R. 274. —AUS.

8540 i. —— *Quitting Ireland before petition presented*—1872 *Act, s.* 12.]—An arrest for felony under the above sect. is not warranted upon an information that prisoner was leaving Ireland, & taking with him part of his property to the amount of £20 or upwards, unless it appear that, at the time of the arrest, debtor had been adjudged bkpt. or presented a petition for arrangement, even though within four months afterwards he be adjudged bkpt., or presents such petition for arran ement, as until that takes place debtor does not become guilty of the felony.—SCOTT *v.* COATES (1876), 10 I. L. T. 165.—IR.

PART XXII. SECT. 3, SUB-SECT. 2.

8544 i. *What constitutes the offence*—1874 *Act, s.* 206.]—A person disposes of goods other than in the ordinary way of his trade within the above sect. if he puts them away in such

Sect. 3.—*Bankruptcy offences: Sub-sects.* 2 & 3.]

prisoner & B. were jointly adjudicated bkpts.:—*Held:* (1) as the adjudication of bkpcy. was not upon prisoner's own petition, it was necessary to prove the trading, petitioning creditor's debt, & act of bkpcy.; (2) as the adjudication was joint, it was necessary to prove a joint trading, a joint petitioning creditor's debt, & an act of bkpcy. against each.

The act of bkpcy. suggested against B. was that, having come over to England two days before the adjudication of bkpcy., & having taken away the books, he had absconded, with intent to defeat his creditors:—*Held:* (1) it was a question for the jury whether he had left London *bonâ fide*, or for the purpose of defeating his creditors; (2) as the goods had all been obtained in Paris, they were obtained out of the jurisdiction, & prisoner, although acting in concert with B. in Paris, was not answerable in England.

On an objection being taken that a creditor domiciled in France could not be a petitioning creditor for a debt contracted in France with a partner, having a house in London, the question left to the jury was, whether the house in Paris was merely used as a depot for warehousing goods, with intent to transmit them to London to be pawned, & whether it was dependent upon & ancillary to the house in London, or whether it was a *bonâ fide* house, carrying on an independent, though branch business. The jury having found that the house in Paris was a sham, & used for the purpose suggested, the trial judge refused to reserve the point.

The Act does not make it an offence merely that a trader should pawn, pledge, or otherwise dispose of goods, unless with the intent to defraud the creditors. The selling of goods under prime cost does not *per se* constitute an offence without such intent. But, if there are many such transactions, if goods are bought at a certain price, & sold shortly afterwards at a lesser one, then, looking at all the circumstances, the intent may be inferred, & the offence constituted.—R. *v.* RAUDNITZ (1863), 4 F. & F. 165.

8545. Debtors Act, 1869, s. 11 (15)—"Being a trader"—Descriptive of offence—Not of person.]—In 1869 Act, s. 11 (15), the word "trader" & the following words do not come in merely by way of a definition of a "person" but they describe the offence. A person, who is not a trader, cannot be guilty of an offence under the sub-sect.—R. *v.* BOUGHTON (1911), 76 J. P. 51; 22 Cox, C. C. 599.

8546. —— "Ordinary way of trade"—Bill of sale of all stock-in-trade & effects.]—A grocer obtained goods of his trade upon credit. Soon after receiving them & before they were paid for, he executed a bill of sale in favour of his sister, who lived with him. The bill of sale, which was given in consideration of a debt owing from his sister, passed away all his stock-in-trade & effects whatsoever, including the above-mentioned unpaid-for goods. Having been made bkpt., he was indicted for misdemeanour under the above sub-sect.:—*Held:* (1) disposing of the goods by bill of sale was not disposing of them in the "ordinary way of trade"; (2) as property which prisoner had obtained on credit, & had not paid for, had passed by the bill of sale he came within s. 11 (15), unless he had no intent to defraud; (3) assigning the whole of his property to one creditor, reserving nothing for the others, showed an intent to defraud.—R. *v.* THOMAS (1870), 22 L. T. 138; 11 Cox, C. C. 535.

Annotation:—**Refd.** R. *v.* Bolus (1870), 23 L. T. 339.

8547. —— —— Selling below proper price—After refusing to unload.]—On May 15, prisoner, a tool-maker, gave an order for six tons of steel. On arrival at his wharf, he did not allow it to be unloaded, & on June 13 sold it at 14*s.* per cwt. for cash. Its estimated value was 18*s.* per cwt. On June 28 a petition in bkpcy. was filed against prisoner, he was adjudicated bkpt. on the 29th, & on July 4 a receiver was appointed, who was subsequently made trustee, but bkpt. did not discover the above-mentioned transaction until it was forced out of him on July 26 before the registrar:—*Held:* there was a case to go to the jury under the above sect.—R. *v.* BOLUS (1870), 23 L. T. 339; 11 Cox, C. C. 610.

8548. —— —— Giving acceptances for goods bought—Obtaining advances on bills of lading.]—A., within four months of the presentation of a bkpcy. petition against him, being utterly insolvent, bought goods, for which he gave his acceptances, exported the goods, & obtained advances on the bills of lading. No assets were forthcoming upon his bkpcy., & no explanation was given, nor accounts furnished, to show how the sums advanced had been disposed of:—*Held:* the property had not been disposed of "otherwise than in the ordinary way of his trade," & the ct. would not direct a prosecution under the above sub-sect.—*Re* HODGSON, *Ex p.* BRETT (1875), 1 Ch. D. 151; 45 L. J. Bcy. 17; 33 L. T. 711; 24 W. R. 101; 13 Cox, C. C. 128, C. A.

Annotation:—**Distd.** *Re* Marsden, *Ex p.* Marsden (1876), 2 Ch. D. 786, C. A.

8549. —— —— Disposing of property obtained on credit & not paid for—Business habitually carried on in such way.]—When debtor had disposed of property, which he had obtained on credit & had not paid for, within four months prior to his bkpcy., & it was proved that he had conducted his business on that footing ever since he commenced business:—*Held:* debtor was not guilty of an offence under the above sub-sect.—R. *v.* JUSTON (1897), 61 J. P. 505.

8550. —— Presentation petition against debtor—Effect of 1890 Act, s. 26.]—Deft. filed his petition in bkpcy. on Jan. 14, 1891, & was convicted of

circumstances that he exhibits an intent to place them beyond the reach of creditors. It is not necessary that a man should absolutely part with the property, if he puts them beyond control of himself or of his trustee.—R. *v.* PIEREMONT (1885), 2 Q. L. J. 93.—**AUS.**

8549 i. *Ordinary way of trade—Disposing of goods obtained on credit & not paid for*—1871 *Act, s.* 154.]—If a trader in difficulties buys goods on credit for the purpose of immediately selling below the cost price, or for the purpose of raising money upon them wherewith to meet his difficulties, & sells them accordingly, he is guilty of the offence of unlawfully disposing of goods otherwise than in the ordinary way of his trade or business within the above sect.—R. *v.* MORRIS (1875), 1 V. L. R. 99.—**AUS.**

8549 ii. —— —— 1869 *Act, s.* 147.]—Prisoners were indicted for having within three months preceding the execution of an assignment in insolvency pawned, pledged, & disposed of, otherwise than in the way of trade, goods which had remained unpaid for during the three months. The goods, which had been purchased on credit, the period of which had not expired when prisoners were indicted, were given on the day of assignment, but before its execution, to a clerk on account of salary due to him, & to indemnify him against accommodation indorsements, to a carter in their employment, in satisfaction of a sum of money previously deposited with them, & to a person who had given them accommodation notes:—*Held:* the disposal of the goods as above was an offence within the above sect.—R. *v.* KERR (1876), 26 C. P. 214.—**CAN.**

f. —— *Handing property to creditor—Receiving credit therefor*—1895 *Act, ss.* 37, 147 (*e*).]—Accused, at a time when he could expect the sequestration of his estate, handed over to a creditor 145 head of cattle, for which he was given credit for £856 odd:—*Held:* accused was rightly convicted of "culpable insolvency" within the above sects.—R. *v.* MOHR (1915), T. P. D. 390.—**S. AF.**

offences under 1869 Act, s. 11 (14) (15), in respect of goods obtained & pawned in Nov., 1890 :—*Held :* as one of the ingredients of each offence had been committed before 1890 Act came into operation, & s. 26 ought not to be construed retrospectively, the conviction could not be supported.—R. *v.* GRIFFITHS, [1891] 2 Q. B. 145 ; 60 L. J. M. C. 93 ; 56 J. P. 87 ; 39 W. R. 719 ; 7 T. L. R. 478, C. C. R.

Annotations :—Refd. *Re* Athlumney, *Ex p.* Wilson, [1898] 2 Q. B. 547 ; R. *v.* Chandra Dharma (1905), 69 J. P. 198, C. C. R.

8551. —— "No intent to defraud"—Onus of proof.]—Upon an indictment under the above sub-sect. :—*Semble :* the burden is upon prisoner to negative the intent to defraud.—R. *v.* BOLUS (1870), 23 L. T. 339 ; 11 Cox, C. C. 610.

8552. Form of indictment—Allegation that debtor adjudicated bankrupt.]—An indictment for fraudulently pledging property within four months next before the presentation of a bkpcy. petition did not allege that debtor was adjudicated bkpt. thereon. The debtor having been convicted :—*Held :* the indictment was bad after verdict.—R. *v.* OLIVER & AUSTIN (1877), 36 L. T. 114 ; 41 J. P. 310 ; 25 W. R. 323 ; 13 Cox, C. C. 588, C. C. R.

Annotation :—Distd. R. *v.* Knight (1877), 37 L. T. 801, C. C. R.

8553. —— Liquidation by arrangement.]—An indictment charged that deft., a trader, "did within four months before the commencement of the liquidation by arrangement of his affairs unlawfully dispose of goods otherwise than in the ordinary way of trade" :—*Held :* the count was good after verdict, & sufficiently averred that deft. was a person whose affairs were liquidated by arrangement within 1869 Act, s. 11.—R. *v.* KNIGHT (1878), 37 L. T. 801 ; 42 J. P. 166 ; 14 Cox, C. C. 31, C. C. R.

SUB-SECT. 3.—FAILURE TO DISCLOSE FICTITIOUS PROOFS, AND FAILURE TO KEEP AND FALSIFICATION OF BOOKS.

8554. Failure to disclose proof of false debt—1869 Act, s. 11 (9)—Proof before appointment of trustee—Subsequent liquidation by arrangement under same trustee.]—B., a trader, filed a petition for liquidation of his affairs by composition, & at the first meeting three false debts were proved with his connivance. At the first meeting of creditors, A. was appointed & duly certified trustee. At the next meeting it was resolved that debtor's affairs should be liquidated by arrangement, & not in bkpcy., & A. was still trustee. All those steps were within a month :—*Held :* A. was a trustee, & entitled to notice of false debts from B., though nothing was then resolved as to arrangement.—R. *v.* BEAUMONT (1872), 26 L. T. 587 ; 36 J. P. 692 ; 12 Cox, C. C. 183, C. C. R.

8555. Falsification of books—1849 Act, s. 152—Intent to defraud must be proved.]—Upon an indictment of a bkpt. under the above sect. for making false entries with intent to defraud his creditors, the jury found that the act complained of was done by him with intent to deceive his creditors as to the state of his accounts, & to prevent an examination of them in the due course of bkpcy., but that it was not done to defraud the creditors of any property, or to conceal any property, or to prevent them from recovering any part of his estate :—*Held :* the sect. applied only where the false entry had been made with "intent to defraud creditors," & as such intent was negatived by the finding of the jury, the conviction must be quashed.—R. *v.* INGHAM (1859), Bell, C. C. 181 ; 29 L. J. M. C. 18 ; 23 J. P. 740 ; 6 Jur. N. S. 55 ; 8 W. R. 28 ; 8 Cox, C. C. 240, C. C. R.

8556. —— 1869 Act, s. 11 (9)—1883 Act, s. 163—Petition presented by bankrupt himself.]—The offences committed by bkpt. fraudulently destroying, etc., books under 1869 Act, s. 11 (9), are, by virtue of 1883 Act, s. 163 (1), equally offences, whether bkpt. presented the petition himself or not.—R. *v.* BECK (1889), 61 L. T. 596 ; 54 J. P. 360 ; 16 Cox, C. C. 718, C. C. R.

8557. —— —— Admissibility & effect of evidence.]—On the trial of an indictment under 1869 Act, s. 11 (9), evidence may be given of the existence of a "book or document" before the "four months" mentioned in the sub-sect.

Applt. was indicted under the sub-sect. for destroying & concealing books & documents relating to his property & affairs after a petition in bkpcy. had been filed against him. He was found guilty. The document upon which reliance was mainly based by the prosecution, was a ledger. It was suggested that the ledger had been burnt ; two witnesses said that it had not, & a ledger was produced in ct. The ledger produced was new,

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g. *Mutilation or alteration of books—Indictment—Immaterial allegation.*]—An indictment alleged that having made an assignment under Insolvent Act, insolvent mutilated & altered one of his books. The mutilation or alteration took place about three months previous to his assignment :—*Held :* the allegation of having made an assignment was immaterial.—R. *v.* MCLEAN (1877), 1 P. & B. 377.—CAN.

8555 i. *Falsification of books—25 Vict. c. 7, s. 7.*]—Insolvents had (*a*) kept false books of account, (*b*) fraudulently withheld certain entries from their books of account, (*c*) wilfully destroyed their books of account, (*d*) withheld at their examination books of account & papers :—*Held :* they were liable to punishment for fraud under the above sect.—*Re* POWER'S INSOLVENCY (1864), 5 Nfld. L. R. 11.—NFLD.

k. —— *Indictment—Uncertainty*—1862 *Act, s.* 42 (7).]—An indictment, for fraudulently falsifying or altering trade-books under the above sect., although it followed the words of the statute, specified neither the book nor document, nor act of falsification or alteration :—*Held :*] bad, even after verdict, for uncertainty.—SIMPSON *v.* R. (1869), 1 C. A. 299.—N.Z.

l. *Failure to keep proper books—Absence of fraud—Small trader*—1883 *Act, ss.* 157, 171.]—In the absence of fraud the ct. will not make an order of imprisonment against a small trader for not keeping proper books of account.—*Re* GRINDLEY (1892), 11 N. Z. L. R. 130.—N.Z.

m. —— *What constitutes offence—Mens rea*—1892 *Act, s.* 137, *ss.* 2, 4.]—Bkpt. was indicted for failure to keep proper books of account. No fraud was alleged, & the jury found that the offence was committed without fraudulent intent :—*Held : Mens rea* was not an ingredient of the offence, & proof by a person charged under either or both of the above sects. that he had no fraudulent intent was immaterial.—R. *v.* TUSTIN (1908), 27 N. Z. L. R. 506.—N.Z.

n. —— *Employment of accountant*—1908 *Act, s.* 138 (*d*).]—A positive duty to keep proper books is imposed upon bkpt. by the above sect., & failure to do so is an offence even where bkpt. employs a competent accountant to perform the duty for him.—R. *v.* DARBY (1911), 30 N. Z. L. R. 908, C. A.—N.Z.

o. —— *"Adequate & proper"*—1895 *Act, s.* 147 (*b*).]—Before insolvent can be said to have kept "adequate & proper books" within the above sect., his books must accurately reflect the nature of his transactions & give the names & addresses of his debtors & creditors.—R. *v.* GRUPET (1915), T. P. D. 342.—S. AF.

p. —— *Admissibility of evidence.*]—Where insolvent is charged with an offence against the insolvency law, his books, even though not kept by him personally, are admissible in evidence against him without calling the book-keeper to prove that they were correctly kept.—R. *v.* SHAMOSEWITZ & SCHATZ (1915), App. D. 682.—S. AF.

q. —— —— *Book lost.*]—A conviction for culpable insolvency in not keeping proper books was quashed, where evidence to the effect that insolvent had kept no books was wrongly admitted at the trial, & accused stated that he had kept a book which was lost.—R. *v.* DE KLERK (1915), E. D. L. 42.—S. AF.

r —— *Punishment — Application of First Offenders Probation Act,* 1886.]—Prisoner had been found guilty of failing to keep proper books under 1892 Act, s. 137. On an application

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without a single entry in it. A witness was called by the prosecution to say that two years previously, when he had visited applt., the latter had turned to a ledger to make a reference. The evidence was objected to at the trial. The trial judge told the jury that it only affected the weight of the evidence generally that he had had a ledger at some time :—*Held :* there was no ground for allowing an appeal. —R. *v.* HILL (1909), 2 Cr. App. Rep. 144, C. C. A.

SUB-SECT. 4.—OBTAINING CREDIT BY FALSE PRETENCES OR OTHER FRAUD.

8558. 1861 Act, s. 221—Obtaining goods on approval—Obtaining credit after pawning them.]—Where a person obtained goods on approval & pawned them, & afterwards obtained credit for them :—*Held :* the above sect. did not apply.—R. *v.* LYONS (1863), 9 Cox, C. C. 299.

8559. 1869 Act, s. 11 (13)—"False representation"—Fraudulent representation—Made knowingly.]—C. was indicted under the above sub-sect. with obtaining goods on credit by false representation within four months prior to the presentation of a bkpcy. petition against him :—*Held :* a false representation meant a fraudulent representation & must have been made knowingly by bkpt.—R. *v.* CHERRY (1871), 12 Cox, C. C. 32.

8560. —— "Or other fraud"—Active fraud similar to false representation.]—To constitute an offence within the above sub-sect. there must be active fraud similar to false representation (MELLISH, L.J.).—*Re* HODGSON, *Ex p.* BRETT (1875), 1 Ch. D. 151 ; 45 L. J. Bcy. 17 ; 33 L. T. 711 ; 24 W. R. 101 ; 13 Cox, C. C. 128, C. A.

Annotation :—**Refd.** *Re* Marsden, *Ex p.* Marsden (1876), 2 Ch. D. 786, C. A.

8561. 1869 Act, s. 11 (14)—Form of indictment.]—An indictment charged that deft., a trader, "did within four months next before the commencement of the liquidation by arrangement of his affairs obtain from W. goods upon credit under the false pretences, etc., with intent to defraud" :—*Held :* the counts were good after verdict, & sufficiently averred that deft. was a person whose affairs were liquidated by arrangement within s. 11.—R. *v.* KNIGHT (1878), 37 L. T. 801 ; 42 J. P. 166 ; 14 Cox, C. C. 31, C. C. R.

8562. 1869 Act, s. 13 (1)—"Any other fraud"—Ordering meal in restaurant without means to pay.]—A person, who orders & consumes a meal at a restaurant without being possessed of the means to pay for it, incurs a debt or liability by fraudulently obtaining credit so as to constitute an offence within the above sect.—R. *v.* JONES, [1898] 1 Q. B. 119 ; 67 L. J. Q. B. 41 ; 77 L. T. 503 ; 46 W. R. 191 ; 14 T. L. R. 79 ; 42 Sol. Jo. 82 ; 19 Cox, C. C. 87, C. C. R.

Annotations :—**Folld.** R. *v.* Edwards (1898), 42 Sol. Jo. 472, C. C. R. **Refd.** R. *v.* Benson, [1908] 2 K. B. 270, C. C. R. ; R. *v.* Muirhead (1908), 1 Cr. App. Rep. 189, C. C. A. ; R. *v.* Brownlow (1910), 74 J. P. 240, C. C. A.

8563. —— Obtaining property or credit essential element—False pretences necessary.]—Bkpt. who, within four months next before the presentation of a bkpcy. petition against him, has obtained goods by any false representation, & has not paid for same, is guilty of a misdemeanour under 1869 Act, s. 11 (13), & any person, who in incurring any debt or liability has obtained credit under false pretences, is guilty of a misdemeanour under s. 13 (1). The essential element of these offences is the obtaining in the one case property & in the other credit, though the making of the false pretence is a necessary element.—R. *v.* ELLIS, [1899] 1 Q. B. 230 ; 68 L. J. Q. B. 103 ; 79 L. T. 532 ; 62 J. P. 838 ; 47 W. R. 188 ; 15 T. L. R. 57 ; 43 Sol. Jo. 77 ; 19 Cox. C. C. 210, C. C. R.

Annotation :—**Refd.** R. *v.* Oliphant (1905), 74 L. J. K. B. 591, C. C. R.

8564. —— Intent to defraud essential.]—There is no offence under s. 13 (1) for obtaining credit under false pretences in incurring a debt or liability, unless there is proved an intention to defraud.—R. *v.* MUIRHEAD (1908), 73 J, P. 31 ; 25 T. L. R. 88 ; 53 Sol. Jo. 164 ; 1 Cr. App. Rep. 189, C. C. A.

Annotations :—**Folld.** R. *v.* Brownlow (1910), 74 J. P. 240, C. C. A. **Refd.** Morison *v.* London County & Westminster Bank, [1914] 3 K. B. 356, C. A.

8565. —— —— Proper direction to jury.]—On an indictment under s. 13 (1), it is a misdirection to direct the jury that they need not consider a fraudulent intent ; a fraudulent intent is a necessary ingredient of the offence, & must be proved by the prosecution.—R. *v.* BROWNLOW (1910), 74 J. P. 240 ; 26 T. L. R. 345 ; 4 Cr. App. Rep. 131, C. C. A.

8566. —— —— What constitutes intent to defraud.]—If a man makes statements of fact which he knows to be untrue, & makes them for the purpose of inducing persons to deposit with him money, which he knows they would not deposit but for their belief in the truth of those statements, & if he intends to use the money so obtained for purposes different from those for which he knows the depositors understand from his statements that he intends to use it, he has an intent to defraud, although he may intend to repay the money if he can, & although he may honestly believe, & even have good reason to believe, that he will be able to repay it.—R. *v.* CARPENTER (1911), 76 J. P. 158 ; 22 Cox, C. C. 618.

Annotation :—**Consd.** R. *v.* Parker & Bulteel (1915), 25 Cox, C. C. 145.

8567. —— —— —— Banker representing solvency by keeping door open.]—Bankers were indicted under s. 13 for conspiring together in incurring debts & liabilities to persons, who should thereafter deposit money in the bank :—*Held :* the jury might find that a banker impliedly represented that he was solvent, when he kept his doors open for banking business.—R. *v.* PARKER & BULTEEL (1916), 80 J. P. 271 ; 25 Cox, C. C. 145.

8568. —— —— Admissibility of evidence—Frauds on other persons.]—Deft. was charged under s. 13 (1) with obtaining credit from a person

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that he should be admitted to probation under the above 1886 Act :—*Held :* the object of 1892 Act would be nullified if the above 1886 Act extended to such case, but prisoner should be punished & treated as a first-class misdemeanant.—R. *v.* ROBERTSON (1907), 27 N. Z. L. R. 71.—N.Z.

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s. *Contracting debts with knowledge of insolvency*—1892 *Act, s.* 137.]—Bkpt. was indicted under the above sect., which came into operation on Jan. 1, 1893, that he was on Mar. 9, 1893, duly adjudged bkpt. under that Act, & that he, prior to his being so adjudged bkpt., did from Jan. to Oct., 1892, contract various debts, & that he could not have had, when the debts were so contracted, any reasonable or probable grounds of expectation of being able to pay the same as well as all his other debts :—*Held :* all the offences charged were committed prior to the coming into operation of the above Act, which made those offences penal, & as that Act was not in express terms retrospective, the indictment disclosed no offence.—R. *v.* HARPER (1893), 12 N. Z. L. R. 413.—N.Z.

t. —— 1908 *Act, s.* 138 (*b*).]—A trader, in addition to having considerable liabilities & an increasing bank overdraft, financed his business by means of accommodation bills, & also during the same period obtained goods on credit :—*Held :* there was evidence to go to the jury that when the bills were negotiated & the goods obtained he could not have had any reasonable or probable expectation of being able to pay the debts so contracted as well as his other debts.—R. *v.* DARBY (1911), 30 N. Z. L. R. 908.—N.Z.

a. —— *False pretences — Obtaining money by*—1867 *Act, ss.* 305–310.]—Bkpt. had upon his marriage insured

who let apartments under false pretences & by means of fraud other than false pretences. Evidence was admitted of other cases in which deft. had shortly before obtained apartments at other houses & had left owing money:—*Held:* the evidence was admissible as tending to establish a system & negativing accident or mistake.—R. *v.* WYATT, [1904] 1 K. B. 188; 73 L. J. K. B. 15; 68 J. P. 31; 52 W. R. 285; 20 T. L. R. 68; 48 Sol. Jo. 85; 20 Cox, C. C. 462, C. C. R.

Annotations:—**Refd.** R. *v.* Smith (1905), 69 J. P. 51, C. C. R.; R. *v.* Charlesworth (1910), 4 Cr. App. Rep. 167, C. C. A. **Mentd.** R. *v.* Bond, [1906] 2 K. B. 389, C. C. R.; R. *v.* Walford (1907), 71 J. P. 215, C. C. R.

8569. —— —— —— ——.]—Deft. was charged that he, in incurring a debt & liability to a person who let apartments, unlawfully did obtain credit for the amount of the debt & liability by means of fraud other than false pretences. Evidence was admitted of other cases, in which deft. had shortly before obtained credit from persons letting houses or apartments, & also from a tradesman for goods supplied:—*Held:* the evidence was admissible as tending to establish a system & to negative accident or mistake.—R. *v.* WALFORD (1907), 71 J. P. 215, C. C. R.

8570. —— —— —— —— **Must be transactions of similar nature.**]—Applt. was charged with obtaining credit by fraud under s. 13. Evidence was given of two previous occasions, upon which he had obtained credit & had not paid:—*Held:* as those transactions could not properly have been the subject of a criminal charge, they were not transactions of a similar nature with the transaction in question, & could not be given in evidence to show fraud on the latter occasion.—R. *v.* BAIRD (1915), 84 L. J. K. B. 1785; 113 L. T. 608; 25 Cox, C. C. 86; 11 Cr. App. Rep. 186, C. C. A.

8571. —— **False pretences—Whether misrepresentation necessary element.**]—Evidence that a person obtained goods from an intending vendor, being without the means of paying for such goods & with the intention of defrauding the owner, but without making any representation either as to his ability to pay or his intentions, is sufficient to support a conviction for obtaining credit by fraud on an indictment under s. 13.—R. *v.* JONES, [1898] 1 Q. B. 119; 67 L. J. Q. B. 41; 77 L. T. 503; 46 W. R. 191; 14 T. L. R. 79; 42 Sol. Jo. 82; 19 Cox, C. C. 87, C. C. R.

Annotations:—**Folld.** R. *v.* Edwards (1898), 42 Sol. Jo. 472, C. C. R. **Consd.** R. *v.* Muirhead (1908), 1 Cr. App. Rep. 189, C. C. A. **Refd.** R. *v.* Benson, [1908] 2 K. B. 270, C. C. R.; R. *v.* Brownlow (1910), 26 T. L. R. 345, C. C. A.

8572. —— —— —— **Incurring hotel bill with statements as to payment by firm, etc.**]—Deft., who was indicted under s. 13 for having obtained credit for a sum of £7 7*s.* 11*d.* for food & drink & sleeping accommodation supplied, & service rendered to him by a hotel proprietor, went to the hotel & engaged a bedroom which he occupied for about a fortnight, being during that time supplied with food & drink & other articles. When ordering some of the articles he said: "I will have that booked; the firm will pay for it, & it does not come out of my pocket"; & when bills were presented to him for payment he asked for time, & said that he was expecting remittances from his mother. Subsequently, when pressed for payment he said: "I am going to throw myself on your mercy; I had no money when I came, & I have no money now; I have no firm, & I cannot pay your bill unless the money is given me by some one." He was then apprehended. The trial judge directed the jury that before they could convict, they should be satisfied that deft. was a person without sufficient means to pay the debt he had incurred to the prosecutrix, & that with the intention of cheating her he had obtained credit from her by means of fraud, not intending to pay the debt. The jury found deft. guilty:—*Held:* there was no doubt that there was evidence of prisoner's guilt to go to the jury.—R. *v.* EDWARDS (1898), 42 Sol. Jo. 472, C. C. R.

8573. —— —— **Must have induced transaction—Direction for jury.**]—On the trial of an indictment for obtaining credit by false pretences, the jury should be specifically directed that the obtaining must have been induced by the false pretences.—R. *v.* SMITH (1915), 11 Cr. App. Rep. 81, C. C. A.

8574. —— —— **Admissibility of evidence—State of banking account.**]—On a charge of obtaining credit by false pretences, one of the pretences averred being that deft. was a man of means, evidence as to the state of his banking account for some time past may be admissible.—R. *v.* FRYER (1912), 7 Cr. App. Rep. 183, C. C. A.

8575. —— **"Debt or liability"—Renewal of bill.**]—Where a new bill is given in renewal of an old one, a new debt is incurred, which is a "debt or liability" within s. 13 (1).—R. *v.* PIERCE (1887), 56 L. J. M. C. 85; 56 L. T. 532; 51 J. P. 790; 3 T. L. R. 586; 16 Cox, C. C. 213, C. C. R.

8576. —— **"Credit."**]—A vendor, who delivers goods on the terms that they are to be paid for immediately after they have been received, gives credit to the purchaser.—R. *v.* JONES, [1898] 1 Q. B. 119; 67 L. J. Q. B. 41; 77 L. T. 503; 46 W. R. 191; 14 T. L. R. 79; 42 Sol. Jo. 82; 19 Cox, C. C. 87, C. C. R.

Annotations:—**Refd.** R. *v.* Edwards (1898), 42 Sol. Jo. 472, C. C. R.; R. *v.* Benson, [1908] 2 K. B. 270, C. C. R.; R. *v.* Muirhead (1908), 1 Cr. App. Rep. 189, C. C. A. **Mentd.** R. *v.* Brownlow (1910), 4 Cr. App. Rep. 131, C. C. A.

8577. —— —— **To whom it must be given—At what time deemed to be given.**]—Before a person can be convicted of an offence within s. 13 (1), it must be shown that he obtained credit to be given to himself. It is not sufficient to show that he has obtained credit to be given to some one else. If a person induces another to enter into an executory contract of sale for the delivery of goods at a future day at a specified price to be paid on delivery of the goods, a debt is incurred & credit given on the making of the contract.—R. *v.* BRYANT (1899), 63 J. P. 376.

8578. —— **Form of indictment—Means by which credit procured must be set forth.**]—A count under s. 13 (1), alleging simply that deft. did obtain

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his life, & assigned the policy to trustees for the benefit of his wife. Afterwards he deposited the policy as security for advances made to him, but on becoming insolvent & filing in ct. verified statements of his assets, & liabilities, he made no mention of the policy as an asset in which he had any interest:—*Held:* a fit case for prosecution for obtaining money by false pretences with intent to defraud.—*Re* HENNINGHAM, Mac. 729.—**N.Z.**

b. *Fraudulent misappropriation of assets.*]—Insolvent expended the balance of money obtained by him, upon the purchase of provisions for himself & family, without any regard to his pledge to pay for goods obtained by him:—*Held:* such expenditure was a fraudulent misappropriation of his assets, rendering insolvent liable to imprisonment under Insolvency Act.—*Re* WALL'S INSOLVENCY (1864), 5 Nfld. L. R. 78.—**NFLD.**

c. *Renewal of notes*—1864 *Act, s.* 8 (7).]—Insolvent indorsed renewal notes, but his conduct in respect of the original notes, which had been given for the purchase of goods some years before the renewal, was not blamable:—*Held:* there was no procurement of an advance in money nor was there a purchase of goods on credit, within the above subsect.—*Re* JONES (1868), 4 P. R. 317.—**CAN.**

d. *Fraud in purchase of goods—Form of indictment—Averment of insolvency*—1875 *Act, s.* 36.]—An averment under the above sect. charging defts. with fraud in the purchase of goods need not allege that defts. have gone into insolvency.—BARRY *v.* HEGAN (1879), 18 N. B. R. 465.—**CAN.**

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credit from the prosecutor "by means of fraud other than by false pretences," without setting out the means, will be quashed as being too general.—R. *v.* BELL (1871), 12 Cox, C. C. 37.

Annotation :—**Refd.** R. *v.* Pierce (1887), 56 L. J. M. C. 85, C. C. R.

8579. —— —— Effect of 1869 Act, s. 19.]—An indictment for misdemeanour framed upon s. 11 (13) which merely charged "that a bkpcy. petition was presented against deft. to the county ct., etc., upon which deft. was adjudged bkpt., & that deft. within four months before the presentation of the petition did by certain false representations obtain from B. on credit, certain property, & has not paid for same" :—*Held :* sufficient in arrest of judgment under the above Act, & also under 7 Geo. 4, c. 64, s. 20.—R. *v.* WATKINSON (1872), 26 L. T. 853 ; 36 J. P. 773 ; 12 Cox, C. C. 271, C. C. R.

Annotation :—**Consd.** R. *v.* Pierce (1887), 56 L. J. M. C. 85, C. C. R.

8580. —— —— ——.]—The above sect. renders unnecessary the setting out, in an indictment under s. 13 (1) of the false pretences, by means of which prisoner incurred a debt or liability.—R. *v.* PIERCE (1887), 56 L. J. M. C. 85 ; 56 L. T. 532 ; 51 J. P. 790 ; 3 T. L. R. 586 ; 16 Cox, C. C. 213, C. C. R.

8581. —— —— Amendment by changing false pretences to "by means of fraud."]—Deft. was indicted under s. 13 (1), for obtaining credit by means of false pretences, which were set out. The prosecution failed to prove the false pretences, & the ct. amended the indictment by striking out all the false pretences & substituting therefor the words "by means of fraud" :—*Held :* (1) s. 13 (1) contained two different offences, namely, the obtaining credit (i) under false pretences, or (ii) by means of other fraud ; (2) the amendment amounted to the substitution of one offence for another, & there was no power to make such an amendment.—R. *v.* BENSON, [1908] 2 K. B. 270 ; 17 L. J. K. B. 644 ; 98 L. T. 933 ; 72 J. P. 286 ; 24 T. L. R. 557 ; 52 Sol. Jo. 516 ; 21 Cox, C. C. 631, C. C. R.

8582. —— Where offence committed.]—Prisoner made false representations in Glasgow as to his credit & financial position. On the faith of those representations goods were supplied to him on credit in the county of Durham. He was shortly afterwards made bkpt. :—*Held :* the offences were committed in the county of Durham, & the Assize Ct. for that county had jurisdiction to try prisoner.—R. *v.* ELLIS, [1899] 1 Q. B. 230 ; 68 L. J. Q. B. 103 ; 79 L. T. 532 ; 62 J. P. 838 ; 47 W. R. 188 ; 15 T. L. R. 57 ; 43 Sol. Jo. 77 ; 19 Cox, C. C. 210, C. C. R.

Annotation :—**Refd.** R. *v.* Oliphant (1905), 74 L. J. K. B. 591, C. C. R.

8583. —— Trial—Joinder of counts for obtaining goods by false pretences & credit by false pretences.]—Where an indictment contains counts for obtaining goods by false pretences & also counts under 1869 Act for obtaining credit under false pretences prisoner ought not to be tried on them all at the same time ; the prosecution should be called upon to proceed on one count at a time.

If he is tried upon them all at once very serious difficulties may arise, inasmuch as evidence which is admissible on the charge of obtaining credit by false pretences may not be admissible on the charge of obtaining chattels by false pretences, & when all the evidence on both charges is before the jury it is very difficult, if not impossible, for them to separate the evidence when they come to consider their verdict (LUSH, J.).—R. *v.* NORMAN, [1915] 1 K. B. 341 ; 84 L. J. K. B. 440 ; 112 L. T. 784 ; 79 J. P. 221 ; 31 T. L. R. 173 ; 24 Cox, C. C. 681 ; 11 Cr. App. Rep. 58, C. C. A.

Annotation :—**Mentd.** R. *v.* Smith (1915), 11 Cr. App. Rep. 81, C. C. A.

8584. Appeal—Grounds for dismissing under Criminal Appeal Act, 1907 (c. 23), s. 4 (1)—Doubtful evidence.]—Where it appeared doubtful whether the evidence supported a conviction under 1869 Act, s. 13, for obtaining credit by fraud other than false pretences, the ct. dismissed the appeal, acting under Criminal Appeal Act, 1907, s. 4 (1), on the ground that the evidence showed that applt. had obtained the property by fraud or larceny.—R. *v.* ARMITAGE (1909), 74 J. P. 48 ; 3 Cr. App. Rep. 80, C. C. A.

SUB-SECT. 5.—UNDISCHARGED BANKRUPT PROCURING CREDIT WITHOUT DISCLOSURE OF BANKRUPTCY.

8585. "Obtain credit"—Credit in fact obtained—No time of payment stipulated for.]—In order to convict an undischarged bkpt. under 1883 Act, s. 31, it is not necessary that there should be a stipulation to grant credit in the contract between the parties ; it is sufficient if a credit in fact is obtained.

Prisoner, an undischarged bkpt., bought a horse from prosecutor, a farmer in Ireland, for £22, free of expenses to the vendor, who by prisoner's direction delivered the horse on board a steamer at Larne ; no stipulation was made as to the time or mode of payment, & prisoner did not disclose the fact that he was an undischarged bkpt. Prisoner paid for the carriage of the horse on its delivery to him at Newcastle, & immediately sold it, & refused to pay the price to the prosecutor :—*Held :* there was evidence to go to the jury of an obtaining of credit by prisoner within s. 31.—R. *v.* PETERS (1886), 16 Q. B. D. 636 ; 55 L. J. M. C. 173 ; 54 L. T. 545 ; 50 J. P. 631 ; 34 W. R. 399 ; 2 T. L. R. 359 ; 16 Cox, C. C. 36, C. C. R.

Annotations :—**Apld.** R. *v.* Juby (1886), 55 L. T. 788, C. C. R. **Refd.** R. *v.* Dyson, [1894] 2 Q. B. 176, C. C. R. **Mentd.** R. *v.* Dawson (1888), 5 T. L. R. 87, C. C. R.

8586. —— —— Request for credit need not be proved.]—In order to convict an undischarged bkpt. of the statutory offence of "obtaining credit to the amount of £20 or upwards from any person without informing such person that he is an undischarged bkpt." it is not necessary to prove a request for credit by bkpt., but it is enough if credit be, in fact, obtained.—R. *v.* JUBY (1886), 55 L. T. 788 ; 51 J. P. 310 ; 35 W. R. 168 ; 3 T. L. R. 211 ; 16 Cox, C. C. 160, C. C. R.

8587. —— —— Intent to defraud need not be proved—Evidence for purpose of contraverting intention inadmissible.]—An intent to defraud is not an ingredient of the offence created by 1883 Act, s. 3, & evidence to show that deft. had no intention to defraud is inadmissible.—R. *v.* DYSON, [1894] 2 Q. B. 176 ; 63 L. J. M. C. 124 ; 70 L. T. 877 ; 58 J. P. 528 ; 42 W. R. 526 ; 10 T. L. R. 432 ; 38 Sol. Jo. 419 ; 18 Cox, C. C. 1 ; 1 Mans. 283 ; 10 R. 230, C. C. R.

Annotation :—**Mentd.** R. *v.* Muirhead (1908), 1 Cr. App. Rep. 189, C. C. A.

8588. —— Effect of giving security.]—"Credit" within 1883 Act, s. 31, may be obtained, even though security for the debt is given.—R. *v.* FRYER (1912), 7 Cr. App. Rep. 183, C. C. A.

8589. —— "More than £20"—Acceptance of goods of more than that value sent on order for less.]—The offence of obtaining credit to the extent of £20 or upwards by an undischarged bkpt. is committed where bkpt. receives & keeps goods

of the value of £20 or upwards without paying for them, or informing the creditor of the fact of his being an undischarged bkpt. or repudiating the contract, although the goods were sent in execution of an order for goods of a less value than £20.—R. *v.* JUBY (1886), 55 L. T. 788; 51 J. P. 310; 35 W. R. 168; 3 T. L. R. 211; 16 Cox, C. C. 160, C. C. R.

8590. —— More than £10—Taking furnished house at £8 a month payable monthly.]—An agreement to take a furnished house at a rent of £8 per month payable monthly:—*Held:* an offence within 1913 Act, s. 5 (1).—R. *v.* SMITH (1915), 11 Cr. App. Rep. 81, C. C. A.

8591. "Misdemeanour under" 1869 Act—Reference to offences in 1869 Act, s. 13—Maximum punishment.]—*Held:* the words "misdemeanour under" 1869 Act, referred to the class of misdemeanours mentioned in 1869 Act, s. 13, & not to the class enumerated in s. 11, & the maximum punishment which could be inflicted upon prisoner convicted under 1883 Act, s. 31, was imprisonment for one year with hard labour.—R. *v.* TURNER, [1904] 1 K. B. 181; 73 L. J. K. B. 46; 89 L. T. 676; 68 J. P. 15; 52 W. R. 214; 20 T. L. R. 67; 48 Sol. Jo. 85; 20 Cox, C. C. 590, C. C. R.

See, now, 1914 Act, s. 155.

8592. Where offence committed.]—An undischarged bkpt. residing in the county of L., while in the county of S. purchased fish on credit to an amount over £20. He did not inform the vendors that he was an undischarged bkpt. He was indicted in the county of L.:—*Held:* credit was obtained in the county of S., & the indictment was wrongly laid in L.—R. *v.* DAWSON (1888), 59 L. T. 932; 53 J. P. 280; 5 T. L. R. 87; 16 Cox, C. C. 556, C. C. R.

8593. —— Creditor in Ireland—Bankrupt in England.]—A., being an undischarged bkpt. in England, obtained credit within 1883 Act, s. 31, from B. in Ireland by buying from him a black cob without paying for same:—*Held:* the offence was committed in England.—R. *v.* PETERS (1886), 16 Q. B. D. 636; 55 L. J. M. C. 173; 54 L. T. 545; 50 J. P. 631; 34 W. R. 399; 2 T. L. R. 359; 16 Cox, C. C. 36, C. C. R.

Annotations:—**Consd.** R. *v.* Juby (1886), 55 L. T. 788, C. C. R. **Distd.** R. *v.* Dyson, [1894] 2 Q. B. 176, C. C. R. **Refd.** R. *v.* Dawson (1888), 5 T. L. R. 87, C. C. R.

SUB-SECT. 6.—THE ORDER FOR PROSECUTION.

8594. 1849 Act—Bankrupt not entitled to protection—Till after last examination.]—The ct. will order bkpt. to be prosecuted by the assignees for fraudulently altering his books & making false entries therein, & such bkpt. is not entitled to protection until he has passed his last examination.—*Re* ASHLIN (1852), 18 L. T. O. S. 348.

See, now, 1914 Act, ss. 154 (9), (10), 161.

8595. 1861 Act, s. 221—Jurisdiction of commissioners.]—Bkpt. had been guilty of acts, which amounted to a misdemeanour within the above sect., & one of the comrs. under s. 159 granted him an order of discharge with a suspension of twelve months:—*Held:* (1) the comr. had jurisdiction to direct a prosecution before a ct. of criminal justice, & it was not incumbent on him, with or without a jury, to try the case himself; (2) the order should be discharged, & a prosecution directed by the assignees at the next assizes.—*Re* WILSON, *Ex p.* DOBSON (1862), 1 New Rep. 75; 32 L. J. Bcy. 1; 7 L. T. 444; 11 W. R. 100, L. JJ.; *subsequent proceedings* (1863), 1 New Rep. 379, L. JJ.

Annotation:—**Refd.** *Re* Evans, *Ex p.* Berry (1872), 27 L. T. 53, L. JJ.

8596. —— Discretion of court—As to previous examination of bankrupt.]—An order for the prosecution of bkpt. may be made before the appointment of a creditors' assignee, & notwithstanding bkpt. has not been examined or had any opportunity of explanation afforded him, & it is a matter for the discretion of the comr. whether a previous inquiry or an examination of bkpt. shall be directed.—*Re* LEVI, *Ex p.* LEVI (1864), 5 New Rep. 203; 34 L. J. Bcy. 23; 11 L. T. 527; 11 Jur. N. S. 97; 13 W. R. 209, L. C.

Annotation:—**Refd.** *Re* Marsden, *Ex p.* Marsden (1876), 2 Ch. D. 786.

8597. —— —— Interference by appellate court.]—The Ct. of Appeal in bkpcy. will not interfere with the discretion of a comr., who has directed the prosecution of bkpt. immediately after adjudication, & before bkpt. has been examined, or had an opportunity of explanation.—*Re* LEVI, *Ex p.* LEVI (1864), 5 New Rep. 203; 34 L. J. Bcy. 23; 11 L. T. 527; 11 Jur. N. S. 97; 13 W. R. 209, L. C.

Annotation:—**Refd.** *Re* Marsden, *Ex p.* Marsden (1876), 2 Ch. D. 786.

8598. —— —— Court need not order prosecution—Effect on costs.]—It is not necessary for the Ct. of Bkpcy. to order the prosecution, & the only effect of its not being so ordered is one of costs.—R. *v.* GRAHAM (1868), 18 L. T. 184.

8599. —— Application should be made ex parte.]—All applications for the criminal prosecution of bkpts. should be *ex p.*, & counsel for bkpt. should not be heard.—*Re* NEWBERRY, *Ex p.* HYAMS (1864), 11 L. T. 390.

8600. —— Must be reasonable evidence of guilt—Suspicion insufficient.]—Reasonable evidence of the guilt of parties is necessary before a prosecution by indictment, under the above sect., can be directed; mere suspicion is not enough.—*Re* STILL, *Ex p.* STRICKLAND (1862), 32 L. J. Bcy. 12, L. C.

Annotation:—**Apprvd.** *Re* Howard, *Ex p.* Stallard (1868), 16 W. R. 469, L. J.

8601. —— —— Conviction not only reasonable but probable.]—After bkpt. has been taken before a magistrate & committed for trial upon a charge of having concealed his property with intent to defraud his creditors, & the grand jury upon an indictment for a misdemeanour under the above sect. have found a true bill against him, the ct. will not sanction the prosecution under s. 223, if there appears no reasonable prospect of a conviction:—*Qu.:* whether, if the chance of a conviction be not only reasonable but probable, the ct. will sanction the prosecution, when no application is made for the purpose before the indictment is preferred.—*Re* NEWBERRY, *Ex p.* HYAMS (1864), 11 L. T. 390.

8602. —— When court will direct prosecution.]—Where bkpt. is accused of a misdemeanour within the above sect., upon evidence capable of supporting an indictment, & affording reasonable probability of obtaining a conviction, the ct. will direct a prosecution.—*Re* NICHOLSON (1865), 12 L. T. 829.

8603. —— —— Irresistible evidence not required—Duty of court.]—It is the duty of the Ct. of Bkpcy. to

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PART XXII. SECT. 3, SUB-SECT. 6.

e. *Discretion of court.*]—When the ct. cannot believe the account given by bkpt. & his friend, the alleged custodian of a large sum belonging to creditors, & when the account leads to the inference of deliberate falsehood, the ct. will not direct a prosecution, although it adjourns the final examination *sine die.*—*Re* M'CARTHY & Co. (1863), 15 Ir. Jur. 178.—IR.

f. —— *What evidence sufficient—Admissions under examination.*]—The ct. will not order a prosecution against bkpt., the only criminatory evidence against whom has been obtained from his own admissions when under

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direct a prosecution under the above sect., wherever there is reasonable evidence of guilt to lay before a jury, & irresistible evidence is not required.—*Re* HOWARD, *Ex p.* STALLARD (1868), 3 Ch. App. 408; 37 L. J. Bcy. 7; 16 W. R. 469, L. J.

Annotations:—**Consd.** *Re* Hodgson, *Ex p.* Brett (1875), 1 Ch. D. 151, C. A.; *Re* Northern Counties Bank (1883), 31 W. R. 546.

8604. —— At what time granted—Before appointment of trustee.]—By an order of a comr., after reciting that there were reasonable grounds for supposing that bkpt. had been guilty of some one or more of the offences set forth in the above sect., & that petitioning creditors were desirous that he should be prosecuted criminally, it was ordered that criminal proceedings or a prosecution might be forthwith commenced & prosecuted against bkpt. No creditors' assignee had been appointed:—*Held:* it was no objection to the validity of the order that creditors' assignees had not been appointed.—*Re* LEVI, *Ex p.* LEVI (1864), 5 New Rep. 203; 34 L. J. Bcy. 23; 11 L. T. 527; 11 Jur. N. S. 97; 13 W. R. 209, L. C.

Annotation:—**Refd.** *Re* Marsden, *Ex p.* Marsden (1876), 2 Ch. D. 786.

8605. —— Before close of examination.]—G., a bkpt., was indicted for a misdemeanour under the above sect. Bkpt. had come up for examination before the Ct. of Bkpcy., & a day had been fixed for him to pass his final examination & obtain his discharge, but before the arrival of the day appointed, the proceedings were taken by the creditors' assignees which formed the subject of the indictment. It did not appear from the proceedings in the Ct. of Bkpcy., that bkpt. had ever passed his final examination. It was objected that the criminal proceedings were premature, & that it was intended by the Act that no such proceedings should be taken till bkpt. had passed his final examination:—*Held:* as criminal proceedings were no part of the proceedings in the bkpcy., an indictment might be preferred at any time when the offence charged was complete, whenever that might be.—R. *v.* GRAHAM (1868), 18 L. T. 184.

8606. —— Form of order—Offences not particularised.]—Form of order for prosecution, referring to "one or more of the offences set forth in the above sect.," approved of.—*Re* LEVI, *Ex p.* LEVI (1864), 5 New Rep. 203; 34 L. J. Bcy. 23; 11 L. T. 527; 11 Jur. N. S. 97; 13 W. R. 209, L. C.

Annotation:—**Refd.** *Re* Marsden, *Ex p.* Marsden (1876), 2 Ch. D. 786.

8607. 1861 Act, s. 223—Power to take debtor before magistrate.]—The ct. has no power under the above sect. to sanction the taking of bkpt., accused of a misdemeanour under the Act, before a magistrate.—*Re* NEWBERRY, *Ex p.* HYAMS (1864), 11 L. T. 390.

8608. 1869 Act, s. 16—Jurisdiction of court—Extends to liquidation by arrangement.]—A county ct. judge refused, on the application of the trustees of a fraudulent debtor, to make an order under the above sect. for the prosecution of debtor, on the ground that he had no jurisdiction:—*Held:* for the purposes of the sect. bkpcy. & liquidation by arrangement were the same thing, & a prosecution of the debtor should be directed.—*Re* DEMPSEY, *Ex p.* DEMPSEY (1873), 8 Ch. App. 676; 42 L. J. Bcy. 93; 28 L. T. 860; 37 J. P. 660; 21 W. R. 800, L. JJ.

Annotations:—**Refd.** *Re* Marsden, *Ex p.* Marsden (1876), 34 L. T. 700, C. A. **Mentd.** Cobham *v.* Dalton (1875), 44 L. J. Ch. 702, L. JJ.

8609. —— —— Debtor presenting his own petition.]—The ct. has no jurisdiction to order the trustee to prosecute debtor, who has presented his own petition, for acts made misdemeanours by 1869 Act, s. 11 (13) (14) (15).—*Re* BURDEN, *Ex p.* WOOD (1888), 21 Q. B. D. 24; 57 L. J. Q. B. 570; 59 L. T. 149; 36 W. R. 896; 5 Morr. 166, D. C.

Annotation:—**Expld.** *R. v.* Beck (1889), 61 L. T. 596, C. C. R.

8610. —— Application ex parte—Locus standi of bankrupt.]—Applications to the ct. under the above sect. for leave to prosecute bkpt. are properly made *ex p.*, & bkpt. cannot be heard in opposition.—*Re* MARSDEN, *Ex p.* MARSDEN (1876), 2 Ch. D. 786; 45 L. J. Bcy. 141; 34 L. T. 700; 24 W. R. 714, C. A.

Annotation:—**Refd.** *Re* Appleby, *Ex p.* Brown (1876), 2 Ch. D. 799, C. A.

8611. —— "Representation of any creditor"—Must be in writing— & supported by evidence.]—The representation by a creditor to the ct., mentioned in the above sect., as a foundation for an order directing the prosecution of bkpt. for alleged offences under the Act, must be made in writing, supported by proper evidence, & filed with the proceedings in bkpcy.—*Re* LEONARD, *Ex p.* LEONARD (1875), L. R. 19 Eq. 269; 44 L. J. Bcy. 80; 31 L. T. 853; 23 W. R. 253.

Annotation:—**Consd.** *Re* Marsden, *Ex p.* Marsden (1876), 2 Ch. D. 786.

8612. —— What evidence sufficient—Report of trustee showing reasonable probability of conviction.]—An order to prosecute bkpt. under the above sect. may be made without any further evidence than the report of the trustee, if the ct. is satisfied from that alone that there is a reasonable probability of a conviction.—*Re* MARSDEN, *Ex p.* MARSDEN (1876), 2 Ch. D. 786; 45 L. J. Bcy. 141; 34 L. T. 700; 24 W. R. 714, C. A.

Annotation:—**Refd.** *Re* Appleby, *Ex p.* Brown (1876), 2 Ch. D. 799, C. A.

8613. —— Grounds for refusing—Not that property removed has been recovered.]—The application of the trustee in a liquidation under the above sect. for an order to prosecute the liquidating debtor for fraudulently removing his property ought not to be refused, merely on the ground that the trustee has recovered the property so removed.—*Re* WARD, *Ex p.* MONKHOUSE (1879), 40 L. T. 296.

8614. —— Effect of order.]—An order for prosecution does not prejudice debtor, but its only effect is to throw upon the country the expense of the prosecution, just as if it were a case of felony instead of a case of misdemeanour.—*Re* MARSDEN, *Ex p.* MARSDEN (1876), 2 Ch. D. 786; 45 L. J. Bcy. 141; 34 L. T. 700; 24 W. R. 714, C. A.

Annotation:—**Refd.** *Re* Appleby, *Ex p.* Brown (1876), 2 Ch. D. 799, C. A.

8615. —— Appeal from refusal—Whether competent.]—A county ct. judge refused to make an order under the above sect., directing the prosecution of a liquidating debtor, on the ground that he had no jurisdiction:—*Held:* a proceeding under the Act being a proceeding in bkpcy., an appeal would lie from the decision of the county ct. judge, although no right of appeal was given by the Act.—*Re* DEMPSEY, *Ex p.* DEMPSEY (1873), 8 Ch. App. 676; 42 L. J. Bcy. 93; 28 L. T. 860; 37 J. P. 660; 21 W. R. 800, L. JJ.

examination.—*Re* M'ILROY (1863), 15 Ir. Jur. 218.—IR.

g. —— *Forgery, making false entries & obtaining credit by false representations charged—Books destroyed.*]—When bkpt. is charged with forgery, & with making false entries in his books, & obtaining credit by false representations, although the documents alleged to have been forgeries have been destroyed, & none of them are forthcoming, a prosecution will be directed.—*Re* M'NEVIN (1864), 16 Ir. Jur. 197.—IR.

Annotations :—**Mentd.** Cobham *v.* Dalton (1875), 44 L. J. Ch. 702, L. JJ. ; *Re* Marsden, *Ex p.* Marsden (1876), 34 L. T. 700, C. A.

8616. —— —— ——.]—A county ct. judge refused to make an order for the prosecution of debtor :—*Held :* an appeal lay against the refusal. *Re* STEPHENS, *Ex p.* TRUSTEE (1885), 2 Morr. 20, D. C.

8617. —— —— **Whether debtor should be served.**]—*Qu. :* whether on an appeal brought by the trustee from an order made under the above sect., it is necessary to serve debtor.—*Re* DEMPSEY, *Ex p.* DEMPSEY (1873), 8 Ch. App. 676 ; 42 L. J. Bcy. 93 ; 28 L. T. 860 ; 37 J. P. 660 ; 21 W. R. 800, L. JJ.

Annotations :—**Mentd.** Cobham *v.* Dalton (1875), 44 L. J. Ch. 702, L. JJ. ; *Re* Marsden, *Ex p.* Marsden (1876), 34 L. T. 700, C. A.

8618. —— **Appeal against order—Accomplice—Not party aggrieved.**]—An order was made under 1869 Act, s. 11, for the prosecution of bkpt., & also for the prosecution of another person as his accomplice :—*Held :* the accomplice was not a person aggrieved within 1869 (Bkpcy.) Act, s. 71, & had no right to appeal against the order.—*Re* APPLEBY, *Ex p.* BROWN (1876), 2 Ch. D. 799 ; 45 L. J. Bcy. 115 ; 35 L. T. 10 ; 24 W. R. 750, C. A.

Annotations :—**Apprvd.** *Re* Orbell, *Ex p.* Evans (1881), 44 L. T. 762, C. A. **Reld.** *Re* Orbell, *Ex p.* Evans (1881), 43 L. T. 575.

8619. —— —— —— ——.]—The ct. has a discretionary power under 1869 Act, s. 16, to order a creditor to prosecute the trustee, debtor, & accomplices for conspiracy, &, if the charge against the accomplices fails, they are not persons aggrieved within 1869 Bkpcy. Act, s. 71.—*Re* ORBELL, *Ex p.* EVANS (1881), 44 L. T. 762 ; 29 W. R. 573, C. A.

8620. —— —— **Bankrupt.**]—Bkpt. cannot appeal from an order made on an application under 1869 Act, s. 16, for his prosecution.—*Re* MARSDEN, *Ex p.* MARSDEN (1876), 2 Ch. D. 786 ; 45 L. J. Bcy. 141 ; 34 L. T. 700 ; 24 W. R. 714, C. A.

Annotation :—**Reld.** *Re* Appleby, *Ex p.* Brown (1876), 2 Ch. D. 799, C. A.

SUB-SECT. 7.—COSTS OF PROSECUTION.

8621. Jurisdiction of court—1849 Act, s. 12.]—The ct. in the exercise of its primary jurisdiction may, in exceptional & special circumstances, order payment of the costs of a prosecution of bkpt., instituted under the direction of the ct., out of the estate in the hands of the trade assignee.—*Re* BALLARD (1863), 9 L. T. 399.

8622. —— **1869 Act, s. 17—Prosecution not ordered.**]—Where the prosecution of bkpt. under 1869 Act is not ordered by any ct., the judge at the trial has no power to allow the costs of the prosecution.—R. *v.* THOMAS (1870), 22 L. T. 138 ; 11 Cox, C. C. 535.

Annotations :—**Mentd.** R. *v.* Bolus (1870), 23 L. T. 339 ; A.-G. *v.* Bournemouth Corpn. (1902), 71 L. J. Ch. 730, C. A.

8623. When costs allowed—Prosecution on instructions of creditors—4 Geo. 4, c. 16, s. 106—"Just allowances."]—Creditors, at a special meeting for the purpose, directed a prosecution for perjury & conspiracy in the proof of debts, to be commenced & carried on by the assignees :—*Held :* the expenses came fairly under the description of "just allowances" authorised by 6 Geo. 4, c 16, s. 106, to be made to the assignees out of the estate. —*Re* ALLMOND, *Ex p.* STRANGE (1828), Mont. & M. 31, L. C.

8624. —— —— **Prosecution without order—Only in exceptional cases.**]—A trustee, who prosecutes debtor for offences committed against the bkpcy. laws without first obtaining an order of the ct. for that purpose under 1869 Act, s. 16, will not, as a general rule, be allowed the costs of the prosecution out of the estate, even although the prosecution was expressly sanctioned by the committee of inspection.—*Re* HOWES, *Ex p.* WHITE, [1902] 2 K. B. 290 ; 71 L. J. K. B. 705 ; 46 Sol. Jo. 588 ; 9 Mans. 252.

8625. —— **Compromise without sanction of court.**]—Where the assignees of bkpt., having commenced a criminal prosecution against him for offences under 1861 Act, compromise the prosecution without the sanction of the ct., the ct. will not, save in exceptional cases, order the costs of the prosecution to be paid out of the chief registrar's fund or out of the bkpt.'s estate.—*Re* EVANS, *Ex p.* BERRY (1872), 27 L. T. 53 ; 20 W. R. 849, L. JJ.

8626. —— **Failure to arrest debtor.**]—Where the ct., being clearly of opinion that bkpt. had committed offences under 1861 Act, s. 221, directed a prosecution, & active steps were taken to apprehend bkpt. & bring him before a magistrate, but he, having heard of the proceedings, left the country : —*Held :* there being no estate, the costs should be taxed & paid out of the chief registrar's fund.—*Re* BAROCH (1869), 17 W. R. 689.

8627. What costs allowed—Costs of taking bankrupt before magistrate—1861 Act, s. 223.]—The ct. will not allow the costs of going before a magistrate to be paid out of the estate.—*Re* NEWBERRY, *Ex p.* HYAMS (1864), 11 L. T. 390.

8628. —— **Costs of prosecuting accomplices—1861 Act, s. 221.**]—Where a prosecution is directed against bkpt. for a misdemeanour under the above sect., the costs, not only of the prosecution of bkpt., but also of the prosecution of his accomplices, will be allowed out of the chief registrar's account.—*Re* LEVI (1867), 2 Ch. App. 493 ; 36 L. J. Bcy. 49 ; 17 L. T. 89 ; 15 W. R. 855, L. C.

8629. —— **Costs of appeal—Order that extra costs should not be paid out of chief registrar's account.**]—The comr. of a district ct. made an order directing the assignee to be the prosecutor in criminal proceedings against bkpt. for offences under 1861 Act, s. 221, but stating it not to be intended by the ct., or required by the assignee, that the extra costs should be paid out of the chief registrar's account, & ordering them to be paid out of bkpt.'s estate, & if that was insufficient, by prosecutor. At the same time a certificate in common form was granted, under s. 223, not referring to the order, nor imposing any condition : —*Held :* (1) notwithstanding the order, as an unconditional certificate had been given in the form required by the Act, the costs must be paid out of the chief registrar's account ; (2) the assignee's costs of the appeal ought also to be paid out of the same account.—*Re* HAMMOND, *Ex p.* SPOONER (1867), 3 Ch. App. 259 ; 37 L. J. Bcy. 2 ; 16 W. R. 181, L. J.

Annotation :—**Distd.** *Re* Howard, *Ex p.* Stallard (1868), 3 Ch. App. 408, L. JJ.

8630. —— —— **Against refusal to order prosecution.**]—A comr. having refused to direct the prosecution of bkpt., an appeal was brought by the assignee, & a prosecution was directed :—*Held :* (1) the assignee's costs of the appeal were not costs of the prosecution within 1861 Act, s. 223 ;

PART XXII. SECT. 3, SUB-SECT. 7.

8627 i. *What costs allowed—Costs of trying to arrest debtor.*]—The ct. allowed the expenses of trying to arrest an absconding bkpt.—*Re* PAYNE (1874), 8 I. L. T. Jo. 402.—IR.

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(2) they could not be paid out of the chief registrar's account.—*Re* HOWARD, *Ex p.* STALLARD (1868), 3 Ch. App. 408 ; 37 L. J. Bcy. 7 ; 16 W. R. 469, L. J.

Annotations:—**Mentd.** *Re* Hodgson, *Ex p.* Brett (1875), 1 Ch. D. 151, C. A. ; *Re* Northern Counties Bank (1883), 31 W. R. 546.

8631. Appeal against refusal to order prosecution—After prosecution carried out successfully without leave—Order granted nunc pro tunc to provide for costs.]—Where, notwithstanding a refusal by the ct. to order a prosecution by the trustee for offences alleged to have been committed by debtors under 1869 Act, the trustee prosecuted them to a conviction :—*Held :* the order to prosecute should have been made, & the ct. would make the order *nunc pro tunc*, in order that the costs of the prosecution might be allowed to the trustee.—*Re* STANLAKE & SON, *Ex p.* PRIESTLEY (1878), 10 Ch. D. 774 ; 48 L. J. Bcy. 48 ; 39 L. T. 643 ; 27 W. R. 292.

Annotation:—**Distd.** *Re* Howes, *Ex p.* White, [1902] 2 K. B. 290.

8632. Appeal from refusal of commissioner to allow costs—Ex parte application—Reference back to commissioner.]—The assignees had instituted against bkpt. a prosecution, which failed, & the comrs. refused to allow the costs to the assignees, without having assigned any reason for the refusal. On an *ex p.* application by the assignees, on a petition stating at length all the circumstances inducing the prosecution, & alleging its propriety, etc., & praying to be allowed the costs in question : *Held :* as the comrs. had disallowed the costs without assigning any reason, & as the application was *ex p.*, it must be referred to them to certify whether the prosecution was properly instituted & conducted, with liberty to state special circumstances.

If assignees institute a proper prosecution they ought to be allowed the costs, but the propriety must be established to the satisfaction of the ct. (*per* CUR.).—*Re* CAVENAGH, *Ex p.* CUMMING (1836), 3 Mont. & A. 29 ; 6 L. J. Bcy. 57, Ct. of R.

SUB-SECT. 8.—OTHER CASES.

8633. Indictment for offence against 1849 Act, s. 251—Whether proceeding pending at date of repeal of Act—1881 Act, s. 230.]—Prisoner, a bkpt., was tried on indictment for an offence against 1849 Act, s. 251, in feloniously not surrendering himself to the Ct. of Bkpcy. on the day limited for his surrender with intent to defraud his creditors. The warrant of the comr. for his apprehension on that charge, & the confirmation on which it was founded, were signed & dated before the coming into operation of 1861 Act, which by s. 230 repealed the before-mentioned statutory provision subject to certain exceptions therein contained. It was contended that in the circumstances the indictment was not a proceeding pending at the date of the repeal. Prisoner was convicted:—*Held:* (1) there was a proceeding pending within s. 230; (2) the word "penalty" in that sect. extended to any penal consequences whatsoever, & was not restricted to a pecuniary penalty only; (3) the conviction should be affirmed.—R. *v.* SMITH (1862), Le. & Ca. 131; 31 L. J. M. C. 105; 5 L. T. 761; 26 J. P. 388; 8 Jur. N. S. 199; 10 W. R. 273; 9 Cox, C. C. 110, C. C. R.

Annotations:—**Consd.** Graham *v.* Robinson (1867), L. R. 2 Q. B. 387. **Refd.** R. *v.* Brown (1913), 8 Cr. App. Rep. 173, C. C. A.; R. *v.* O'Connor, [1913] 1 K. B. 557, C. C. A.

Part XXIII.—Compositions and Schemes and Deeds of Arrangement.

NOTE.—*The provisions now in force in England are, as to Compositions & Schemes of Arrangement under the Bankruptcy Acts, Bankruptcy Act,* 1914 (*c.* 59), *ss.* 16, 17 & 21, *which reproduce in substance the* 1883 *Act, ss.* 19, 23 & 105 (6), & 1890 *Act, s.* 3 (*replacing* 1883 *Act, s.* 18), *as amended by* 1913 *Act, s.* 7, &, *as to Deeds of Arrangement apart from the Bankruptcy Acts, Deeds of Arrangement Act,* 1914 (*c.* 47), *herein referred to as* 1914 (*Deeds*) *Act. This latter Act repealed Deeds of Arrangement Act,* 1887 (*c.* 57), & *Bankruptcy & Deeds of Arrangement Act,* 1913 (*c.* 34) (*so far as it dealt with deeds of arrangement*), *herein referred to as* 1887 *Act* & 1913 *Act respectively. In considering the cases set out in this Part, many of which were decided under the* 1869 & *earlier Bankruptcy Acts, regard must be had to their date, the Act under which they were decided,* & *the effect of the subsequent Acts.*

SECT. 1.—**JURISDICTION OF COURT.**

8634. Under 1861 Act, s. 136—Extends to deed of inspectorship.]—*Held :* a deed of inspectorship was included in the words " deed of composition or arrangement " in the above sect.—*Re* DEED OF INSPECTORSHIP, *Ex p.* JOHNSON (1869), 20 L. T. 177.

8635. —— Resolution under s. 110.]—Where creditors have by the requisite statutory majority resolved under 1861 Act, s. 110, to suspend proceedings in bkpcy., & to have the estate wound up by trustees, the Ct. of Bkpcy. has still power under s. 136 to determine any questions that may arise in the winding up of the estate by the trustees, & will restrain a Ch. suit for the administration of the estate.—*Re* PARTRIDGE, *Ex p.* PENYSTON (1874), 31 L. T. 259, L. JJ.

PART XXII. SECT. 3, SUB-SECT. 8.

k. *False representation—" Agreement "*—1871 *Act.*]—Insolvent making false representations to his creditors to induce them under s. 68 (ii.) of the above Act to direct that his furniture be granted to him, does not commit an offence within s. 154 (xvi.), of the above Act, such direction not being an " agreement."—*Re* AARONS (1880), 6 V. L. R. 56.—**AUS.**

l. *Fraudulent & culpable negligence*—1871 *Act, s.* 137.]—Fraudulent & culpably negligent conduct in insolvent, is not an offence punishable by imprisonment.—*Re* ROWLEY (1877), 3 V. L. R. 8.—**AUS.**

m. *Defendant in action alleging fraud allowing judgment to go by default —Liability to immediate imprisonment —Insolvent Act,* 1875, *ss.* 136, 137.]—ROURKE *v.* ROBERTSON (1879), 2 P. E. I. 285.—**CAN.**

PART XXIII. SECT. 1.

a. *Under* 1897 *Act—All questions relating to administration of assigned estate.*]—The Ct. of Insolvency has the power of deciding all questions, relating to the administration of property assigned by deed of arrangement, to the same extent as the Supreme Ct. in its equity jurisdiction formerly had. —*Re* COOK, HOWDEN *v.* COOK, [1915] V. L. R. 324.—**AUS.**

8636. Under 1861 Act, s. 197—Extends only to deeds registered under ss. 192, 193.]—*Held :* s. 197 applied only to deeds registered under ss. 192, 193, & not to deeds registered under s. 194. —PEARSON *v.* PEARSON (1866), L. R. 1 Exch. 308 ; 4 H. & C. 316 ; 35 L. J. Ex. 172 ; 12 Jur. N. S. 589 ; 14 W. R. 842.

Annotations :—**Consd.** *Re* Brooksbank, *Ex p.* Atkinson (1870), L. R. 9 Eq. 736. **Apprvd.** Benecke *v.* Whittall (1877), 2 App. Cas. 602, P. C. **Refd.** Latham *v.* Lafone (1867), L. R. 2 Exch. 115 ; Clegg *v.* Rees (1871), 25 L. T. 261.

8637. —— As regards deed registered under 1861 Act, s. 194—1869 Act, s. 20.]—1861 Act, s. 197, gives the Ct. of Bkpcy. jurisdiction over deeds registered under s. 194.

The jurisdiction of the Ct. of Bkpcy. over a deed registered under s. 194 is within the saving in 1869 Act, s. 20.—*Re* BROOKSBANK, *Ex p.* ATKINSON (1870), L. R. 9 Eq. 736 ; 39 L. J. Bcy. 10 ; 22 L. T. 279 ; 18 W. R. 598.

Annotations :—**Consd.** Glegg *v.* Rees (1871), 25 L. T. 261 ; Benecke *v.* Whittall (1877), 2 App. Cas. 602, P. C.

8638. —— To enforce deed of inspectorship—To alter rights of parties.]—The above sect. gives the ct. jurisdiction to enforce the provisions of a deed of inspectorship under s. 192, but not to give rights or take them away.—*Re* SYMONS (1869), 17 W. R. 1040.

8639. Under 1869 Act—Generally.]—*Held :* s. 72 of the above Act gave to the Ct. of Bkpcy. the same powers, in cases of liquidation by arrangement & composition, as in cases of bkpcy.—*Re* THORPE, *Ex p.* HARTEL (1873), 8 Ch. App. 743 ; 42 L. J. Bcy. 34 ; 28 L. T. 530, L. J.

Annotations :—**Mentd.** *Re* Harper, *Ex p.* King (1873), L. R. 17 Eq. 332 ; *Re* Glover, *Ex p.* Radcliffe Investment Co. (1873), 43 L. J. Bcy. 4 ; Eyre *v.* Smith (1877), 2 C. P. D. 435, C. A. ; *Re* Barnett. *Ex p.* Reynolds (1885), 15 Q. B. D. 169, C. A.

8640. —— "Proceedings in bankruptcy."]—All the three forms of proceeding in the case of an insolvent debtor, contained in 1869 Act, *viz.* by an adjudication of bkpcy. under s. 6, a liquidation by arrangement under s. 125, & a composition under s. 126, are, though different in form, "proceedings in bkpcy." The general enactments in ss. 49 & 50 apply to all discharges under the stat., & an order of discharge in each of the three cases operates only to release debtor in whose favour it is given, leaving his solvent co-debtor still liable to be sued separately by a joint creditor who has been a party to the release of the insolvent debtor.—MEGRATH *v.* GRAY, GRAY *v.* MEGRATH (1874), L. R. 9 C. P. 216 ; 43 L. J. C. P. 63 ; 30 L. T. 16 ; 22 W. R. 409.

Annotations :—**Consd.** Ellis *v.* Wilmot (1874), L. R. 10 Exch. 10. **Apprvd.** *Re* Jacobs, *Ex p.* Jacobs (1875), 10 Ch. App. 211, L. JJ. **Consd.** Simpson *v.* Henning (1875), L. R. 10 Q. B. 406, Ex. Ch. **Refd.** Thornton *v.* Maynard (1875), L. R. 10 C. P. 695 ; Société Générale de Paris *v.* Geen (1883), 8 App. Cas. 606, H. L. **Mentd.** R. *v.* Creese (1874), 43 L. J. M. C. 51, C. C. R.

8641. —— As regards deeds registered under 1861 Act, s. 192.]—*Held :* the Bkpcy. Ct. under 1869 Act, had, over deeds of arrangement & composition, registered under 1861 Act, s. 192, not only all the jurisdiction which 1861 Act gave to the old ct. over such deeds, but also all the larger & more extensive jurisdiction which 1869 Act, s. 72, had given to the ct. over bkpcies.—*Re* TAYLOR & RUMBOLL, *Ex p.* RUMBOLL (1871), 6 Ch. App. 842 ; 40 L. J. Bcy. 82 ; 25 L. T. 253 ; 19 W. R. 1102, L. JJ.

Annotations :—**Folld.** *Re* Dixon, *Ex p.* Gordon (1873), 8 Ch. App. 557, n. **Consd.** Megrath *v.* Gray, Gray *v.* Megrath (1874), L. R. 9 C. P. 216. **Refd.** Graham *v.* Winterson (1873), L. R. 16 Eq. 243.

8642. —— As regards taxation of costs.]—The Ct. of Bkpcy. has jurisdiction in cases of composition to order taxation of costs.—*Re* DIXON, *Ex p.* SHEPHERD (1876), 2 Ch. D. 430 ; 45 L. J. Bcy. 103 ; 34 L. T. 743 ; 24 W. R. 931.

8643. Under 1883 Act—As regards costs.]—A second meeting of creditors under a bkpcy. petition, held to consider the confirmation of a scheme of arrangement of debtor's affairs accepted at the first meeting, is not a "proceeding in ct." within 1883 Act, s. 105 (1), & the ct. has no power to order the costs of petitioner incidental to that meeting to be paid out of debtor's estate. —*Re* STRAND, *Ex p.* BOARD OF TRADE (1884), 13 Q. B. D. 492 ; 53 L. J. Q. B. 563 ; 1 Morr. 196, D. C.

8644. —— To proceed after death of debtor.]—In 1889 A. mortgaged property to secure £2,000 & interest. Shortly afterwards a receiving order was made against A. on his own petition. In July, 1890, he made a composition with his creditors under 1883 Act, s. 18, which was approved of by the ct., under which the creditors were to be paid by three instalments extending over a year. The mtgees. neither attended the creditor's meeting nor assented to the scheme of composition. Default was made in payment of the instalments. A. died two months after the expiration of the year, & an action in Ch. was commenced by a creditor for the administration of his estate which proved to be insolvent. The mtgees. valued their security at £1,500, & claimed to be admitted as creditors in the action for £500, the balance of their debt. Their proof had been admitted by the trustee under the composition deed :—*Held :* the Ct. of Bkpcy. had jurisdiction to proceed in the bkpcy. of A. under 1883 Act, ss. 108, 18 (11), notwithstanding his death, & the strict course would be to allow appcts. to take proceedings in that ct., but pltf. having submitted, in order to save delay & expense, to abide by the judgment of the Ct. of Ch., on what would be the result of those proceedings, the claim was admitted.—*Re* HARDY, HARDY *v.* FARMER, [1896] 1 Ch. 904 ; 65 L. J. Ch.

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b. *Under* 1857 *Irish Act—Amount of composition—Annulment of bankruptcy.*]—The Cts. of Bkpcy. & Insolvency in Ireland have no jurisdiction over compositions between bkpts. & their creditors save to see that the amount of composition offered corresponds with that advertised & to annul (with or without costs) the adjudication of bkpcy.—*Re* FAHY (1861), 14 Ir. Jur. 46.—IR.

c. *Equitable jurisdiction* — 1857 *Irish Act.*]—Although the Bkpt. Ct. is a Ct. of Law & Equity, it cannot exercise its equitable jurisdiction, even in favour of creditors, in any way not warranted by the above statute.—*Re* CRAIG (1869), I. R. 4 Eq. 158.—IR.

d. —— *To order particular debt to be paid in full.*]—The ct. has an equitable jurisdiction to direct that a particular creditor shall be paid a portion of his debt in full, if the trader's proposal would not be reasonable or proper as regards that creditor. Such time may be given for payment as the ct. directs.—*Re* AN ARRANGING TRADER (1877), 18 Ir. Jur. 323.—IR.

e. *Under Irish* 1872 *Act — To stay proceedings in arrangement matter.*] —When a debtor's summons has been duly issued & served previously to an order for protection against process, obtained by debtor under proceedings in arrangement instituted after service of the debtor's summons, & an act of bkpcy. has been committed by debtor, a petition for adjudication in bkpcy. may be presented, & the ct. will stay further proceedings in the arrangement matter.—*Re* KER (1877), 12 I. L. T. 9.—IR.

f. —— *To see that composition is fair.*]—A bkpcy. judge has no power to compel a purchaser of property from an arranging debtor to lodge his purchase-money in ct. before completion of the purchase, unless it is so contracted.

The only duty or power of a bkpcy. judge, in an arrangement case, is to see that the composition is fair, & that the value of the assets is properly assessed (O'BRIEN, C.J.).—*Re* CROCHET (1895), 29 I. L. T. 117.—IR.

g. *Under* 1883 *Act, s.* 192—*Enforcement of composition—Determination of creditor's rights.*]—The Ct. of Bkpcy. has exclusive jurisdiction in the enforcement of the composition & the

Sect. 1.—*Jurisdiction of court.* *Sects.* 2 & 3: *Subsect.* 1.]

461; 74 L. T. 403, 44 W. R. 503; 40 Sol. Jo. 437; 3 Mans. 150.

8645. Under 1914 (Deeds) Act, s. 23.—To entertain application to declare deed void.]—The Ct. of Bkpcy. has no jurisdiction under the above sect. to entertain an application for a declaration that a deed of arrangement is void, it being neither an application " for the enforcement of trusts " of the deed, but, on the contrary, an application to have it declared that there are no trusts to be enforced, nor an application for the " determination of questions under " the deed, but, on the contrary, an application for a declaration that there is no valid deed under which an application could be made.—*Re* WILSON, [1916] 1 K. B. 382; 85 L. J. K. B. 329; 114 L. T. 32; 32 T. L. R. 86; 60 Sol. Jo. 90; [1916] H. B. R. 17, C. A.

8646. Court of equity—When it will interfere.]—A ct. of equity will not interfere upon any question arising out of a creditor's composition deed or other proceedings in bkpcy., except in special circumstances.—GRAHAM *v.* WINTERSON (1873), L. R. 16 Eq. 243; 42 L. J. Ch. 633; 28 L. T. 803; 21 W. R. 722.

As regards distribution of unclaimed dividends.]—*See* Part XIII., *ante*.

To restrain action against debtor.]—*See* Part XXI., Sect. 6, *ante*.

SECT. 2.—PETITION FOR LIQUIDATION BY ARRANGEMENT.

NOTE.—*The provisions as to Liquidation by Arrangement were contained in* 1869 *Act, s.* 125; *they were repealed by* 1883 *Act, subject, as to pending proceedings, to ss.* 169 (3), 170, *& not re-enacted: in applying the principles of these decisions regard must be had to the terms of those sects.*

8647. Who may petition — Debtor with no distributable assets.] — Debtor, who has practically no assets distributable among his creditors, is not entitled to file a liquidation petition.—*Re* AARONSON, *Ex p.* AARONSON (1878), 7 Ch. D. 713; 47 L. J. Bcy. 60; 38 L. T. 243; 26 W. R. 470, C. A.

Annotations:—**Mentd.** *Re* Buckley; *Ex p.* Buckley (1881), 16 Ch. D. 513, C. A.; *Re* Sharpe, *Ex p.* Matthews (1881), 50 L. J. Ch. 284, C. A.; *Re* Amor, *Ex p.* Amor (1882), 21 Ch. D. 594, C. A.; *Re* Tilley, *Ex p.* Solomon (1882), 20 Ch. D. 281, C. A.; *Re* Walton, *Ex p.* Hudson (1883), 22 Ch. D. 773, C. A.

See, also, No. 1615, *ante*.

8648. Form of petition—Must give private as well as business address.]—Debtor described himself in his liquidation petition by his business address only, omitting all mention of his private residence:—*Held:* this was a misdescription, & the defect was not a mere formal one, but was a matter of substance.—*Re* JERNINGHAM, *Ex p.* JERNINGHAM (1878), 9 Ch. D. 466; 47 L. J. Bcy. 115; 39 L. T. 186; 27 W. R. 157, C. A.

Annotations:—**Distd.** *Re* Mason, *Ex p.* Kirkwood (1879), 11 Ch. D. 724, C. A. **Mentd.** Burliner *v.* Royle (1880), 5 C. P. D. 354.

See 1915 Bkpcy. Rules, r. 146.

8649. —— Description of debtor insufficient & misleading.]—Debtor presented his petition for liquidation upon Aug. 31, 1881. He therein described himself as an engineer, giving a private address. Previously thereto & down to Feb., 1881, he had carried on business at first in partnership, but afterwards by himself, as an iron-founder at another address. In Feb. he made over that business to his father, but until May in that year it was continued to be carried on in debtor's name:—*Held:* the description in the petition was insufficient & misleading.—*Re* WOODHOUSE, *Ex p.* KERSHAW (1881), 45 L. T. 687.

8650. —— —— Farmer described as cattle dealer.] — Debtor must give in his liquidation petition a description of himself which will not be misleading & will give fair notice to all his creditors.

The description of a farmer as a cattle-dealer:—*Held:* sufficient.—*Re* MASON, *Ex p.* KIRKWOOD (1879), 11 Ch. D. 724; 40 L. T. 566; 27 W. R. 806, C. A.

Annotation:—**Mentd.** *Re* Bagster, *Ex p.* Bagster (1883), 24 Ch. D. 477, C. A.

—— —— **Effect.**]—*See* Nos. 8672, 8745, *post*.

8651. Second petition—Resolution under former petition enforceable.]—When a resolution for composition has been passed which is capable of being enforced against debtor, he cannot present a second petition for liquidation or composition.—*Re* SYDNEY, *Ex p.* SYDNEY (1875), 10 Ch. App. 208; 44 L. J. Bcy. 21; 31 L. T. 714; 23 W. R. 205, L. JJ.

Annotations:—**Folld.** *Re* Robinson, *Ex p.* Robinson (1875), 33 L. T. 609. **Consd.** *Re* Russell, *Ex p.* Russell (1875), 44 L. J. Bcy. 42; *Re* Robinson, *Ex p.* Burrell (1876), 1 Ch. D. 537, C. A.; *Re* Andrews, *Ex p.* Barrow (1881), 18 Ch. D. 464, C. A. **Refd.** *Re* Roberts, *Ex p.* Watson (1879), 41 L. T. 516, C. A.

See, also, No. 8746, *post*.

8652. —— After former liquidation ceased to be pending.]—Debtor having commenced proceedings for liquidation, his creditors passed a resolution that his discharge should be granted to him on his paying £4,000 in a month, & giving a bond for payment of £5,000 more to the trustee by five yearly instalments. In default of payment of any instalment the whole £5,000 was to become payable at once. The £4,000 was paid, the bond given, & two yearly instalments paid under it, but default was made in payment of the third. Debtor then commenced fresh proceedings for liquidation & presented a statement of accounts showing a large amount of debts & hardly any assets. He was in receipt of half-pay as a retired officer in the army. The creditors passed a resolution that the affairs of debtor should be liquidated by arrangement, that, until full payment of the debts, debtor should pay to the trustee the excess of his income above £600 a year, & that as soon as a deed had been executed to carry the above resolutions into effect debtor should, without any further resolution, be

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determination of the right of a creditor to participate in it.—LEVIN *v.* DEATH (1889), 8 N. Z. L. R. 150.—N.Z.

h. *Under* 1892 *Act, s.* 39 (3).]—The above sub-sect. does not enable the ct., on a creditor's petition, to order that the estate shall be administered under a deed of assignment executed by debtor for the benefit of his creditors, instead of adjudicating debtor a bkpt., where there are other acts of bkpcy. anterior in date to the deed of assignment.—*Re* BOWEN, *Ex p.* BING, HARRIS & Co. (1896), 14 N. Z. L. R. 720.—N.Z.

PART XXIII. SECT. 2.

k. *Who may petition—Right dependent on residence & domicil.*]—NICHOLSON *v.* BAIRD (1884), N. B. Dig. 312.—CAN.

l. *Death of debtor.*]—An arrangement was allowed to proceed, notwithstanding the death of debtor subsequent to the second sitting & the registration of the trust deed under Deeds of Arrangement Act.—*Re* M'QUOID (1896), 31 I. L. T. 63.—IR.

m. *Second petition—After death of one petitioner.*]—A petition for arrangement under control of the ct. was presented by the several partners of a trading firm, & a resolution accepting a composition was assented to by the requisite majority of their creditors & confirmed by the ct. Afterwards one of the arranging debtors died:—*Held:* no further steps in the matter could be taken, save the filing of an affidavit authenticating the death, with the view of enabling the survivors to present another petition for arranging with their creditors.—*Re* M. (BROTHERS) (1877), 11 I. L. T. 30.—IR.

discharged from the debts. The trustee under the former liquidation proved for the £3,000, & voted for the resolutions without the consent of the committee of inspection, & without his vote the resolutions would not have been passed. The registrar having refused to register these resolutions :—*Held :* after the £4,000 mentioned in the former resolutions had been paid & the bond given, the future property of debtor was released, & the former liquidation was not pending so as to prevent debtor from instituting fresh proceedings for liquidation.—*Re* RUSSELL, *Ex p.* RUSSELL (1875), 10 Ch. App. 255 ; 44 L. J. Bcy. 42 ; 32 L. T. 4 ; 23 W. R. 817, L. JJ.

Annotations :—**Refd.** *Re* Terrell, *Ex p.* Terrell, *Ex p.* Sheffield & Rotherham Joint Stock Banking Co. (1876), 4 Ch. D. 293, C. A. ; *Re* Webb, *Ex p.* Walter (1876), 34 L. T. 701 ; *Re* Aaronson, *Ex p.* Aaronson (1878), 7 Ch. D. 713, C. A. ; *Re* Sharpe, *Ex p.* Mathewes (1881), 16 Ch. D. 655, C. A. ; *Re* Wainwright, *Ex p.* Wainwright (1881), 19 Ch. D. 140, C. A. **Mentd.** Ebbs *v.* Boulnois (1875), 10 Ch. App. 479, L. JJ. ; *Re* Wainwright, *Ex p.* Greener (1881), 30 W. R. 125, C. A.

8653. Costs of liquidation—When bankruptcy supervenes.]—A liquidation by arrangement was rejected by the creditors, but a receiver appointed under the liquidation remained in office when debtor was adjudged bkpt. :—*Held :* the proceedings in liquidation were pending so as to enable the ct., under 1870 Rules, r. 292, to direct the trustee of the bkpcy. to pay the costs of the liquidation.—*Re* HAWES, *Ex p.* JEFFERY (1874), 9 Ch. App. 144 ; 43 L. J. Bcy. 27 ; 22 W. R. 287 ; *sub nom. Re* HAWES, *Ex p.* HOWELL, 29 L. T. 859, L. JJ.

Annotations :—**Distd.** *Re* Elliott, *Ex p.* Hopper (1878), 8 Ch. D. 53, C. A. **Refd.** *Re* McHenry, *Ex p.* McHenry (1883), 24 Ch. D. 35, C. A.

Sect. 3.—MEETING OF CREDITORS TO CONSIDER PROPOSALS.

NOTE.—*In considering the cases set out in this Section, regard must be had to the Notes at the beginning of the Part & of Sect.* 2, *ante.*

SUB-SECT. 1.—IN GENERAL.

8654. Notice summoning meeting—By whom signed.]—Under Bkpcy. Rules, 1870, rr. 255, 256, the notice summoning the first general meeting of creditors under a liquidation petition need not be signed by debtor's attorney with his own hand ; it is sufficient if the attorney's name is subscribed by his clerk by his direction.—*Re* HIRST, *Ex p.* HIRST (1874), L. R. 18 Eq. 704 ; 43 L. J. Bcy. 130 ; 30 L. T. 800 ; 22 W. R. 857.

8655. Who entitled to notice of meetings—Under second petition—Creditors under former petition.]—Creditors under a liquidation petition resolved that the liquidation should close, & the trustees be released as from Jan., 1871, but no order of discharge was given to debtor. Four years after, debtor filed a second petition, & the creditors again resolved on liquidation :—*Held :* the creditors under the second petition need not give notices of their meetings to the creditors under the first petition.—*Re* WILLIAMS, *Ex p.* WILLIAMS (1875), L. R. 20 Eq. 743 ; 44 L. J. Bcy. 122 ; 32 L. T. 699 ; 23 W. R. 790.

Annotations :—**Consd.** *Re* Smith, Green *v.* Smith (1883), 24 Ch. D. 672. **Apld.** *Re* Powell, Powell *v.* Powell (1904), 20 T. L. R. 374.

8656. Who must attend—Debtor—Must be personally present in room.]—The meaning of 1869 Act, s. 126, is that debtor must as a rule be personally present at the meetings of his creditors to consider a proposed composition, & personally produce his statement of affairs. It is not sufficient that he should be in a room immediately adjoining that in which the meeting is held, ready to be called in if the creditors wish to examine him, even though the creditors are informed of this.

If there be a custom in the City of London, that as a rule debtor need not be in the room unless the creditors send for him, such custom is contrary to the Act (COTTON, L.J.).—*Re* BEST, *Ex p.* BEST (1881), 18 Ch. D. 488 ; 51 L. J. Ch. 293 ; 45 L. T. 95, C. A.

Annotation :—**Mentd.** *Re* Tilley, *Ex p.* Solomon (1882), 20 Ch. D. 281.

See, also, Nos. 8669, 8670, 8743 *et seq.*, 8755, *post.*

8657. Who may attend—Parties other than creditors & proxies—Debtor's solicitor & accountant.]—There is nothing in 1869 Act prohibiting other persons, besides creditors & proxies, from being present at the meetings of creditors under a liquidation, & it is a rational practice to allow debtor's solr., his accountant, if the affairs are complicated, & the solrs. of the creditors to be present.—*Re* TILLEY, *Ex p.* SOLOMON (1882), 20 Ch. D. 281 ; 51 L. J. Ch. 677 ; 47 L. T. 57 ; 30 W. R. 603, C. A.

Annotation :—**Mentd.** *Re* Amor, *Ex p.* Amor (1882), 21 Ch. D. 594, C. A.

PART XXIII. SECT. 3, SUB-SECT. 1.

n. *Object of meeting.*]—The true objects of preliminary meetings in arrangement cases are to investigate the trader's representations, & the reasonableness of the composition offered.—*Re* AN ARRANGING TRADER (1868), 2 I. L. T. Jo. 446.—**IR.**

o. *Notice summoning meeting—Publication.*]—*Re* ATKINS (1866), 2 C. L. J. N. S. 25.—**CAN.**

p. *Who entitled to notice of meetings.*]—All creditors, however small their debts may be, must be served with notice of an intended arrangement. —*Re* AN ARRANGING TRADER (1869), 3 I. L. T. Jo. 579.—**IR.**

q. *Place of meeting.*]—Under 1864 Act the place where the proceedings are instituted is the place where the assignee should call all meetings.—*Re* ATKINS (1866) 2 C. L. J N. S. 25.—**CAN.**

r. *Within what time — After publication of notice.*]—Not less than two weeks should intervene between the first publication of the notice & the day of meeting.—*Re* ATKINS (1866), 2 C. L. J. N. S. 25.—**CAN.**

s. —— *After interim protection order.*]—Where an *ad interim* order for protection is granted, petitioner must, within one week after, call a meeting of his creditors, & submit to them a full & true statement of his affairs.—*Re* ARRANGING TRADER (1861), 13 Ir. Jur. 355.—**IR.**

t. *Service of notice of meeting—Debtor absconding without making affidavit.*]—When a party posting notices of the second sitting in an arrangement has left the country without making the necessary affidavit, the ct., on being satisfied that the notices were served, will allow the case to proceed.—*Re* A. B. (1870), 4 I. L. T. Jo. 216.—**IR.**

a. *Who must attend—More than one creditor.*]—A meeting of insolvent's creditors being called to accept a composition, one person only attended as proxy for two creditors, & as representing one he proposed, & as representing the other seconded, a resolution to accept a composition :—*Held :* he could not be split into two separate capacities so as to constitute a majority.—*Re* SCHLIEFF (AN INSOLVENT) (1877), 3 V. L. R. 18.—**AUS.**

b. —— ——.]—Although creditors can be represented at a meeting by proxy, yet there cannot be a meeting at all unless more than one individual is actually present in person.

A person holding proxies from four creditors attended a meeting, voted himself into the chair, & then proposed & seconded a resolution appointing himself trustee, at a commission of 5 per cent., & declared the resolution carried :—*Held :* there was no meeting, & the appointment was void.—*Re* ANDREW, 2 J. R. N. S. 257.—**N.Z.**

8656 i. —— *Debtor.*]—At a second meeting debtor did not attend, but a resolution was carried confirming those passed at the first meeting :—*Held :* debtor's absence rendered the meeting void.—*Re* FITZGERALD (1906), 2 Tas. L. R. 33.—**AUS.**

d. *Official assignee acting as chairman—Propriety of.*]—*Re* HARRIS, 12 C. L. J. 251.—**CAN.**

e. *Right of meeting to know debtor's financial position.*]—Creditors, called upon to accept a composition, are entitled to know where the goods & money entrusted to the debtor are gone, & to what causes the loss is to

Sect. 3.—Meeting of creditors to consider proposals: Sub-sects. 1 & 2.]

8658. How quorum calculated.]—In calculating a *quorum* of creditors at a first meeting, only those entitled to vote should be reckoned.—*Re* THOMAS, *Ex p.* WARNER (1911), 55 Sol. Jo. 482.

8659. Right of debtor to consult solicitor—As to materiality of question.]—A liquidating debtor attending at the first meeting of his creditors to answer inquiries, under 1869 Act, s. 125 (3), is entitled to the advice of his solr. as to whether a question is material.—*Re* HELLIWELL, *Ex p.* MACKENZIE (1874), 10 Ch. App. 88; 44 L. J. Bcy. 14; 31 L. T. 421; 23 W. R. 121, L. JJ.

Annotations:—**Refd.** *Re* Reynolds, *Ex p.* Reynolds (1882), 20 Ch. D. 294, C. A. **Mentd.** *Re* Hope, *Ex p.* Hope (1878), 9 Ch. D. 398, C. A.

8660. Right of meeting to control questions to debtor—Right of court to review.]—The provision of 1869 Act, s. 125 (3), that at a meeting of creditors summoned under that sect. debtor "shall answer any inquiries made of him," extends only to proper & material questions, & the meeting has the power of preventing improper & immaterial questions being put to him, but such power must be exercised honestly, & its exercise is open to review by the ct.—*Re* HOPE, *Ex p.* HOPE (1878), 9 Ch. D. 398; 47 L. J. Bcy. 78; 38 L. T. 762; 27 W. R. 7, C. A.

Annotations:—**Refd.** *Re* Tilley, *Ex p.* Solomon (1882), 47 L. T. 57. **Mentd.** *Re* Sharpe, *Ex p.* Mathewes (1881), 16 Ch. D. 655, C. A.

8661. Right of meeting to delegate powers—Power to grant discharge.]—The power which a general meeting of creditors has of granting a debtor his discharge cannot be delegated.—*Re* HOPE, *Ex p.* HOPE (1878), 9 Ch. D. 398; 47 L. J. Bcy. 78; 38 L. T. 762; 27 W. R. 7, C. A.

Annotations:—**Mentd.** *Re* Sharpe, *Ex p.* Mathewes (1881), 16 Ch. D. 655, C. A.; *Re* Tilley, *Ex p.* Solomon (1882), 47 L. T. 57, C. A.

See, further, Part XVIII., *ante*.

8662. Right of creditor to make notes.]—At creditors' meetings under a liquidation petition a creditor, wishing to examine debtor, is entitled to have a shorthand writer present to take notes of the examination.—*Re* TILLEY, *Ex p.* SOLOMON (1882), 20 Ch. D. 281; 51 L. J. Ch. 677; 47 L. T. 57; 30 W. R. 603, C. A.

Annotation:—**Mentd.** *Re* Amor, *Ex p.* Amor (1882), 21 Ch. D. 594, C. A.

8663. Validity of proceedings—How proved—Certificate of discharge.]—Defts. filed a petition for liquidation by arrangement or composition under 1869 Act, & at the first meeting of creditors a resolution was passed that defts.' discharge might be granted on a certificate of the committee of inspection & trustee to that effect. At a subsequent meeting of creditors, for the purpose of considering a scheme for the settlement of defts.' affairs, it was resolved that the whole estate should be sold to one of defts. in consideration of his paying a dividend of 8*s.* in the pound secured by four promissory notes payable at successive dates. The certificate of discharge was granted. Pltf. was a creditor & proved on the estate to the full amount of his debt. Three of the promissory notes were paid to all the creditors including pltf., but default was made in payment of the fourth:—*Held:* the certificate of discharge was by force of 1869 Act, ss. 49, 125, conclusive evidence of the validity of the proceedings under the liquidation, & the discharge was valid.—LEWIS *v.* LEONARD (1880), 5 Ex. D. 165; 49 L. J. Q. B. 308; 42 L. T. 351; 28 W. R. 719, C. A.

8664. Adjournment.]—When the sense of the first meeting has been taken & found adverse to the acceptance of the composition, there is no power to adjourn the meeting for the purpose of bringing the question before the creditors at such adjourned meeting.—*Re* RATCLIFFE, *Ex p.* TILL (1875), 10 Ch. App. 631; 44 L. J. Bcy. 103; 32 L. T. 521; 23 W. R. 670, L. JJ.; *revsg.* S. C. *sub nom. Re* RATCLIFFE, *Ex p.* RATCLIFFE, 32 L. T. 504.

Annotations:—**Refd.** Macdougall *v.* Gardiner (1875), 1 Ch. D. 13, C. A.; *Re* McHenry, *Ex p.* Walker (1883), 48 L. T. 291, C. A.

8665. —— Formalities required.]—A resolution for adjournment requires to be passed with the same formalities as other resolutions, & every creditor who has handed in his proofs, & does not sign the resolution, must be taken to have voted against it, unless he withdraws his proofs, in which case, for the purposes of the proposed resolution, he is to be considered not present at the meeting.—*Re* HORSLEY, *Ex p.* ORDE (1871), 6 Ch. App. 881; 40 L. J. Bcy. 60; 25 L. T. 400; 19 W. R. 1103, L. JJ.

Annotation:—**Distd.** *Re* Baum, *Ex p.* Evans (1880), 13 Ch. D. 424, C. A.

8666. New first meeting—Jurisdiction to call—Requisite majority not obtained.]—M., a creditor, voted at a first meeting of creditors for a resolution for liquidation by arrangement. A requisite majority not having been obtained, the resolution was not registered, but the registrar, on the application of debtor, directed a fresh first meeting to be called:—*Semble:* the registrar had no power to direct a fresh first meeting to be called.—*Re* SEDLEY, *Ex p.* COBB (1873), 8 Ch. App. 727; 42 L. J. Bcy. 63; 29 L. T. 123; 21 W. R. 777, L. JJ.

Annotations:—**Apld.** *Re* Ratcliffe, *Ex p.* Till (1875), 44 L. J. Bcy. 103, C. A. **Expld.** *Re* Webb, *Ex p.* Gibbs (1875), 10 Ch. App. 382, L. J. **Distd.** *Re* Terrell, *Ex p.* Terrell, *Ex p.* Sheffield & Rotherham Joint Stock Banking Co. (1876), 4 Ch. D. 293, C. A. **Distd. & Apprvd.** *Re* McHenry, *Ex p.* McHenry (1883), 24 Ch. D. 35, C. A. **Refd.** Seymour *v.* Coulson (1880), 5 Q. B. D. 359, C. A. **Mentd.** *Re* Burrs, *Ex p.* Fore St. Warehouse Co. (1874), 30 L. T. 624, C. A.; *Re* Condon, *Ex p.* James (1874), 22 W. R. 937, C. A.; *Re* Harper, *Ex p.* Linsley (1874), 29 L. T. 857, C. A.; *Re* Poole, *Ex p.* Cocks (1882), 21 Ch. D. 397, C. A.

8667. —— —— Proceedings at first meeting invalid—Omission in debtor's statement.]—Where the proceedings at a first meeting of creditors are invalid owing to an omission in debtor's statement

be attributed.—HOOD *v.* DODDS (1873), 19 Gr. 639.—CAN.

f. *Statement of creditors must be exhibited.*]—Under 1869 Act there must be a statement of the creditors as well as of insolvent's affairs exhibited at the first meeting of creditors.—PRESTON *v.* HUNTON (1875), 37 U. C. R. 177.—CAN.

g. *Validity of proceedings—Who may object.*]—Objection to the validity of proceedings at a meeting of creditors may be taken by a solr. of a creditor, who is present, to watch his client's interests, although he may not be qualified to vote.—*Re* DANE (1877), 3 V. L. R. 19.—AUS.

8664 i. *Adjournment—Jurisdiction of judge.*]—A disagreement having arisen between the majority in number & the majority in value of the creditors, a motion to adjourn was opposed by the latter, whereupon application was made to the judge to dispose of the matter, who ordered that the majority in number might proceed in Ch. in the assignee's name against the majority in value:—*Held:* the judge had power to make such order. *Semble:* neither party could legally oppose the adjournment, if insisted upon by the other, but such adjournment should have followed as of course.—*Re* LAMB (1867), 17 C. P. 173.—CAN.

8664 ii. —— *When granted.*]—Applications for the adjournment of the first private sitting before the ct. in arrangement cases, grounded upon the resolution of creditors passed at their previous preliminary meeting will only be granted in exceptional cases.—*Re* AN ARRANGING TRADER (1868), 2 I. L. T. Jo. 446.—IR.

8667 i. *New first meeting—Jurisdiction to call—Proceedings at first meeting invalid—Irregularity in proof.*]—A creditor's affidavit, in proof of a debt in proceedings for composition with creditors under Bkpcy. Act, 1873 (No. 32), s. 113, was, according to the date in the *jurat*, sworn before the

of affairs, the ct. has power to direct a fresh first meeting to be summoned.—*Re* WEBB, *Ex p.* GIBBS (1875), 10 Ch. App. 382; 44 L. J. Bcy. 73; 32 L. T. 292; 23 W. R. 529, L. J.

Annotations :—**Folld.** *Re* Terrell, *Ex p.* Terrell, *Ex p.* Sheffield & Rotherham Joint Stock Banking Co. (1876), 4 Ch. D. 293, C. A. **Apprvd.** *Re* McHenry, *Ex p.* McHenry (1883), 24 Ch. D. 35, C. A. **Mentd.** *Re* Webb, *Ex p.* Walter (1876), 2 Ch. D. 326, C. A.; *Re* Aaronson, *Ex p.* Aaronson (1878), 7 Ch. D. 713, C. A.

8668. —— —— —— Through mistake of creditors.]—The power to direct a fresh meeting to be summoned extends not only to a case where, through accident or mistake on the part of debtor, no valid resolution has been passed, but also to a case where, owing to a mistake on the part of the creditors, or from any other cause, no valid resolution has been passed.—*Re* TERRELL, *Ex p.* TERRELL, *Ex p.* SHEFFIELD & ROTHERHAM JOINT STOCK BANKING CO. (1876), 4 Ch. D. 293; 46 L. J. Bcy. 47; 35 L. T. 648; 25 W. R. 153, C. A.

Annotations :—**Refd.** *Re* McHenry, *Ex p.* McHenry (1883), 24 Ch. D. 35, C. A. **Mentd.** *Re* Aaronson, *Ex p.* Aaronson (1878), 7 Ch. D. 713, C. A.; *Re* Williams, *Ex p.* Williams (1881), 18 Ch. D. 495, C. A.; *Re* Walton, *Ex p.* Hudson (1883), 22 Ch. D. 773, C. A.

8669. —— —— —— Debtor not present at meeting.]—At the first meeting of creditors debtor's statement of his affairs was read by his solr. He himself was not present in the room in which the meeting was held, but he was in an adjoining room. A., who was present as proxy for creditors, said that he wished to examine debtor. His solr. then sent for him, but most of the creditors said that he was an old man & they did not want to annoy him. Debtor, however, came to the door of the room, but most of the creditors present called out to him to go back, whereupon he retired. A. did not press for his examination. The resolutions for liquidation were then passed, A. dissenting from them. A., on behalf of his clients, opposed the registration of the resolutions, on the ground (*inter alia*) that debtor was not present at the meeting, & that he had not been validly excused by the meeting. The registrar having overruled the objection & registered the resolutions :—*Held :* leave should be given to summon a fresh first meeting of creditors, no act done by the trustee to be impeached by the trustee in any other liquidation, or in a bkpcy. without the leave of the ct.—*Re* COX, *Ex p.* HOLLENDER, [1883] W. N. 186, C. A.

8670. —— —— —— —.]—Where a resolution to accept a composition was passed at a first meeting of creditors but was rendered invalid by debtor not having been actually present at the meeting, though present in a room immediately adjoining & ready to be called if the creditors wished :—*Held :* there had been no slip in the proceedings, & the case was not one in which a fresh first meeting should be allowed.—*Re* BEST, *Ex p.* BEST (1881), 18 Ch. D. 488; 51 L. J. Ch. 293; 45 L. T. 95, C. A.

Annotation :—**Expld.** *Re* Tilley, *Ex p.* Solomon (1882), 20 Ch. D. 281, C. A.

8671. —— —— To allow creditors to reconsider improper resolution.]—*Held :* the ct. had jurisdiction, in the circumstances, to order a fresh first meeting, not for the benefit of debtor, but in order that the creditors might reconsider a resolution, which was an improper resolution, & one which they had no right to pass in order to put a stop to the proceedings.—*Re* MCHENRY, *Ex p.* MCHENRY (1883), 24 Ch. D. 35; 53 L. J. Ch. 27; 48 L. T. 921; 31 W. R. 873, C. A.

Annotations :—**Refd.** *Re* McHenry, *Ex p.* Credit Co. (1883), 24 Ch. D. 353, C. A.; *Re* Moon, *Ex p.* Moon (1887), 19 Q. B. D. 669, C. A. **Mentd.** *Re* May, *Ex p.* May (1884), 32 W. R. 839, C. A.

8672. —— Debtor improperly described in petition.]—An application for leave to summon a fresh first meeting of the creditors was refused, where debtor's private residence was not given on his petition.—*Re* JERNINGHAM, *Ex p.* JERNINGHAM (1878), 9 Ch. D. 466; 47 L. J. Bcy. 115; 39 L. T. 186; 27 W. R. 157, C. A.

Annotations :—**Distd.** *Re* Mason, *Ex p.* Kirkwood (1879), 11 Ch. D. 724, C. A. **Consd.** Burliner *v.* Royle (1880), 5 C. P. D. 354.

8673. —— At instance of creditor whose proof rightly rejected—Application after proof corrected & admitted.]—The ct. will not direct a new first meeting of creditors to be held at the instance of a creditor, whose proof was rightly rejected at the first meeting of creditors, but has since been put in order & been ordered to be admitted.—*Re* BRADLEY, *Ex p.* BOURNER (1910), 54 Sol. Jo. 444, C. A.

—— On failure to elect trustee.]—*See* Part VII., Sect. 2, sub-sect. 2, *ante*.

Joint creditor attending meeting of separate creditors—Acting as chairman & voting—Whether amounting to election to prove.]—*See* No. 4070, *ante*.

Non-acceptance of proposals—Effect on power of court to adjudicate bankrupt.]—*See* Part V., Sect. 1, *ante*.

SUB-SECT. 2.—VOTING.

8674. Who may vote—Trustees proving for cestui que trust.]—Trustees, who were carrying on a trade & had been admitted to prove in bkpcy. for a debt on behalf of their *cestui que trust :—Held :* entitled to vote on a resolution for a suspension of proceedings under 1861 Act.—*Re* BARFOOT, *Ex p.* PROTHERO (1868), 3 Ch. App. 823; 16 W. R. 1161, L. JJ.

8675. —— Creditor who has not proved.]—*Qu :* Whether a creditor, whose debt is inserted in the statement of the debts of a compounding debtor, can vote at a meeting of creditors, until he has proved his debt.—*Re* DUFFIELD, *Ex p.* PEACOCK (1873), 8 Ch. App 682; 42 L. J. Bcy. 78; 28 L. T. 830: 21 W. R. 755, L. JJ.

Annotations :—**Mentd.** *Re* Bestwick, *Ex p.* Hodgkinson (1876), 34 L. T. 73; Campbell *v.* Im Thurn (1876), 1 C. P. D. 267; *Re* Newman, *Ex p.* Brooke (1876), 3 Ch. D. 494, C. A.; Melhado *v.* Watson (1877), 2 C. P. D. 281; Breslauer *v.* Brown (1878), 3 App. Cas. 672, H. L.; Tea Co. *v.* Jones (1880), 43 L. T. 255; Vint *v.* Hudspith (1885), 33 W. R. 738, C. A.; *Re* Bluck, *Ex p.* Bluck (1887), 56 L. J. Q. B. 607; *Re* British Gold Fields of West Africa, [1899] 2 Ch. 7, C. A.

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commencement of the proceedings :—*Held :* not an irregularity which could be remedied under s. 76 of the above Act, but a nullity, & leave should be given to debtor to serve notices for a fresh meeting of creditors.—*Re* FITZGERALD (1906), 2 Tas. L. R. 33.—AUS.

PART XXIII. SECT. 3, SUB-SECT. 2.

8675 i. *Who may vote—Creditor who has not proved.*]—A creditor, who has not proved, is not entitled to oppose a proposal for an arrangement, even though his debt is admitted on debtor's sched.—*Re* C. H. (1873), I. R. 7 Eq. 299; 7 I. L. T. 70.—IR.

l. —— *Plaintiff in suit—Surety.*]—Pltf. in a Ch. suit, in which the arranging debtor had been ordered to lodge a sum of money, which he had not lodged, appeared to oppose the arrangement; & stated that he was a claimant for the same sum as surety for debtor in an administration bond, on which latter ground only he was admitted by the registrar as a claimant :—*Held :* he could not vote in the arrangement, but could be heard in objection to it.—*Re* W. (1874), 8 I. L. T. Jo. 565.—IR.

m. —— *Creditor whose debt less than £20.*]—Creditors, whose debts do not amount to £20, are not entitled to vote at the first meeting in a composition after bkpcy., & are not to be computed in number as agreeing to or opposing the offer of composition.—*Re* BUCKLEY (1880), 14 I. L. T. 113.—IR.

Sect. 3.—*Meeting of creditors to consider proposals: Sub-sect.* 2. *Sect.* 4: *Sub-sect.* 1.]

8676. —— Creditor who has executed release.]—Creditors, who have executed releases, have no interest entitling them to vote upon the scheme.—*Re* BAINES, *Ex p.* BOARD OF TRADE (1902), 86 L. T. 691, D. C.

Annotations:—**Refd.** *Re* Pilling, *Ex p.* Board of Trade, [1903] 2 K. B. 50, C. A.; *Re* Aron (1905), 21 T. L. R. 693.

8677. —— Proxy—Proxy signed in blank—& filled in at meeting.]—A proxy paper was signed by a creditor with the name of the person who was to use the proxy in blank:—*Held:* the proxy was sufficiently signed by the person who was to use it filling in his name at the creditors' meeting.

At a first meeting of creditors resolutions for composition having been moved, it appeared by counting the votes that the majority would be against the composition, & thereupon, before the result of the votes had been announced by the chairman, and while the matter was still in progress, debtor's solr. put in a proof for another debt, & voted as proxy in respect of it. The vote was admitted & by means of it the requisite majority was created, & the resolutions were declared to be carried:—*Held:* the whole matter was *in fieri*, & the vote was properly admitted.—*Re* LANCASTER, *Ex p.* LANCASTER (1877), 5 Ch. D. 911; 46 L. J. Bcy. 90; 36 L. T. 674; 25 W. R. 669, C. A.

Annotations:—**Distd.** Howard *v.* Hill (1888), 59 L. T. 818. **Folld.** Ernest *v.* Loma Gold Mines Co. (1898), 65 L. J. Ch. 850.

8678. —— —— —— Filled in by debtor's solicitor in own name.]—A creditor signed a proxy in blank & sent it to his solr., who forwarded it to debtor's solr. without express instructions, but in contemplation of a meeting of which notice had been given. Debtor's solr. filled up the blank with his own name & voted for a composition. The creditor, who would have voted contrarily, opposed the registration of the resolutions:—*Held:* debtor's solr. had implied authority to fill up the proxy with his own name & vote on the creditor's behalf.—*Re* WHITEHOUSE, *Ex p.* DUCE (1880), 13 Ch. D. 429; 42 L. T. 385; 28 W. R. 501, C. A.

8679. —— —— Himself a creditor—On whose behalf vote given.]—A creditor, who is present at a general meeting of creditors, cannot be considered as present on behalf of another creditor for whom he holds a proxy, notwithstanding the fact that the proxy is on the file of proceedings, unless he has done some act to show that he intends to be present on that occasion on behalf of his principal as well as on his own behalf.

The appointment of a proxy only confers on the person so appointed an authority to represent his principal; it does not necessarily follow that he in fact represents his principal on all subsequent occasions when he is present at a meeting, unless he would have no right to be present in any other capacity.—*Re* BAUM, *Ex p.* EVANS (1880), 13 Ch. D. 424; 49 L. J. Bcy. 25; 42 L. T. 384; 28 W. R. 500, C. A.

8680. —— —— Cannot witness instrument of proxy.]—A person appointed by a creditor to act as his proxy cannot himself be the attesting witness to the instrument of proxy.—*Re* PARROTT, *Ex p.* CULLEN, [1891] 2 Q. B. 151; 60 L. J. Q. B. 567; 64 L. T. 801; 39 W. R. 543; 7 T. L. R. 564; 8 Morr. 185, D. C.

8681. —— In respect of what debts—Estimated amount of costs.]—At a meeting of creditors, at which a resolution to accept a composition was proposed, a judgment creditor tendered proof of his judgment debt, & also of a certain sum, which he estimated as the amount of his costs:—*Held:* he was not entitled to vote in respect of the estimated amount of his costs, it being an unliquidated debt, but he should either have applied for leave to sign judgment & tax his costs, or else have sworn in his affidavit to such a sum as the costs when taxed would at least amount to.—*Re* DUMMELOW, *Ex p.* RUFFLE (1873), 8 Ch. App. 997; 42 L. J. Bcy. 82; 29 L. T. 384; 21 W. R. 932, L. JJ.

Annotations:—**Distd.** *Re* Canadian Pacific Colonization Corp. (1891), 40 W. R. 40. **Refd.** *Re* Thrift, *Ex p.* Kimber (1879), 11 Ch. D. 869, C. A.; *Re* A Debtor (1910), 102 L. T. 691, C. A.

8682. —— —— Debt of unascertained amount—Annuity.]—Debtor had, by a separation deed between himself & his wife, covenanted to pay to a trustee an annuity, during the joint lives of himself & his wife, for the maintenance of the wife & child of the marriage. The annuity was to cease in case the husband & wife should cohabit again:—*Held:* the value of the annuity not having been ascertained, the trustee was not entitled to vote in respect of it at a meeting of creditors under the petition.—*Re* GRIEVES, *Ex p.* PEARCE (1879), 13 Ch. D. 262; 41 L. T. 742; 28 W. R. 404, C. A.

—— —— **What debts provable.**]—*See* Part VIII., *ante*.

—— **At election of trustee.**]—*See* Part VII., Sect. 2, sub-sect. 2, Part XI., Sect. 3, sub-sect. 3, B., (b), *ante*.

8683. Objection to vote of creditor—Time for taking.]—An objection by a creditor to the proof of a creditor, who has voted at the first meeting of creditors on a composition resolution, is in time if taken at the second meeting. *Semble:* the objection would be in time, if taken after the second meeting & before the registration of the resolution.—*Re* MENTROP, *Ex p.* WEIL (1877), 5 Ch. D. 345; 46 L. J. Bcy. 84; 36 L. T. 533; 25 W. R. 552, C. A.

8684. How majority in number & value computed—Creditors to whom debtor liable jointly with others—1849 Act, s. 216.]—The three-fifths of the creditors required by the above sect. to give effect to an arrangement with creditors, may include creditors to whom debts are due from the arranging

8677 i. —— *Proxy—Sufficiency of appointment.*]—An authority to a solr. to vote, annexed at the foot of the proof of debt, entitled in the cause to which matter it plainly had reference, & in these words—"We appoint C. our proxy in the above matter," is sufficient.—*Re* TUOHY (1870), 4 I. L. T. Jo. 769.—IR.

8684 i. *How majority in number & value computed.*]—The statement of assets & debts required from debtor, at a meeting of his creditors for acceptance of a composition under Insolvency Act, 1871 (No. 379), s. 151, is, so far as the Act is concerned, the only material for deciding who are to vote, & ascertaining majorities.—*Re* DANE (1877), 3 V. L. R. 19.—AUS.

8684 ii. ——.]—*Held:* the majority of creditors required for the complete execution of a deed of arrangement under Debtors & Creditors Act, 1876, s. 138, was a majority of those creditors who were present or represented at the meeting, & not of the whole body of creditors, such majority representing three-fourths in value of the creditors present or represented.—*Re* TONKS, *Ex p.* POLL, 3 J. R. N. S. 1.—N.Z.

8684 iii. —— *Creditors who have assigned their interests.*]—A deed of assignment provided that the trustee should not dispose of a life interest of the assignor except with the consent & by the direction of a three-fourths majority in number & value of the creditors & with the consent of the assignor, or failing his consent then under & subject to the approval of the ct. Certain creditors assigned to another creditor their debts, proofs of debts, & the benefits of such proofs, & authorised their assignee to exercise all rights which they might be able to exercise under the deed. Proposals were made for the disposal of the life interest.

debtor jointly with others.—*Ex p.* HEATH (1851), 4 De G. & Sm. 593 ; 64 E. R. 972.

8685. —— Secured creditors included—1861 Act, s. 192.]—The word "creditors," in the first condition specified in the above sect., means & extends to creditors holding security, good or bad, sufficient or insufficient, as well as creditors wholly without security ; & in reckoning the proportion of assenting creditors under that sect., the debts due to secured as well as unsecured creditors must be taken into account.—*Re* SHETTLE, *Ex p.* GODDEN (1862), 1 De G. J. & Sm. 260 ; 1 New Rep. 151 ; 32 L. J. Bcy. 37 ; 7 L. T. 608 ; 11 W. R. 158 ; 46 E. R. 105, L. JJ.

Annotations :—**Consd.** *Re* Smith, *Ex p.* Smith (1864), 3 De G. J. & Sm. 218, L. C. **Folld.** Turquand *v.* Moss (1864), 17 C. B. N. S. 15. **Consd.** Gregory *v.* Baillon (1865), 4 F. & F. 1069. **Refd.** Hodgson *v.* Wightman (1863), 1 H. & C. 810 ; King *v.* Randall (1863), 14 C. B. N. S. 721 ; *Re* Wardell & Rolls, *Ex p.* Watts (1864), 10 L. T. 74 ; Whittaker *v.* Lowe (1865), L. R. 1 Exch. 74. **Mentd.** Dewhurst *v.* Kershaw (1863), 1 H. & C. 726 ; Berridge *v.* Abbott (1863), 13 C. B. N. S. 507 ; Ilderton *v.* Castrique (1863), 14 C. B. N. S. 99 ; Brooks *v.* Jennings (1866), L. R. 1 C. P. 476 ; Reeves *v.* Watts (1866), 35 L. J. Q. B. 171.

8686. —— —— ——.]—*Qu. :* Whether in estimating the number & value of the assenting creditors to a deed under 1861 Act, s. 192, secured as well as unsecured creditors are to be taken into account.—KING *v.* RANDALL (1863), 14 C. B. N. S. 721 ; 2 New Rep. 325 ; 10 Jur. N. S. 207 ; 11 W. R. 1031 ; 143 E. R. 628.

Annotation :—**Refd.** Turquand *v.* Moss (1864), 17 C. B. N. S. 15.

8687. —— —— ——.]—In the schedule of creditors assenting to or dissenting from a composition under 1861 Act, s. 192, the names & the amount of the debts of all the creditors must appear, whether secured, wholly or in part, or unsecured.—TURQUAND *v.* MOSS (1864), 17 C. B. N. S. 15 ; 4 New Rep. 244 ; 33 L. J. C. P. 355 ; 10 L. T. 574 ; 10 Jur. N. S. 824 ; 12 W. R. 960 ; 144 E. R. 7.

Annotations :—**Dbtd.** Whittaker *v.* Lowe (1865), 6 New Rep. 165. **Refd.** Gregory *v.* Baillon (1864), 4 F. & F. 1069 ; Whittaker *v.* Lowe (1865), L. R. 1 Exch. 74.

8688. —— —— ——.]—*Semble :* secured creditors must be calculated in computing the requisite number of assents.—*Re* WARDELL & ROLLS, *Ex p.* WATTS (1864), 10 L. T. 74.

8689. —— —— ——.]—For the purpose of ascertaining whether the required assents have been given to a deed of arrangement under 1861 Act, the secured creditors must be taken into account in ascertaining the number of assenting creditors, but their debts must not be taken into account in reckoning the value of the debts.—GREGORY *v.* BAILLON (1865), 4 F. & F. 1069, N. P.

8690. —— —— 1861 Act, s. 187.]—In reckoning three-fourths in number & value of all the creditors of bkpt. under 1861 Act, s. 187, creditors holding securities must be included in making such calculation.—*Re* MURPHY (1862), 7 L. T. 26.

8691. —— —— Whether value of security should be deducted—1861 Act, s. 192.]—*Semble :* the amounts of the securities should be deducted in calculating the majority on the question of value.—*Re* SMITH, *Ex p.* SMITH (1864), 3 De G. J. & Sm. 218 ; 10 L. T. 803 ; 46 E. R. 620, L. C.

Annotations :—**Consd.** Whittaker *v.* Lowe (1865), L. R. 1 Exch. 74 ; *Re* Stark (1866), 1 Ch. App. 150, L. C. **Mentd.** Pearson *v.* Pearson (1866), L. R. 1 Exch. 308.

8692. —— —— —— ——.]—In reckoning the proportions of the debts of the assenting creditors to the gross amount of debts of debtor, the value of securities held by secured creditors should not be deducted in estimating the value of their debts.—WHITTAKER *v.* LOWE (1865), L. R. 1 Exch. 74 ; 4 H. & C. 109 ; 35 L. J. Ex. 44 ; 13 L. T. 469 ; 12 Jur. N. S. 375, Ex. Ch.

Annotation :—**Folld.** *Re* Stark (1865), 1 Ch. App. 150, L. C.

8693. —— —— —— ——.]—A deed of arrangement with creditors in the form prescribed by 1861 Act, s. 192, may be registered, if assented to by a majority in number representing three-fourths in value of the creditors, without deducting the amount of the securities held by such creditors as are secured.—*Re* STARK (1866), 1 Ch. App. 150 ; 35 L. J. Bcy. 15 ; 13 L. T. 573 ; 12 Jur. N. S. 40 ; 14 W. R. 255, L. C.

8694. How votes determined—Whether signature of creditor—Or course taken at meeting.]—At a meeting of creditors resolutions were proposed for a liquidation by arrangement. A creditor for a large amount attended by proxy & opposed the resolutions, & voted against them on the show of hands, but afterwards signed them. If that creditor were excluded, the resolutions were not passed by the requisite majority :—*Held :* the resolutions were duly passed & ought to be registered, for the votes of the signing creditors were determined by their signatures, & the course which they had taken at the meeting could not be looked to.—*Re* RUSSELL, *Ex p.* POOLEY (1870), 5 Ch. App. 722 ; 40 L. J. Bcy. 41 ; 23 L. T. 275 ; 18 W. R. 1013, L. J.

Annotations :—**Consd.** *Re* Horsley, *Ex p.* Orde (1871), 6 Ch. App. 881, L. JJ. **Refd.** *Re* Baum, *Ex p.* Evans (1880), 13 Ch. D. 424, C. A. **Mentd.** *Re* Meade, *Ex p.* Harold (1876), 3 Ch. D. 119.

Effect of vote—By secured creditor—In choice of assignee.]—*See* No. 3402, *ante*.

See, also, No. 4070, *ante*.

SECT. 4.—RESOLUTIONS.

NOTE.—*In considering the cases set out in this Section, regard must be had to the Notes at the beginning of the Part & of Sect.* 2, *ante*.

SUB-SECT. 1.—IN GENERAL.

8695. Who may sign resolution—Creditor who has opposed same.]—It is not competent for a creditor, who has opposed a resolution for liquidation by arrangement, to change his mind & sign the resolution after the filing thereof, & by so doing to make up the statutory majority & thereby perfect the resolution, which otherwise would have been void.—*Re* BUTLIN, *Ex p.* THORNE (1873), 21 W. R. 763, C. A.

8696. "Extraordinary" resolution.]—A resolution does not become an "extraordinary" one, until it has been confirmed at the second meeting of creditors.—*Re* MCCOLLA, *Ex p.* MCLAREN (1881), 16 Ch. D. 534 ; 50 L. J. Ch. 203 ; 44 L. T. 36 ; 29 W. R. 389, C. A.

Annotation :—**Mentd.** *Re* Roundwood Colliery Co., Lee *v.* Roundwood Colliery Co., [1897] 1 Ch. 373, C. A.

The creditor used the votes based on the assigned debts to aid in defeating such proposals :—*Held :* creditors, who had assigned their interests, had not thereby ceased to be creditors who should be counted in calculating the stipulated majority of three-fourths in number & value, whose consent was necessary before disposal of the life interest.—*Re* COCK, HOWDEN *v.* COCK, [1915] V. L. R. 324.—AUS.

"8685 i. —— *Secured creditors included—Subsequent realisation of security.*]—Holders of discounted bills, not due at the date of insolvency, are creditors whose claims are to be taken into account in calculating the majority in value of assenting creditors under 33 Geo. 2, c. 14, s. 11 ; & the subsequent realisation of such securities does not invalidate their consent.—DAVIES *v.* KENNEDY (1869), I. R. 3 Eq. 668.—IR.

Sect. 4.—Resolutions: Sub-sects. 1 & 2, A. & B.]

8697. Confirmation of resolution—When necessary.]—A special resolution of creditors under 1883 Act, s. 23, entertaining a proposal for a composition after an adjudication of bkpcy., requires confirmation at a second meeting of the creditors, in the same way as a special resolution under s. 18 entertaining a similar proposal before adjudication.—*Re* GENESE, *Ex p.* KEARSLEY (1886), 18 Q. B. D. 168; 56 L. J. Q. B. 220; 56 L. T. 79; 3 T. L. R. 74; 3 Morr. 274, C. A.

Annotations:—**Consd.** *Re* Barlow, *Ex p.* Thornber (1886), 56 L. T. 168. **Refd.** *Re* Waugh (1886), 3 T. L. R. 264; *Re* Reed, Bowen (1887), 3 T. L. R. 433; *Re* Wood (1888), 4 T. L. R. 277; *Re* Bottomley, *Ex p.* Bottomley (1893), 10 Morr. 262; *Re* Beer, *Ex p.* Beer, [1903] 1 K. B. 628, C. A.

8698. Stamp on resolution—On what sum payable.]—Where the assets of a liquidating debtor exceed his debts stamp duty upon the registration of the special resolution of the creditors is not payable on any amount exceeding the sum estimated as necessary to pay all the creditors in full.—*Re* FORREST, *Ex p.* MURRAY (1873), L. R. 16 Eq. 215; 42 L. J. Bcy. 96; 28 L. T. 678; 21 W. R. 769.

Annotation:—**Distd.** *Re* Berger (1873), L. R. 16 Eq. 623.

8699. ——— ———.]—The stamp duty payable under Table A. of the Ord. of Aug. 10, 1871, is to be calculated upon the amount of assets as estimated by debtor in his statement of affairs, & not upon the amount which the trustee in his affidavit states that he believes the assets will realise.—*Re* BERGER (1873), L. R. 16 Eq. 623; 42 L. J. Bcy. 97; 29 L. T. 76; 21 W. R. 883.

Effect of improper stamping of resolutions.]—*See* No. 8734, *post.*

Resolution for consolidation of joint and separate estates.]—*See* Part XI., Sect. 8, *ante.*

SUB-SECT. 2.—REGISTRATION OF RESOLUTIONS.

A. In General.

8700. Necessity for registration.]—A direction to transfer the proceedings to another ct., under 1870 Rules, r. 288, is part of the resolution in which it is inserted, & has no validity till such resolution has been registered.—*Re* DAVIS, *Ex p.* DAVIS (1872), 7 Ch. App. 526; 41 L. J. Bcy. 69; 27 L. T. 53; 20 W. R. 791, L. JJ.

Annotation:—**Mentd.** *Re* Whitnall, *Ex p.* Whitnall (1882), 20 Ch. D. 438.

8701. ———.]—A resolution has no validity whatever, until it is registered.—*Re* MCCOLLA, *Ex p.* MCLAREN (1881), 16 Ch. D. 534; 50 L. J. Ch. 203; 44 L. T. 36; 29 W. R. 389, C. A.

Annotation:—**Mentd.** *Re* Roundwood Colliery Co., Lee *v.* Roundwood Colliery Co., [1897] 1 Ch. 373, C. A.

8702. Jurisdiction of registrar—To direct examination of debtor or witnesses.]—The proper time for investigation into the affairs of debtor, who has filed a petition for liquidation by arrangement with his creditors, is at the meetings of creditors; & the registrar has no power, upon the presentation to him for registration of a resolution for composition, to direct an examination before him of debtor or other witnesses.—*Re* VARBETIAN & Co., *Ex p.* LEVY & Co. (1871), L. R. 11 Eq. 619; 40 L. J. Bcy. 40; 24 L. T. 332; 19 W. R. 586.

Annotation:—**Distd.** *Re* Jones, *Ex p.* Jones (1873), L. R. 16 Eq. 386.

8703. ——— **To inquire into sufficiency of debtor's statement.**]—The meaning of 1870 Rules, r. 301, is, that, on the presentation of a special resolution for liquidation by arrangement to the registrar for registration, the passing of the resolution is conclusive evidence that debtor's statement of affairs is sufficient, & the registrar has no power to inquire into the sufficiency of the statement.—*Re* WEBB, *Ex p.* WALTER (1876), 2 Ch. D. 326; 45 L. J. Bcy. 105; 34 L. T. 701; 24 W. R. 834, C. A.

Annotations:—**Distd.** *Re* Aaronson, *Ex p.* Aaronson (1878), 7 Ch. D. 713, C. A. **Refd.** *Re* Hope, *Ex p.* Hope (1878), 38 L. T. 762, C. A. **Mentd.** Eyre *v.* Smith (1877), 2 C. P. D. 435, C. A.; *Re* Sidebotham, *Ex p.* Sidebotham (1880), 14 Ch. D. 458, C. A.

8704. ——— ———.]—*Semble:* the effect of 1870 Rules, r. 301, is to make the creditors, if they act *bonâ fide*, the sole judges whether debtor has given sufficient information as to his affairs.—*Re* HOPE, *Ex p.* HOPE (1878), 9 Ch. D. 398; 47 L. J. Bcy. 78; 38 L. T. 762; 27 W. R. 7, C. A.

Annotations:—**Refd.** *Re* Sharpe, *Ex p.* Mathewes (1881), 16 Ch. D. 655, C. A.; *Re* Tilley, *Ex p.* Solomon (1882), 47 L. T. 57.

8705. ——— **To register resolutions—After adjudication of bankruptcy.**]—The registrar has no power to register a resolution for liquidation or composition after an adjudication of bkpcy. has been made, unless the adjudication has been made under 1870 Rules, r. 266, in which case the adjudication is intended to be merely ancillary to the liquidation.—*Re* STANLEY, *Ex p.* MILWARD (1880), 16 Ch D. 256; 50 L. J. Ch. 166; 44 L. T. 73; 29 W. R. 167, L. JJ.

Annotation:—**Follo.** *Re* Ward, *Ex p.* Bennett (1881), 16 Ch. D. 541, C. A.

8706. ——— **To omit resolutions with consent of debtor.**]—The registrar may register resolutions for liquidation, omitting from them, with debtor's consent, a resolution for an immediate discharge.—*Re* WEBB, *Ex p.* WALTER (1876), 2 Ch. D. 326; 45 L. J. Bcy. 105; 34 L. T. 701; 24 W. R. 834, C. A.

Annotations:—**Distd.** *Re* Aaronson, *Ex p.* Aaronson (1878), 7 Ch. D. 713, C. A. **Refd.** *Re* Hope, *Ex p.* Hope (1878), 38 L. T. 762, C. A. **Mentd.** Eyre *v.* Smith (1877), 2 C. P. D. 435, C. A.; *Re* Sidebotham, *Ex p.* Sidebotham (1880), 14 Ch. D. 458, C. A.

8707. ——— **To strike out ultra vires resolution.**]—The registrar or ct. can strike out an *ultra vires* resolution & direct the other resolutions to be registered without it.—*Re* HOPE, *Ex p.* HOPE (1878), 9 Ch. D. 398; 47 L. J. Bcy. 78; 38 L. T. 762; 27 W. R. 7, C. A.

Annotations:—**Refd.** *Re* Sharpe, *Ex p.* Mathewes (1881), 16 Ch. D. 655, C. A.; *Re* Tilley, *Ex p.* Solomon (1882), 47 L. T. 57.

See, also, No. 8728, *post.*

8708. ——— **To direct issue to be tried by jury as to existence of debt—On application to register creditors' resolutions.**]—Upon an application under 1870 Rules, r. 295, to register the resolutions passed by the creditors, the registrar has no power to direct an issue to be tried by a jury as to the existence of a debt, but must decide the matter himself or refer it to the judge.—*Re* BEETENSON, *Ex p.* WILLIAMS (1882), 46 L. T. 241; 30 W. R. 491.

8709. Who may oppose registration—Creditor who has withdrawn proof.]—*Semble:* a creditor, who has withdrawn his proof at the first general meeting, has not, under 1870 Rules, rr. 273, 295, any *locus standi* before the registrar on the registration of the resolutions.—*Re* MASON, *Ex p.* KIRKWOOD (1879), 11 Ch. D. 724; 40 L. T. 566; 27 W. R. 806, C. A.

Annotation:—**Follo.** *Re* Bagster, *Ex p.* Bagster (1883), 24 Ch. D. 477, C. A.

8710. ——— **Only creditor who has previously proved debt.**]—A person who claims to be a creditor, & in that character to oppose the registration, cannot prove his debt when he comes before the registrar to oppose. If he has not previously proved a debt, he cannot be heard.—*Re* BAGSTER, *Ex p.* BAGSTER (1883), 24 Ch. D. 477; 53 L. J. Ch. 124; 49 L. T. 272; 32 W. R. 215, C. A.

8711. Where registration refused—Costs of abortive proceedings.]—Solicitors' costs incurred in abortive proceedings to reduce the amount of a composition, the resolution for which the registrar refused to register, were not allowed.—*Re* ELLIOTT, *Ex p.* HOPPER (1878), 8 Ch. D. 53; 47 L. J. Bcy. 41; 38 L. T. 366; 26 W. R. 488, C. A.

8712. —— Recovery of stamp duty.]—Where registration is refused, the ct. has no power to order a return of the *ad valorem* stamp duty paid on the filing of the resolutions. The proper course is to memorialise the Comrs. of Inland Revenue.—*Re* MOIR, *Ex p.* IZARD (1882), 20 Ch. D. 703; 51 L. J. Ch. 939; 47 L. T. 212; 30 W. R. 861, C. A.

8713. —— Affidavit by registrar as to proceedings.]—A registrar, who had refused to register resolutions, made an affidavit in support of his certificate as to what took place at a meeting of creditors:—*Held:* his doing so must not be made a precedent, for it was not desirable that a judicial officer should make an affidavit of what took place before him.

His doing so lowers the dignity of his office; it is as if the ct. would not credit his simple statement (JAMES, L.J.).—*Re* RATCLIFFE, *Ex p.* TILL (1875), 10 Ch. App. 631; 44 L. J. Bcy. 103; 32 L. T. 521; 23 W. R. 670, L. JJ.

Annotations:—**Mentd.** Macdougall *v.* Gardiner (1875), 1 Ch. D. 13, C. A.; *Re* McHenry, *Ex p.* Walker (1883), 48 L. T. 291, C. A.

B. Grounds for Refusal of Registration.

See, also, cases in Sect. 5, sub-sect. 2, C., Sect. 6, sub-sect. 2, Sect. 10, sub-sect. 3, B., *post.*

8714. Debtor's statement not showing joint & separate debts separately.]—Debtor filed a liquidation petition describing himself as carrying on business alone. He had formerly been in partnership, but the partnership had come to an end more than a year before the petition was filed. There were debts of the firm remaining unpaid. Debtor's statement did not show which were his joint & which were his separate assets or debts, & on that ground the registrar refused to register the resolutions which the creditors passed for liquidation by arrangement, though all the creditors had had notice of the meetings, & no one objected to the registration:—*Held:* the registrar's decision was right.—*Re* COCKAYNE, *Ex p.* COCKAYNE (1873), L. R. 16 Eq. 218; 42 L. J. Bcy. 71; 28 L. T. 678; 21 W. R. 749.

Annotations:—**Consd.** *Re* Webb, *Ex p.* Gibbs (1875), 10 Ch. App. 382, L. J. **Distd.** *Re* Webb, *Ex p.* Walter (1876), 2 Ch. D. 326, C. A. **Refd.** *Re* Aaronson, *Ex p.* Aaronson (1878), 7 Ch. D. 713, C. A.

8715. Resolutions not passed in interest of creditors.]—Resolutions under a liquidation petition were refused registration, on the ground that they had not been passed in the *bonâ fide* interest of the creditors.—*Re* LLOYD, *Ex p.* PULBROOK (1883), 48 L. T. 128.

8716. ——.]—If it is clear *ex facie* that the statement produced by debtor is one which the majority of the creditors could not have accepted *bonâ fide* in the interest of the creditors, this may be taken as an objection to the registration of the resolution.—*Re* WEBB, *Ex p.* WALTER (1876), 2 Ch. D. 326; 45 L. J. Bcy. 105; 34 L. T. 701; 24 W. R. 834, C. A.

Annotations:—**Expld.** *Re* Aaronson, *Ex p.* Aaronson (1878), 7 Ch. D. 713, C. A. **Consd.** *Re* Sidebotham, *Ex p.* Sidebotham (1880), 14 Ch. D. 458, C. A. **Mentd.** Eyre *v.* Smith (1877), 2 C. P. D. 435, C. A.; *Re* Hope, *Ex p.* Hope (1878), 38 L. T. 762, C. A.

8717. —— Vote not bonâ fide for benefit of creditors.]—A creditor who votes for a composition with debtor is bound to vote *bonâ fide* for the benefit of the creditors, & not for the benefit of debtor.

M., a creditor, before the holding of a fresh first meeting, sold his debt to T., for 10*s.* in the pound. At the meeting M., by T.'s direction, voted for a composition of 2*s.* 6*d.* in the pound, & by his vote the resolution was carried:—*Held:* inasmuch as it appeared clear that the vote in respect of T.'s debt was given for the benefit of debtor, & not of the creditors, the vote ought to be rejected, & the resolution set aside.—*Re* SEDLEY, *Ex p.* COBB (1873), 8 Ch. App. 727; 42 L. J. Bcy. 63; 29 L. T. 123; 21 W. R. 777, L. JJ.

Annotations:—**Consd.** Seymour *v.* Coulson (1880), 5 Q. B. D. 359, C. A. **Refd.** *Re* Poole, *Ex p.* Cocks (1882), 21 Ch. D. 397, C. A. **Mentd.** *Re* Burrs, *Ex p.* Fore St. Warehouse Co. (1874), 30 L. T. 624, L. J.; *Re* Condon, *Ex p.* James (1874), 30 L. T. 773, L. JJ.; *Re* Harper, *Ex p.* Linsley (1874), 29 L. T. 857, L. C. & L. JJ.; *Re* Webb, *Ex p.* Gibbs (1875), 10 Ch. App. 382, L. J.; *Re* Ratcliffe, *Ex p.* Till (1875), 44 L. J. Bcy. 103, L. JJ.; *Re* Terrell, *Ex p.* Terrell, *Ex p.* Sheffield & Rotherham Joint Stock Banking Co. (1876), 4 Ch. D. 293, C. A.; *Re* McHenry, *Ex p.* McHenry (1883), 24 Ch. D. 35, C. A.

8718. —— But to secure debtor's discharge.]—A debtor having commenced proceedings for liquidation, his creditors passed a resolution that his discharge should be granted to him on his paying £4,000 in a month, & giving a bond for payment of £5,000 more to the trustee by five yearly instalments. In default of payment of any instalment the whole £5,000 was to become payable at once. The £4,000 was paid, the bond given, & two yearly instalments paid under it, but default was made in payment of the third. Debtor then commenced fresh proceedings for liquidation, & presented a statement of accounts showing a large amount of debts, & hardly any assets. He was in receipt of half-pay as a retired officer in the army. The creditors passed resolutions that the affairs of debtor should be liquidated by arrangement, that until full payment of the debts debtor should pay to the trustee the excess of his income above £600 a year, & that as soon as a deed had been executed to carry the above resolutions into effect debtor should, without any further resolution, be discharged from the debts:—*Held:* the resolutions under the second proceedings were manifestly not passed for the benefit of the creditors, but for the sake of discharging debtor, & ought not to be registered.—*Re* RUSSELL, *Ex p.* RUSSELL (1875), 10 Ch. App. 255; 44 L. J. Bcy. 42; 32 L. T. 4; 23 W. R. 817, L. JJ.

Annotations:—**Folld.** *Re* Terrell, *Ex p.* Terrell, *Ex p.* Sheffield & Rotherham Joint Stock Banking Co. (1876), 4 Ch. D. 293, C. A.; *Re* Aaronson, *Ex p.* Aaronson (1878), 7 Ch. D. 713, C. A. **Distd.** *Re* Sharpe, *Ex p.* Mathewes (1881), 16 Ch. D. 655, C. A. **Refd.** *Re* Robinson, *Ex p.* Burrell (1876), 1 Ch. D. 537, C. A.; *Re* Webb, *Ex p.* Walter (1876), 34 L. T. 701, C. A. **Mentd.** Ebbs *v.* Boulnois (1875), 10 Ch. App. 479, L. JJ.; *Re* Wainwright, *Ex p.* Wainwright (1881), 19 Ch. D. 140, C. A.

8719. —— But from motives of kindness to debtor.]—The power of the statutory majority of creditors to bind the minority must be exercised *bonâ fide* for the benefit of the creditors, & not

PART XXIII. SECT. 4, SUB-SECT. 2.—B.

8715 i. *Resolutions not passed in interest of creditors—But for collateral object.*]—A resolution may be set aside if it has been passed not in the honest belief that it was in the interests of the estate & for the benefit of the creditors but for some collateral object.—PARUK *v.* PARKER, WOOD & CO., LTD., [1917] App. D. 163.—S. AF.

q. *Resolution contrary to statutory provisions.*]—A resolution, that the stock-in-trade of insolvents should be divided into lots of £10 value & distributed, amongst the creditors for the current year of the insolvency, by ballot so as to make a dividend of 10*s.* in the pound, is void as contrary to statutory provisions.—*Re* DOOLING & KELLY'S INSOLVENCY, *Ex p.* LITTLE (1818), 1 Nfld. L. R. 71.—NFLD.

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from motives of kindness to debtor.—*Re* PAGE, *Ex p.* PAGE (1876), 2 Ch. D. 323; 45 L. J. Bcy. 119; 34 L. T. 638; 24 W. R. 502, C. A.

Annotations:—**Folld.** *Re* Terrell, *Ex p.* Terrell, *Ex p.* Sheffield & Rotherham Joint Stock Banking Co. (1876), 4 Ch. D. 293, C. A. **Apld.** *Re* Wedgwood Coal & Iron Co. (1877), 6 Ch. D. 627. **Folld.** *Re* Poole, *Ex p.* Cocks (1882), 21 Ch. D. 397, C. A. **Refd.** *Re* Aaronson, *Ex p.* Aaronson (1878), 7 Ch. D. 713, C. A.; *Re* Durham, *Ex p.* Merchant Banking Co. of London (1881), 16 Ch. D. 623, C. A.; *Re* Walton, *Ex p.* Hudson (1883), 22 Ch. D. 773, C. A.

8720. —— ——.]—All the creditors of H. except one agreed to accept a composition, &, having the necessary majority, gave debtor his discharge. The dissentient creditor applied to the county ct. to have the order of discharge rescinded on the grounds that it had been granted without proper care & from motives of benevolence. From the evidence it appeared that the creditors did not wish to see debtor ruined, but also that the main part of debtor's property consisted of an equity of redemption, which might have taken time to realise. The county ct. judge refused the application:—*Held:* no case of fraud had been proved, & applt. was not entitled to the order he asked for.—*Re* HARPER, *Ex p.* LINSLEY (1873), 42 L. J. Bcy. 109; 29 L. T. 77; 21 W. R. 909; *affd.* (1874), 9 Ch. App. 290, L. C. & L. JJ.

Annotation:—**Refd.** *Re* Page, *Ex p.* Page (1876), 24 W. R. 502, C. A.

8721. —— **Inadequate composition—Criterion as to amount required.**]—*Held:* resolutions accepting a composition of 1*s.* in the pound ought to be registered, debtor having no assets, but the payment of the composition being secured by a third person.

The question in all such cases is whether the creditors, in accepting the composition offered, have acted *bonâ fide*, *i.e.*, in the interest of the creditors, & not merely with a view to benefit debtor. There is no hard & fast line as to the amount of composition which may be accepted, except that the sum must not be so small that no reasonable man would accept it; for in such a case the amount would in itself be evidence of want of *bona fides*.—*Re* WALTON, *Ex p.* HUDSON (1883), 22 Ch. D. 773; 52 L. J. Ch. 584; 47 L. T. 674; 31 W. R. 372, C. A.

Annotation:—**Refd.** *Re* Hickman, *Ex p.* Strawbridge (1883), 25 Ch. D. 266, C. A.

8722. —— —— **No security offered.**]—The statement of affairs of debtor, who had filed a liquidation petition, showed that his debts amounted to £11,358, while his assets were only £75. Of the debts, the preferential claims amounted to £127. The creditors, by the proper statutory majority, resolved to accept a composition of 1*s.* in the pound, to be paid within one month after registration of the resolution, no security for its payment being offered. One of the dissentient creditors opposed the registration:—*Held:* the resolution could not have been passed in the interest of the creditors, but must have been passed for the benefit of debtor, & the registrar was right in refusing to register it.—*Re* TERRELL, *Ex p.* TERRELL, *Ex p.* SHEFFIELD & ROTHERHAM JOINT STOCK BANKING CO. (1876), 4 Ch. D. 293; 46 L. J. Bcy. 47; 35 L. T. 646, 648; 25 W. R. 153, C. A.

Annotations:—**Consd.** *Re* Williams, *Ex p.* Williams (1881), 18 Ch. D. 495, C. A.; *Re* Walton, *Ex p.* Hudson (1883), 22 Ch. D. 773, C. A. **Refd.** *Re* Aaronson, *Ex p.* Aaronson (1878), 7 Ch. D. 713, C. A.; *Re* McHenry, *Ex p.* McHenry (1883), 24 Ch. D. 35, C. A.

8723. —— —— **Abuse of process.**]—The statement of affairs of debtor, who had filed a liquidation petition, showed that his debts amounted to £1,293, & that he had no assets. At the first meeting of his creditors he admitted he was in the receipt of a salary of £5 a week. The creditors resolved by the proper statutory majority to accept a composition of 6*d.* in the pound, to be paid within a month after the registration of the resolutions, & to be secured to the satisfaction of the chairman of the meeting. The resolutions were confirmed at the second meeting:—*Held:* the proceedings were an abuse of the process of the ct., & the resolutions ought not to be registered.—*Re* PARNELL, *Ex p.* BALL (1882), 20 Ch. D. 670; 51 L. J. Ch. 911; 47 L. T. 213; 30 W. R. 738, C. A.

Annotation:—**Mentd.** *Re* Walton, *Ex p.* Hudson (1883), 22 Ch. D. 773, C. A.

See, now, 1914 Act, s. 16 (2).

8724. —— —— ——.]—The creditors of debtor, whose debts amounted to £304 18*s.*, & whose assets were only £8 13*s.*, resolved to accept a composition of 3*d.* in the pound, the payment of which was to be secured by one of the creditors. The registration of the resolutions was opposed by a dissentient creditor:—*Held:* having regard to the small amount of the composition, the resolutions must have been passed solely in the interest of debtor were an abuse of the process of the ct., & ought not to be registered.—*Re* ROBINS, *Ex p.* RUSSELL (1883), 22 Ch. D. 778; 47 L. T. 675; 31 W. R. 442, C. A.

Annotation:—**Refd.** *Re* Hickman, *Ex p.* Strawbridge (1883), 25 Ch. D. 266, C. A.

8725. —— —— **No opposition.**]—When the registrar is satisfied, either from the small amount of composition offered, or otherwise, that resolutions accepting a composition have been passed in the interest of debtor, & not for the benefit of the creditors, it is his duty to refuse to register them even though no creditor opposes.—*Re* WILLIAMS, *Ex p.* WILLIAMS (1881), 18 Ch. D. 495; 50 L. J. Ch. 741; 45 L. T. 96, C. A.

8726. —— —— **Absence of fraud.**]—The statutory majority of the creditors of a liquidating debtor passed a resolution accepting a composition of 6*d.* in the pound, which was subsequently duly confirmed:—*Held:* in the absence of fraud, the resolution must be registered.—*Re* WILLIAMS, *Ex p.* WILLIAMS (1877), 36 L. T. 324; 25 W. R. 432.

8727. —— —— **Statutory requirements complied with—No available assets.**]—Debtor filed a liquidation petition, & the creditors unanimously resolved to accept a composition of 3*d.* in the pound. The debts were £130, & the assets amounted to £7. The registrar refused to register the resolutions, though no creditor opposed, on the ground that there were "no available assets for distributing among the creditors":—*Held:* as all the requirements of 1869 Act & Rules had been complied with, the resolutions must be registered.—*Re* ELWORTHY, *Ex p.* ELWORTHY (1875), L. R. 20 Eq. 742; 44 L. J. Bcy. 123; 32 L. T. 699; 23 W. R. 790.

Annotations:—**Dbtd.** *Re* Aaronson, *Ex p.* Aaronson (1878), 38 L. T. 243, C. A. It is hard to reconcile *Re Elworthy, Ex p. Elworthy* with *Re Stapp* (1820), L. R. 20 Eq. 775 (THESIGER, L.J.). **Distd.** *Re* Parnell, *Ex p.* Ball (1882), 20 Ch. D. 670, C. A.

8728. Resolution ultra vires.]—In 1884, at a meeting of the creditors of debtor whose affairs were being liquidated by arrangement under 1869 Act, resolutions were passed releasing the trustee & closing the liquidation, & it was also resolved that the discharge of debtor be not granted, but at a subsequent meeting held in 1889, a resolution was obtained whereby the discharge of debtor was granted. On an application under 1869 Act, s. 125 (10), for a certificate to that effect, the

county ct. registrar refused to certify the discharge on the ground that the resolution in question was *ultra vires* :—*Held :* the registrar was right in refusing to grant a certificate.—*Re* HART & SON, *Ex p.* HART (1889), 58 L. J. Q. B. 440 ; 61 L. T. 256 ; 38 W. R. 32 ; 5 T. L. R. 641 ; 6 Morr. 235.

See, also, No. 8707, *ante.*

8729. Assets very small—Substantial bonâ fide claims pending.]—Want of *bona fides* will not necessarily be imputed to liquidation resolutions however small the assets immediately available may be, if debtor has *bonâ fide* claims, the subject of pending litigation.—*Re* HOPE, *Ex p.* HOPE (1878), 9 Ch. D. 398 ; 47 L. J. Bcy. 78 ; 38 L. T. 762 ; 27 W. R. 7, C. A.

Annotations :—**Refd.** *Re* Sharpe, *Ex p.* Mathewes (1881), 16 Ch. D. 655. **Mentd.** *Re* Tilley, *Ex p.* Solomon (1882), 47 L. T. 57.

8730. —— Registration opposed by one creditor.]—The statement of debtor who had filed a liquidation petition showed that his debts amounted to £540, & that his assets were only £32. The creditors resolved upon a liquidation. One creditor opposed the registration of the resolutions :—*Held :* the petition was an abuse of the procedure of the ct., & the registration had been rightly refused.—*Re* STAFF, *Ex p.* STAFF (1875), L. R. 20 Eq. 775 ; 44 L. J. Bcy. 137 ; 33 L. T. 40 ; 23 W. R. 950.

Annotations :—**Distd.** *Re* Williams, *Ex p.* Williams (1877), 36 L. T. 324 ; *Re* Sharpe, *Ex p.* Mathewes (1881), 16 Ch. D. 655, C. A. **Apprvd.** *Re* Parnell, *Ex p.* Ball (1882), 20 Ch. D. 670, C. A. **Refd.** *Re* Aaronson, *Ex p.* Aaronson (1878), 38 L. T. 243, L. JJ. ; *Re* Walton, *Ex p.* Hudson (1883), 22 Ch. D. 773, C. A.

8731. —— Resolution opposed by creditor who otherwise would take whole assets.]—The creditors of debtor, whose statement of affairs showed that his debts amounted to £534 & his assets to £85, resolved on a liquidation by arrangement, & gave debtor an immediate discharge. The registration was opposed by one creditor, who had, after the filing of the petitions seized the whole of debtor's goods under a *fi. fa.* :—*Held :* the resolutions could not be treated as any abuse of the procedure of the ct., nor as having been passed *malâ fide*, the real contest having been whether one creditor should take the whole assets, or whether they should be distributed among all the creditors.—*Re* GOLDING, *Ex p.* EARLY (1879), 13 Ch. D. 300 ; 42 L. T. 298 ; 28 W. R. 310, C. A.

Annotations :—**Folld.** *Re* Sharpe, *Ex p.* Mathewes (1881), 16 Ch. D. 655, C. A. **Expld.** *Re* Williams, *Ex p.* Williams (1881), 18 Ch. D. 495, C. A. **Refd.** *Re* Woodhouse, *Ex p.* Kershaw (1881), 45 L. T. 687.

8732. —— ——.]—The statement of affairs of debtor, who had filed a liquidation petition, showed that his debts were £1,759 & his assets £85, the latter sum being subject to a deduction in respect of preferential debts. The creditors resolved upon a liquidation by arrangement, & gave debtor an immediate discharge. They also voted £10 for the remuneration of the trustee. The registration of the resolutions was opposed by a creditor, who had brought an action against debtor for £182, but who had been restrained from proceeding with the action. He was in a position to sign judgment & issue execution so soon as the injunction should be dissolved :—*Held :* notwithstanding the small amount of the assets, the resolutions ought to be registered, the contest being really whether the assets, such as they were, should be distributed among the creditors generally, or be swept away by the judgment creditor, although the judgment creditor offered to undertake to present a bkpcy. petition against debtor.—*Re* SHARPE, *Ex p.* MATHEWES (1881), 16 Ch. D. 655 ; 50 L. J. Ch. 284 ; 44 L. T. 117, C. A.

Annotation :—**Expld.** *Re* Williams, *Ex p.* Williams (1881), 18 Ch. D. 495, C. A.

8733. —— Resolutions not discharging debtor.]—Resolutions for a liquidation by arrangement, passed in respect to debtor who has practically no assets distributable among his creditors, ought not to be registered, even though they do not include a discharge to debtor.—*Re* AARONSON, *Ex p.* AARONSON (1878), 7 Ch. D. 713 ; 47 L. J. Bcy. 60 ; 38 L. T. 243 ; 26 W. R. 470, C. A.

Annotations :—**Mentd.** *Re* Buckley, *Ex p.* Buckley (1881), 16 Ch. D. 513, C. A. ; *Re* Sharpe, *Ex p.* Matthews (1881), 50 L. J. Ch. 284, C. A. ; *Re* Amor, *Ex p.* Amor (1882), 21 Ch. D. 594, C. A. ; *Re* Tilley, *Ex p.* Solomon (1882), 20 Ch. D. 281, C. A. ; *Re* Walton, *Ex p.* Hudson (1883), 22 Ch. D. 773, C. A.

8734. Resolutions not properly stamped.]—An extraordinary resolution of creditors presented to a registrar under 1869 Act, s. 126, must have the proper stamp affixed, & must be accompanied by the affidavit required by 1870 Rules, r. 284, verifying the statement of proofs & proxies ; otherwise it cannot be received by the registrar for the purpose either of filing or of registration.—*Re* DAVIS, *Ex p.* DAVIS (1872), 7 Ch. App. 526 ; 41 L. J. Bcy. 69 ; 27 L. T. 53 ; 20 W. R. 791, L. JJ.

Annotation :—**Folld.** *Re* Whitnall, *Ex p.* Whitnall (1882), 20 Ch. D. 438.

See, also, Nos. 8698, 8699, *ante.*

8735. Proceedings regular but in wrong court—Resolution transferring same.]—A petition for liquidation was by mistake presented by debtor to the wrong ct. A receiver was appointed, & all proceedings were carried on with perfect regularity till just before the second meeting of creditors, when the error was discovered. At the second meeting a resolution was passed transferring the proceedings to the proper ct. The registrar refused to register the resolution, on the ground that the proceedings were a nullity :—*Held :* the registrar should register the resolutions, & the proceedings should be transferred to the proper ct.—*Re* BUCKLAND (1873), L. R. 15 Eq. 221 ; 42 L. J. Bcy. 32 ; 21 W. R. 291.

Annotation :—**Consd.** Revell *v.* Blake (1873), L. R. 8 C. P. 533, Ex. Ch.

8736. Resolutions passed at adjourned meeting—First meeting adverse.]—At a first meeting of creditors a composition was offered, but in consequence of debtor's solr. finding that the majority of creditors present would vote against it, no formal resolution on the matter was proposed. Instead, a resolution for adjournment was put & carried. At the adjourned meeting a resolution for the same composition was again proposed & then carried :—*Held :* the resolution was invalid, & ought not to be registered.—*Re* RATCLIFFE, *Ex p.* TILL (1875), 10 Ch. App. 631 ; 44 L. J. Bcy. 103 ; 32 L. T. 521 ; 23 W. R. 670, L. JJ.

Annotations :—**Refd.** Macdougall *v.* Gardiner (1875), 1 Ch. D. 13, C. A. ; *Re* McHenry, *Ex p.* Walker (1883), 48 L. T. 291, C. A.

8737. —— Some creditors without notice.]—At the first meeting of creditors in a liquidation a resolution to accept a composition was passed against a minority of dissentient creditors, & another resolution was passed fixing the time & place of the second meeting. The second meeting was held accordingly, & the resolution for the composition confirmed. The dissentients opposed the registration of the resolution on the ground that they had had no notice of the second meeting, though it was proved that the notices had been duly posted. The registrar refused to register the resolution :—*Held :* there being no provision that sending the notices should be equivalent to delivering them, the registrar had rightly exercised his

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discretion, & refused to register the resolution on the ground that the dissentient creditors had not received notice of the second meeting.—*Re* DEAN, *Ex p.* DEAN (1879), 13 Ch. D. 313; 41 L. T. 602; 28 W. R. 204, C. A.

8738. Trustee given power to grant discharge.]—At a first meeting of creditors held under a petition for liquidation, debtor's statement of affairs showed liabilities exceeding £43,000, & assets £120, & it was also stated that debtor was prosecuting two pending actions, in one of which he expected to recover a very large sum, & in the other a considerable sum. The solr. for certain creditors, who were defts. in one of the actions, made inquiries of debtor which he refused to answer, on the ground that they were made with a view to obtain information which would prejudice him in the trials of his actions, & were not made in the interests of the creditors, & the majority of the creditors being of that opinion, passed resolutions for liquidating debtor's affairs by arrangement, appointing a trustee without a committee of inspection, & giving the trustee power to grant debtor his discharge when he should think fit to do so, & declaring that debtor was justified in declining to answer the questions:—*Held:* (COTTON, L.J., *dub.*), with the exception of the resolution giving the trustee power to grant debtor his discharge, which was *ultra vires*, the resolutions were proper, & ought to be registered.—*Re* HOPE, *Ex p.* HOPE (1878), 9 Ch. D. 398; 47 L. J. Bcy. 78; 38 L. T. 762; 27 W. R. 7, C. A.

Annotations:—**Refd.** *Re* Sharpe, *Ex p.* Mathewes (1881), 16 Ch. D. 655. **Mentd.** *Re* Tilley, *Ex p.* Solomon (1882), 47 L. T. 57.

8739. Proceedings irregular but bonâ fide—Creditor not allowed to take notes—Debtor's statement incomplete—Fresh meeting ordered.]—A meeting of creditors refused to allow one of their number, who wished to examine debtor, to be attended by a shorthand-writer for the purpose of taking notes of the examination. Debtor's statement of affairs was also insufficient, but resolutions for a composition were passed by the meeting:—*Held:* the resolutions ought not to be registered, but as the proceedings were only irregular, & there was no proof of *mala fides*, a fresh meeting should be summoned.—*Re* TILLEY, *Ex p.* SOLOMON (1882), 20 Ch. D. 281; 51 L. J. Ch. 677; 47 L. T. 57; 30 W. R. 603, C. A.

Annotation:—**Mentd.** *Re* Amor, *Ex p.* Amor (1882), 21 Ch. D. 594, C. A.

8740. Conduct of creditor—Purchase of debt at excessive price—By friend of debtor—Without concealment.]—A resolution for a composition was passed through the vote of a creditor, whose debt had been bought up by a friend of debtor for more than its value:—*Held:* the resolution ought not to be registered. *Semble:* if the purchase of the debt had been secret, the resolution could not have stood, even if carried by an independent majority, as other creditors might have been influenced by the vote.—*Re* SEDLEY, *Ex p.* COBB (1873), 8 Ch. App. 727; 42 L. J. Bcy. 63; 29 L. T. 123; 21 W. R. 777, L. JJ.

Annotations:—**Folld.** *Re* Burrs, *Ex p.* Fore St. Warehouse Co. (1874), 30 L. T. 624, L. J. **Refd.** *Re* Harper, *Ex p.* Linsley (1874), 29 L. T. 857, C. A.; Seymour *v.* Coulson (1880), 5 Q. B. D. 359, C. A.; *Re* Poole, *Ex p.* Cocks (1882), 21 Ch. D. 397, C. A. **Mentd.** *Re* Condon, *Ex p.* James (1874), 30 L. T. 773, C. A.; *Re* Ratcliffe, *Ex p.* Till (1875), 44 L. J. Bcy. 103; *Re* Webb, *Ex p.* Gibbs (1875), 10 Ch. App. 382, L. J.; *Re* Terrell, *Ex p.* Terrell, *Ex p.* Sheffield & Rotherham Joint Stock Banking Co. (1876), 4 Ch. D. 293, C. A.; *Re* McHenry, *Ex p.* McHenry (1883), 24 Ch. D. 35, C. A.

8741. —— Purchase of debt by creditor favouring composition — Adjudication.] — Where the passing of a resolution in favour of a composition has been obtained by the vote of a creditor, who has purchased the debt, in respect of which he votes, in order to vote in favour of the composition, such a fraud taints the whole of the proceedings for a composition, & the ct. will make an order of adjudication of bkpcy. against debtor on the petition of a duly qualified creditor, in spite of the pendency of the proceedings for a composition.—*Re* BURRS & Co., *Ex p.* FORE STREET WAREHOUSE CO., LTD. (1874), 30 L. T. 624, L. J.

8742. Conduct of debtor—Refusal to answer questions—Refusal justified.]—*Semble:* a refusal to answer proper questions would be a ground of objection to the registration of the resolutions.

A paper was put into debtor's hand, & he was asked the question whether it was written by his authority, but the paper was not read to the meeting, nor was his solr. allowed to see it, &, by his solr.'s advice, he refused to answer the question:—*Held:* there had been no such refusal by debtor to give information as would render the resolutions invalid & prevent their registration.—*Re* HELLIWELL, *Ex p.* MACKENZIE (1874), 10 Ch. App. 88; 44 L. J. Bcy. 14; 31 L. T. 421; 23 W. R. 121, L. JJ.

Annotations:—**Expld.** *Re* Reynolds, *Ex p.* Reynolds (1882), 20 Ch. D. 294, C. A. **Refd.** *Re* Hope, *Ex p.* Hope (1878), 9 Ch. D. 398, C. A.

8743. —— Non-attendance at meeting—Present in adjoining room.]—Dissentient creditors objected to the registration of resolutions for a composition passed by the creditors of debtor on the ground (*inter alia*) that at one of the meetings of the creditors debtor was not present. The meeting was held at the office of an accountant, & debtor, though not actually in the room in which the meeting was held, was in an adjoining room, & was ready, if required, to come into the meeting & answer any inquiries. That fact was known to the creditors present, & no objection was then made by any one:—*Held:* in the circumstances, debtor must be taken either to have been present at the meeting, or at any rate to have been absent from a cause satisfactory to the meeting, & the registration of the resolutions was right.—*Re* STRECKEISEN, *Ex p.* GRUNELINS, [1876] W. N. 244, C. A.

Annotation:—**Consd.** *Re* Best, *Ex p.* Best (1881), 18 Ch. D. 488, C. A.

8744. —— —— Unless excused.]—If debtor is not actually present in the room, he is bound to show that he was prevented by sickness, or that the creditors, for some other cause satisfactory to them, excused his presence. If he does not do this, any resolutions passed accepting a composition will be invalid & cannot be registered.—*Re* BEST, *Ex p.* BEST (1881), 18 Ch. D. 488; 51 L. J. Ch. 293; 45 L. T. 95, C. A.

Annotation:—**Mentd.** *Re* Tilley, *Ex p.* Solomon (1882), 20 Ch. D. 281, C. A.

See, also, Nos. 8656, 8669, 8670, *ante*, No. 8755, *post.*

8745. —— Improper description of himself in petition.] — Debtor presented his petition for liquidation, the description of himself in the petition being insufficient & misleading:—*Held:* resolutions for liquidation by arrangement & giving to debtor his immediate discharge could not be registered.—*Re* WOODHOUSE, *Ex p.* KERSHAW (1881), 45 L. T. 687.

—— —— **Requirements of petition.**]—*See* Nos. 8648—8650, *ante.*

8746. Resolutions under second petition—Enforceable resolutions passed under former petition.]—When a resolution for composition has been passed which is capable of being enforced against

debtor, any resolution passed under a second petition for liquidation or composition is void, & ought not to be registered.—*Re* SYDNEY, *Ex p.* SYDNEY (1875), 10 Ch. App. 208; 44 L. J. Bcy. 21; 31 L. T. 714; 23 W. R. 205, L. JJ.

Annotations:—**Folld.** *Re* Robinson, *Ex p.* Robinson (1875), 33 L. T. 609. **Consd.** *Re* Russell, *Ex p.* Russell (1875), 44 L. J. Bcy. 42; *Re* Robinson, *Ex p.* Burrell (1876), 1 Ch. D. 537, C. A.; *Re* Andrews, *Ex p.* Barrow (1881), 18 Ch. D. 464, C. A. **Refd.** *Re* Roberts, *Ex p.* Watson (1879), 41 L. T. 516, C. A.

See, also, No. 8651, *ante.*

8747. —— Failure to pay composition under former arrangement.]—Where nothing further remains to be done under composition resolutions, & the rights of the creditors thereunder are in no way interfered with, the ct. will not refuse to register resolutions for a composition under a second petition by same debtor, notwithstanding that all the creditors have not been paid their composition under the first petition.—*Re* DAVIES, *Ex p.* LOMAS, HORNER & Co. (1880), 42 L. T. 595.

C. Reopening Proceedings and Cancellation of Registration.

See, also, cases in Sect. 5, sub-sect. 2, E., *post.*

8748. Jurisdiction of court—To order examination of debtor—Primâ facie case of fraud established.]—Even after a resolution for a composition has been registered, the Ct. of Bkpcy. has jurisdiction, on a proper case being shown, to reopen the question, &, with that object, to order the examination of debtor.

A creditor invoking the exercise of such jurisdiction must show a *primâ facie* case of fraud against debtor in procuring the composition. It is not sufficient to allege that the assenting creditors were friendly to debtor.—*Re* DAVIS, CORNFORTH *v.* DAVIS (1871), 19 W. R. 524.

8749. —— —— ——.]—After the creditors of debtor have resolved to accept a composition, & the resolutions have been registered, the ct. has jurisdiction, if a dissentient creditor makes out a *primâ facie* case of fraud on the part of debtor, to order him to be examined as to his affairs.—*Re* JONES, *Ex p.* JONES (1873), L. R. 16 Eq. 386; 28 L. T. 679; 21 W. R. 769.

Annotation:—**Refd.** *Re* Wright, *Ex p.* Willey (1883), 23 Ch. D. 118.

8750. —— To inquire whether fraud committed.]—The High Ct. of Justice has jurisdiction to inquire & decide whether fraud has been committed in the registration of resolutions for liquidation by arrangement under 1869 Act.—EYRE *v.* SMITH (1877), 2 C. P. D. 435; 37 L. T. 417; 25 W. R. 871, C. A.

8751. In what circumstances—Debtor's statement fraudulent.]—If debtor's statement is a fraudulent one, the proper course for a dissentient creditor to take is to move, after the resolution has been registered, to have the registration vacated.—*Re* WEBB, *Ex p.* WALTER (1876), 2 Ch. D. 326; 45 L. J. Bcy. 105; 34 L. T. 701; 24 W. R. 834, C. A.

Annotations—**Expld.** Eyre *v.* Smith (1877), 2 C. P. D. 435, C. A. **Consd. & Expld.** *Re* Aaronson, *Ex p.* Aaronson (1878), 7 Ch. D. 713, C. A. **Refd.** *Re* Hope, *Ex p.* Hope (1878), 38 L. T. 762, C. A. **Mentd.** *Re* Sidebotham, *Ex p.* Sidebotham (1880), 14 Ch. D. 458, C. A.

8752. —— Malpractice in obtaining vote.]—Malpractice in obtaining any one vote is sufficient to vitiate a resolution, however large may be the majority by which it has been passed.—*Re* BAUM, *Ex p.* BAUM (1878), 7 Ch. D. 719; 47 L. J. Bcy. 48; 38 L. T. 367; 26 W. R. 568, C. A.

8753. —— Misstatement of assets—Amounting to misdemeanour under Debtors Act, 1869 (c. 62), s. 11 (6).]—The ct. will not rescind the registration of resolutions for composition on the ground of misstatement of assets by debtor, except upon evidence sufficient to convict him of a misdemeanour under the above sub-sect.

A compounding debtor, whose statement of affairs showed debts amounting to £5,146, with assets £3,485, was proved to have estimated six specified debts at £63 15*s.* 7*d.* only in his statement of affairs, while in the course of the next two years he recovered £249 3*s.* 8*d.* in respect of them. On an application by a creditor to rescind the registration of the resolutions, on the ground that debtor had fraudulently misstated his assets:—*Held:* the evidence being insufficient to establish an intent to defraud, the application must be dismissed, but without costs.—*Re* LAW, *Ex p.* HART (1878), 47 L. J. Bcy. 88.

8754. —— Payment of composition delayed—Non-payment of fees delaying registration.]—Debtor will not be allowed, by delaying registration of the resolutions, to postpone payment of a composition which has been accepted by his creditors; & a delay of more than three weeks, owing to non-payment by inadvertence of the fees for stamps, in obtaining the registration of resolutions for a composition, is ground for vacating, on the application of a creditor, the registration.—*Re* WHITNALL, *Ex p.* WHITNALL (1882), 20 Ch. D. 438; 46 L. T. 775.

8755. —— Debtor absent from meeting.]—At the first meeting of creditors debtor's statement of his affairs was read by his solr. He himself was not present in the room in which the meeting was held, but he was in an adjoining room. A., who was present as proxy for creditors, said that he wished to examine debtor. His solr. then sent for him, but most of the creditors said that he was an old man & they did not want to annoy him. Debtor, however, came to the door of the room, but most of the creditors present called out to him to go back, whereupon he retired. A. did not press for his examination. The resolutions for liquidation were then passed, A. dissenting from them. A., on behalf of his clients, opposed the registration of the resolutions, on the ground (*inter alia*) that debtor was not present at the meeting, & that he had not been validly excused by the meeting. The registrar having overruled the objection & registered the resolutions:—*Held:* the registration should be disallowed.—*Re* COX, *Ex p.* HOLLENDER, [1883] W. N. 186, C. A.

See, also, Nos. 8656, 8669, 8670, 8743 *et seq., ante.*

8756. Within what time.]—*Held:* an application to have the registration of resolutions cancelled was not barred by delay, though made more than two years after the date of the resolutions.—*Re* LAW, *Ex p.* HART (1878), 47 L. J. Bcy. 88.

8757. ——.]—*Held:* an application to vacate the registration of a resolution, on the ground of fraud, was not an appeal which must be brought within twenty-one days under 1870 Rules, r. 143.—*Re* BAUM, *Ex p.* BAUM (1878), 7 Ch. D. 719; 38 L. T. 367; 26 W. R. 568, C. A.

Annotation:—**Mentd.** *Re* Baum, *Ex p.* Evans (1880), 28 W. R. 500, C. A.

8758. Appeal from refusal to cancel—Who may appeal.]—Creditors, who have not been heard before the registrar on an application for the

8751 i. *In what circumstances—Unverified statement of assets—Hasty registration.*]—A resolution framed upon an unverified statement of assets & debts, had been registered before objections to registration could reasonably be filed:—*Held:* ground for cancelling registration.—*Re* DANE (1877), 3 V. L. R. 19.—AUS.

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registration of resolutions, or before the chief judge on an application to reverse the order for registration, have a *locus standi* to appeal from the order of the chief judge.—*Re* WEBB, *Ex p.* WALTER (1876), 2 Ch. D. 326; 45 L. J. Bcy. 105; 34 L. T. 701; 24 W. R. 834, C. A.

Annotations:—**Expld.** Eyre *v.* Smith (1877), 2 C. P. D. 435, C. A. **Refd.** *Re* Hope, *Ex p.* Hope (1878), 38 L. T. 762, C. A.; *Re* Sidebotham, *Ex p.* Sidebotham (1880), 14 Ch. D. 458, C. A. **Mentd.** *Re* Aaronson, *Ex p.* Aaronson (1878), 7 Ch. D. 713, C. A.

8759. Appeal from cancellation—Costs—Liability of undischarged debtor.]—An undischarged debtor will not be ordered personally to pay the costs, beyond the deposit of his unsuccessful appeal from a decision of the registrar vacating the registration of resolutions.—*Re* BAUM, *Ex p.* BAUM (1878), 7 Ch. D. 719; 47 L. J. Bcy. 48; 38 L. T. 367; 26 W. R. 568, C. A.

Annotation:—**Mentd.** *Re* Baum, *Ex p.* Evans (1880), 28 W. R. 500, C. A.

SUB-SECT. 3.—EFFECT OF RESOLUTIONS AND THEIR REGISTRATION.

8760. Act of bankruptcy in filing liquidation petition purged.]—The filing of a liquidation petition is an act of bkpcy., but when resolutions for an arrangement or composition are duly passed & registered under such petition, the act of bkpcy. is purged, & cannot be made the basis of a petition in bkpcy. as an act of bkpcy. committed by debtor, & available against him for adjudication.—*Re* WALTON, *Ex p.* HOARE (1873), L. R. 16 Eq. 625; 43 L. J. Bcy. 38; 29 L. T. 140; 21 W. R. 909.

Annotations:—**Folld.** *Re* Kearley & Clayton's Contract (1878), 7 Ch. D. 615. **Mentd.** *Re* Baum, *Ex p.* Cooper (1878), 10 Ch. D. 313, C. A.

See, also, Nos. 8911—8913, *post.*

8761. Discharge by operation of law—Of debtor as acceptor of bill of exchange—Not of drawer.]—Where the acceptor of a bill of exchange presents a petition for liquidation or composition under 1869 Act & the creditors pass a resolution for composition, the acceptor must be considered as discharged by operation of law, & the drawer is not thereby discharged from his liability. It makes no difference whether the billholder is present at the meeting or not, or whether he votes in favour of the resolution or against it.—*Re* JACOBS, *Ex p.* JACOBS (1875), 10 Ch. App. 211; 44 L. J. Bcy. 34; 31 L. T. 745; 23 W. R. 251, L. JJ.

Annotations:—**Consd.** Simpson *v.* Hemming (1875), L. R. 10 Q. B. 406. **Folld.** *Re* Fothergill, *Ex p.* Corry (1876), 45 L. J. Bcy. 153, C. A. **Apld.** *Re* London Chartered Bank of Australia, [1893] 3 Ch. 540. **Consd.** Dane *v.* Mortgage Insce. Corpn., [1894] 1 Q. B. 54, C. A. **Distd.** Mortgage Insce. Corpn. *v.* Pound (1895), 64 L. J. Q. B. 394, C. A. **Refd.** *Re* Fitz George, *Ex p.* Robson (1905), 53 W. R. 384.

8762. Proceedings no longer pending.]—After the registration of composition resolutions the composition proceedings are no longer pending.—PASHLER *v.* VINCENT (1878), 8 Ch. D. 825; 27 W. R. 2, C. A.

8763. Mere preliminary step—Creditors not bound.]—H. was a creditor of F. & Co., who, being in difficulties, summoned a private meeting of their creditors. The meeting was attended by nineteen out of twenty-seven creditors, whose debts amounted to £2,400, out of a total of £2,628. A resolution was passed by the meeting, & signed by the chairman, that debtors' estate & effects should be assigned to trustees for the benefit of the creditors. In pursuance of such resolution, debtors gave up possession of their property to the trustees nominated by the meeting, but the deed of assignment, although prepared, was never executed. H. was present at the meeting, & assented to the resolution:—*Held:* the resolution did not constitute a binding agreement, but it was only a preliminary step, intended to be binding if the deed was executed by all the creditors, which had not been done.—*Re* FOSTER, *Ex p.* FOSTER (1883), 22 Ch. D. 797; 52 L. J. Ch. 577; 48 L. T. 497; 31 W. R. 774, C. A.

8764. Examination for discovery—Under 1869 Act.]—Where resolutions accepting a composition had been duly registered:—*Held:* the ct. had no jurisdiction under s. 96 of the above Act to order a creditor to be examined for discovery on the application of compounding debtor.—*Re* WRIGHT, *Ex p.* WILLEY (1883), 23 Ch. D. 118; 52 L. J. Ch. 546; 48 L. T. 380; 31 W. R. 553, C. A.

Annotations:—**Consd.** *Re* Hewitt, *Ex p.* Hewitt (1885), 15 Q. B. D. 159; Jeffris *v.* Tomlinson, Tomlinson, Garnishee (1886), 3 T. L. R. 193, D. C. **Refd.** Hood Barrs *v.* Heriot, *Ex p.* Blyth, [1896] 2 Q. B. 338, C. A. **Mentd.** *Re* Aylmer, *Ex p.* Bischoffsheim (1887), 19 Q. B. D. 33, C. A.; Dashwood *v.* Magniac, [1891] 3 Ch. 306, C. A.; Bourne *v.* Keane, [1919] A. C. 815, H. L.

Position of—Trustee.]—*See* Sect. 9, *post.*

—— **Creditors.**]—*See* Sect. 10, *post.*

—— **Debtor.**]—*See* Sect. 11, *post.*

—— **Sureties.**]—*See* Sect. 12, *post.*

SECT. 5.—THE COMPOSITION DEED, SCHEME OR DEED OF ARRANGEMENT.

NOTE.—*In considering the cases set out in this Section, regard must be had to the Note at the beginning of this Part.*

SUB-SECT. 1.—IN GENERAL.

8765. When deed takes effect—Date of registration—Under 1861 Act.]—A composition deed under 1861 Act, so far as its operation depends on the Act, takes effect, for all purposes, from the date of registration, not of execution.—STANGER *v.* MILLER (1865), L. R. 1 Exch. 58; 4 H. & C. 1; 35 L. J. Ex. 49; 11 Jur. N. S. 1005.

PART XXIII. SECT. 4, SUB-SECT. 3.

s. *Failure to comply with resolutions—Act of insolvency.*]—Where resolutions, requesting debtor to surrender his estate under 1871 Act, are passed in debtor's presence at a duly constituted meeting of creditors, & no objection is then made by debtor, failure to comply with such resolutions is an act of insolvency.—*Re* INGLIS (1877), 3 V. L. R. 100.—**AUS.**

8763 i. *Mere preliminary step—Creditors not bound.*]—At a meeting of creditors it was resolved that debtor should assign his estate to trustees. A deed of assignment was prepared by the solr. to the trustees & executed by debtor. The book debts were not assigned by the deed, & at a further meeting of creditors it was resolved that the estate should forthwith be wound up in bkpcy., unless debtor executed an amended deed. Debtor declined so to do, & a petition for adjudication was filed:—*Held:* the first resolution meant that debtor should execute a deed of arrangement & assignment under Debtors & Creditors Act, 1896, & as the deed executed was imperfect & did not carry out the creditors' resolution, there must be an adjudication.—*Re* BECK & TONKS, *Ex p.* WILLIAMS (1879), O. B. & F. 100.—**N.Z.**

8763 ii. ——.——.]—At a meeting of creditors of G., the creditors present agreed to sign a deed of assignment of G.'s assets for the payment of his debts. Subsequently a creditor H., a party to the resolution, refused to sign the deed:—*Held:* until signed the assignment had not become effective, & creditors could claim sequestration of the estate.—GOURLAY, CAVANAGH & Co. *v.* GROMER (1903), 20 S. C. 612; 13 C. T. R. 1090.—**S. AF.**

t. —— *Not enforceable by third party.*]—A third person, who is no party thereto, cannot rely on a resolution of creditors as binding them to a certain course of action in respect to a claim, & as barring them from subsequently agreeing to depart therefrom.—NORDEN (TRUSTEE OF SMITH) *v.* NORDEN (1843), 2 Men. 128.—**S. AF.**

8766. Distinction between composition & scheme of arrangement.]—Where debtor makes over his assets to be administered by a trustee, that is a scheme. Where debtor keeps his assets & undertakes to pay over to the creditors a certain sum, that is a composition (CAVE, J.).—*Re* GRIFFITH (1886), 3 Morr. 111.

8767. —— Assignment for inventory & sale—Not a composition.]—Testator gave certain shares in his property to his nephews & nieces, & he revoked all legacies & bequests which any of his legatees should endeavour to sell, mortgage, or in any way anticipate, & in case any of his nephews or nieces should at any time before their respective legacies became due & payable, become bkpt. or compound with his or their creditors, then he revoked the legacy to such person. One of the nephews, before his share became payable, executed a deed assigning all his stock-in-trade, etc., & all his property & estate, both real & personal, of which he was possessed, or to which he was entitled, to trustees, to make an inventory thereof, & to proceed to sell same for the benefit of his creditors :—*Held :* the deed was not a composition with creditors.—*Re* WALEY'S TRUSTS (1855), 3 Drew. 165 ; 3 Eq. Rep. 380 ; 24 L. J. Ch. 499 ; 25 L. T. O. S. 77 ; 1 Jur. N. S. 338 ; 3 W. R. 286 ; 161 E. R. 866.

8768. Who may execute—Attorney of debtor.]—The execution of a deed of arrangement by debtor personally is not necessary, & it can be executed by the donee of a power of attorney given by debtor for that purpose.—*Re* WILSON, [1916] 1 K. B. 382 ; 85 L. J. K. B. 329 ; 32 T. L. R. 75 ; 60 Sol. Jo. 90 ; [1916] H. B. R. 17, D. C. ; *revsd.* on another point [1916] 1 K. B. 398, C. A.

Annotation :—**Mentd.** *Re* Wilson, *Ex p.* Jones (1916), 85 L. J. K. B. 1408, C. A.

8769. Schedule added to deed after registration—Whether deed valid.]—A deed was registered under 1861 Act, s. 192, which was expressed to be made between debtor, a surety, & scheduled creditors. At the time of registration no schedule was annexed, but a schedule was afterwards added by debtor :—*Held :* the addition of the schedule vitiated the deed.—SELLIN *v.* PRICE (1869), L. R. 2 Exch. 189 ; 36 L. J. Ex. 93 ; 16 L. T. 21 ; 15 W. R. 749.

Annotation :—**Distd.** Wood *v.* Slack (1868), L. R. 3 Q. B. 379.

8770. Deed signed after registration—Whether deed valid.]—A deed of arrangement, whereby debtor assigned all his property to a trustee for his creditors' benefit, made parties thereto of the fourth part "the several persons, cos., & firms whose names & seals are hereunto signed & affixed respectively, being creditors of debtor, & all other creditors of debtor acceding hereto." The trust declared by the deed was to divide the balance of the proceeds of the estate after payment of expenses, etc., "ratably among the creditors parties hereto, including as such creditors, if the trustee & committee of inspection shall determine, but not otherwise, such persons being creditors of debtor as may have refused or neglected to execute these presents." The deed was executed on same day by debtor, the trustee, & one creditor, who signed & sealed in a schedule thereto, & within seven days, was registered under 1887 Act. Subsequently to such registration six other creditors signed & affixed their seals in the schedule :—*Held :* the execution of the deed by the creditors after registration did not amount to an alteration of the deed so as to avoid it or vitiate the registration of it.—*Re* BATTEN, *Ex p.* MILNE (1889), 22 Q. B. D. 685 ; 58 L. J. Q. B. 333 ; 37 W. R. 499 ; 5 T. L. R. 423 ; 6 Morr. 110, C. A.

Annotations :—**Refd.** *Re* Samson & Schreiber's Contract (1895), 39 Sol. Jo. 504. **Mentd.** Maskelyne & Cooke *v.* Smith, [1903] 1 K. B. 671, C. A.

8771. Stamp duty.]—The proposal put forward by debtor provided that all the property of such debtor divisible among his creditors should vest in a trustee, &, subject to the provisions of the scheme, be administered according to the law of bkpcy., that, in addition, the sum of £100 a year out of a pension of £297 belonging to debtor should be paid to the trustee under the scheme until, with the rest of debtor's property, all the costs relating to the bkpcy. should have been paid, & the creditors should have received 15*s.* in the pound upon the amount of their debts, that after payment of 15*s.* in the pound to the creditors upon their debts & of all the costs, charges, & expenses, the trustee should hand over to debtor the surplus of the estate, & that, as from the date of the confirmation of the scheme by the ct., debtor should be released & discharged from all debts provable under the bkpcy. :—*Held :* the above arrangement had more of the elements of a scheme than of a composition, & the fee must be paid on the estimated value of the £100 a year as an asset.—*Re* GRIFFITH (1886), 3 Morr. 111.

PART XXIII. SECT. 5, SUB-SECT. 1.

u. *Distinction between composition & absolute assignment.*]—An instrument in writing, whereby debtor transfers all his assets to an assignee for the purpose of paying a fixed sum to the creditors, & of securing to debtor the residue, is an arrangement by way of composition, & not an absolute assignment under 1887 Act, although stated in the instrument to be under that Act.—GUNDRY *v.* JOHNSTON (1896), 28 O. R. 147.—**CAN.**

a. *Whether acceptance by trustee necessary.*]—A voluntary assignment to an official assignee under 1864 Act, is not valid, unless accepted by the assignee.—YARRINGTON *v.* LYON (1866), 12 Gr. 308.—**CAN.**

b. ——.]—The operation of an assignment made under Assignments Act, 1907 (c. 6), to an official assignee, is suspended until the assignee does some act signifying his acceptance of the assignor's interest. *Qu. :* in the case of a voluntary assignment for the benefit of creditors to an assignee of debtor's choice.—NORTH WEST THEATRE CO. *v.* MCKINNON (1915), 30 W. L. R. 897 ; 31 W. L. R. 226 ; 8 W. W. R. 237, 691 ; *revsd.* on the facts (1916), 52 S. C. R. 588.—**CAN.**

c. *Whether trustee necessary party.*]—It is not necessary that an assignee in insolvency should be a party to a deed of composition.—DREDGE *v.* WATSON (1872), 33 U. C. R. 165.—**CAN.**

d. *Whether for valuable consideration.*]—An assignment by debtor of his estate for the benefit of creditors generally, in consideration of his debts, is made for valuable consideration.—PETER *v.* SHIPWAY (1908), 7 C. L. R. 232.—**AUS.**

e. *Parol composition — Whether valid.*]—A parol composition which does not concern lands, or an assignment of goods, which would not fall within Stat. Frauds, is valid.—BRUNSKILL *v.* METCALF (1853), 2 C. P. 431.—**CAN.**

f. *List of creditors.*]—If the assignment be made to an official assignee a copy of the list of creditors produced at the meeting of creditors need not be appended to the assignment, for in fact no such meeting may be held.—HINGSTON *v.* CAMPBELL (1866), 2 C. L. J. N. S. 299.—**CAN.**

g. —— *& assets inaccurately prepared—What list should contain.*]—If the list of creditors & statement of assets filed with a deed of arrangement are not accurately prepared, being calculated to deceive & mislead, the deed may on that ground be set aside & declared an act of bkpcy.

The names of secured as well as unsecured creditors should appear, & where there were bills of exchange the names of the holders also.—*Re* TONKS, *Ex p.* POLL, 3 J. R. N. S. 1.—**N.Z.**

h. *Where there are joint & several liabilities.*]—The only composition which 1875 Act provides for, in the case of an insolvent firm, is one extending to all the partners, & including both firm creditors & those of the individual members.—*Re* WALKER (1878), 2 A. R. 265.—**CAN.**

k. *Trustee's negligence — Whether deed invalidated thereby.*]—A deed of assignment for benefit of creditors cannot be invalidated by subsequent negligence on the part of trustees.—STEPHENSON *v.* BAUMGARTNER, BAUMGARTNER *v.* STEPHENSON (1868), 3 Agra 104, 321.—**IND.**

8771 i. *Stamp duty.*]—A debtor's deed assigned all his estate to trustees, upon trust to distribute same amongst all his creditors :—*Held :* not chargeable with duty under Stamps Act, 1892, as being an instrument in the nature of a "settlement or deed of gift."—BRETT *v.* IMPORTS COLLECTOR (1896), 22 V. L. R. 29.—**AUS.**

Sect. 5.—The composition deed or deed of arrangement: Sub-sects. 1 & 2, A. & B.]

8772. Duty of commissioners for certifying as to due execution.]—Before certifying that a deed of arrangement within 1849 Act has been executed by the majority required by the provisions of that Act, the comrs. ought to be satisfied that the deed is one within the scope of them.—*Re* WILKES, *Ex p.* WILKES (1855), 5 De G. M. & G. 418; 24 L. J. Bcy. 6; 25 L. T. O. S. 49; 3 W. R. 197; 43 E. R. 932, L. JJ.

Annotations:—**Consd.** Irving *v.* Gray (1858), 3 H. & N. 34; Walter *v.* Adcock & Spokes (1862), 7 H. & N. 541. **Mentd.** *Re* Calvert, *Ex p.* Calvert (1858), 3 De G. & J. 95, L. JJ.

See, also, No. 8793, *post.*

SUB-SECT. 2.—REGISTRATION OF DEED.

A. What Deeds must be registered.

Under Bills of Sale Acts.]—*See* BILLS OF SALE.

8773. Under 1861 Act, s. 194—Deed for benefit of creditors generally.]—1861 Act, s. 194, applies not only to deeds which comply with & are framed under s. 192, but to every deed whatever which is or professes to be, or is obviously on the face of it, intended to be a deed of arrangement between debtor & the whole body of his creditors; every such deed which is not registered in the Ct. of Bkpcy., under s. 194, is inadmissible in evidence.

A deed of composition purported to be entered into between a debtor & the creditors who executed the deed, & the creditors, stated therein to be or represent, at the least, three-fourths in value of the creditors, in consideration of the payment of a composition, which debtor covenanted to pay to them by two instalments on specified days, released their debts. It did not appear whether all the creditors, or what proportion of them in number & value executed the deed. In an action by one of the executing creditors against debtor, the deed of composition being offered in evidence by deft. in support of a plea of release:—*Held:* this was a deed intended to be executed by or binding on the whole body of creditors, & being unregistered it could not be given in evidence.—HODGSON *v.* WIGHTMAN (1863), 1 H. & C. 810; 1 New Rep. 445; 32 L. J. Ex. 147; 7 L. T. 832; 9 Jur. N. S. 308; 11 W. R. 574; 158 E. R. 1110.

Annotations:—**Consd.** Clapham *v.* Atkinson (1864), 4 B. & S. 722. **Folld.** Pritchard *v.* Timothy (1866), 4 H. & C. 393. **Consd.** *Re* Brooksbank, *Ex p.* Atkinson (1870), L. R. 9 Eq. 736. **Refd.** Symons *v.* George (1864), 3 H. & C. 68; Cairncross *v.* Wills (1869), 20 L. T. 529; Clegg *v.* Rees (1871), 25 L. T. 261.

8774. Under 1887 Act, s. 5—Deed for benefit of particular creditors only.]—A family arrangement was arrived at between the tenant for life & the reversioners under the will of T., by which certain debts, which had been incurred by his extrix., the tenant for life, in carrying on his business, were to be paid off, other creditors of his estate satisfied, & various breaches of trust confirmed, & the residue was then to be divided between the beneficiaries. In order to effect the arrangement the tenant for life & the reversioners concurred in executing a conveyance of testator's freehold estates to the vendors upon trust to sell same within a certain time, & to hold the proceeds of sale upon the trusts of a deed of even date therewith:—*Held:* as the arrangement was for the benefit of particular creditors, & not for "the benefit of creditors generally" within s. 4 of the Act, neither of the above deeds came within the letter or spirit of the Act.—*Re* SAMSON AND SCHREIBER'S CONTRACT (1895), 39 Sol. Jo. 504.

8775. —— ——.]—An assignment by debtor for the benefit of certain named creditors only without any option to the remaining creditors to assent to the deed, is not a deed of arrangement for the benefit of the creditors generally, & does not require registration.—*Re* SAUMAREZ, *Ex p.* SALAMAN [1907] 2 K. B. 170; 76 L. J. K. B. 828; 97 L. T. 121; 23 T. L. R. 477; 51 Sol. Jo. 447; 14 Mans. 171, C. A.

Annotations:—**Distd.** *Re* Allix, *Ex p.* Trustee, [1914] 2 K. B. 77. **Consd.** *Re* Halstead, *Ex p.* Richardson, [1917] 1 K. B. 695, C. A. This was altered by 1913 Act, s. 37 (LORD COZENS-HARDY, M.R.).

8776. —— Deed primarily for benefit of debtor & his daughter.]—Debtor, in consideration of an immediate advance of £100 by one of two trustees, assigned all his personal estate by deed to the trustees upon trust to sell, & out of the proceeds, (1) to repay the £100 to the advancing trustee, (2) to discharge debtor's debts & liabilities, & (3) to hold the residue in trust for debtor's daughter. The creditors were not parties to the deed:—*Held:* the primary object of the deed was to benefit debtor & his daughter, & not debtor's creditors generally, & the deed did not fall within the Act, & was not void for want of registration.—*Re* HOBBINS, *Ex p.* OFFICIAL RECEIVER (1899), 6 Mans. 212.

8777. —— Deed for benefit of creditors generally.]—Debtor, who was unable to pay his debts, called a meeting of his creditors, at which he stated that his liabilities were about £5,500, of which about £3,800 was for money lent by relatives, & his assets about £900. It was arranged that the relatives should withdraw their claims, that the creditors should accept a composition of 5*s.* in the pound, & that P., who was present, should be the trustee for the creditors. Three days later a deed was executed between debtor & P., by which debtor, in consideration of £50 paid to him by P., conveyed all his property to P. absolutely "& not as trustee" for debtor or his creditors, & P. covenanted to pay in full all claims against debtor which would have a preferential right in bkpcy. & to pay a composition of 5*s.* in the pound to the creditors on their debts not exceeding £1,800. The deed was not registered:—*Held:* the deed was a deed made for the benefit of creditors generally within s. 4, & was void to all intents & purposes because it was not registered as required by the Act.—HEDGES *v.* PRESTON (1899), 80 L. T. 847.

Annotation:—**Refd.** *Re* Saumerez, *Ex p.* Salaman, [1910] 2 K. B. 170, C. A.

8778. —— ——.]—In Dec., 1892, debtor convened a meeting of eighteen of his principal creditors, & in pursuance of a resolution then passed a deed of arrangement was made between debtor of the first part, two sureties of the second part, a trustee of the third part, & the several persons whose names & seals were thereunto subscribed &

PART XXIII. SECT. 5, SUB-SECT. 2.—A.

l. *Under* 1869 *Act—Deed including real estate.*]—A deed of assignment was executed by debtor under the above Act in the form prescribed but not registered:—*Held:* to make the deed effectual to pass title to real estate under the above Act it should have been registered, or livery of seisin given.—PARLEE *v.* AGRICULTURAL INSURANCE CO. (1876), 3 Pug. 476.—**CAN.**

m. *Under Registration Act,* 1877—*Trusts Act,* 1882—*Deed compounding debts.*]—A deed compounding debts due does not require registration under the above Acts.—CHANDRASHANKAR *v.* BAI MAGAN (1914), I. L. R. 38 Bom. 576.—**IND.**

n. *Preferential assignment.*]—A preferential assignment, no matter how slight or meritorious the preferences may be, & though made for the benefit of all the creditors of the assignor, is not an "assignment for the general benefit of all the creditors" & has no effect until registered.—BLACK *v.* SAWYER (1865), 2 Old. 1.—**CAN.**

affixed being respectively creditors of debtor & thereinafter called " the creditors " of the fourth part, whereby debtor assigned to the trustee a life policy upon trust for the payment of the debts due to the creditors with interest, & covenanted to stand possessed of all money that he should receive from certain sources upon trust for the creditors or their trustees, & the creditors in consideration of the premises covenanted not to sue debtor during the life of his mother. The deed was not registered under the Act, but an affidavit made at the time under the Act by debtor stated that his liabilities were £9,388 16*s.* 8*d.*, & were due to eighteen creditors, whose names & addresses were set out in a schedule to the affidavit. There were four other creditors, not mentioned in the affidavit, whose debts exceeded £5,000 & who were no parties to the transaction. Of the eighteen creditors, thirteen executed the deed, but five did not :—*Held :* the deed was not confined to a limited class of creditors, but was for the benefit of creditors generally, & was void for non-registration.—*Re* ALLIX, *Ex p.* TRUSTEE, [1914] 2 K. B. 77 ; 83 L. J. K. B. 665 ; 110 L. T. 592 ; 58 Sol. Jo. 250 ; 21 Mans. 1.

8779. —— Deed executed by foreign debtors abroad—" Debtor."]—The word " debtor " in the Act, which is supplementary to the law of bkpcy., means debtor subject to Bkpcy. Acts, so that a deed of assignment for the benefit of creditors executed by foreign debtors in the country of their domicil, who are possessed of goods in England, in respect of a business carried on through an agent, does not require registration here, & there is no *lex loci rei sitæ* in respect of such goods to interfere with the operation of the maxim *Mobilia sequuntur personam.*—DULANEY *v.* MERRY & SONS, [1901] 1 K. B. 536 ; 70 L. J. K. B. 377 ; 84 L. T. 156 ; 49 W. R. 331 ; 17 T. L. R. 253.

Annotation :—**Mentd.** *Re* Anderson, [1911] 1 K. B. 896.

8780. —— Deed executed by company.]—The Act does not apply to arrangements made by limited cos.—*Re* RILEYS, LTD., HARPER *v.* RILEYS, [1903] 2 Ch. 590 ; 72 L. J. Ch. 678 ; 89 L. T. 529 ; 51 W. R. 681 ; 10 Mans. 314.

8781. —— Application for membership of Stock Exchange coupled with rules & notice of default.]—The application for admittance to membership of the Stock Exchange, coupled with the rules of the Stock Exchange & the member's notice of default, operate as an assignment of his property for the benefit of his Stock Exchange creditors, which is a deed of arrangement within s. 4, as extended by 1913 Act, s. 37, & such assignment, not being registered, is void.—*Re* HALSTEAD, *Ex p.* RICHARDSON, [1917] 1 K. B. 695 ; 86 L. J. K. B. 621 ; 116 L. T. 386 ; 33 T. L. R. 191 ; [1917] H. B. R. 60, C. A.

8782. Under 1914 (Deeds) Act—Declaration of trust for various creditors.]—H., a solr., acted for pltfs., trustees of a marriage settlement, & for other trustees & clients. In 1906 he received £4,000 belonging to pltfs.' trust in respect of a mtge., & misappropriated it. In Dec., 1913, H. mortgaged property of his own to a building society for £2,000, & in May, 1916, being, as was admitted, insolvent, signed what purported to be declarations of trust of property in favour of various trustees & other clients for whom his firm acted. The declaration, as regarded pltfs.' trust stated that the society's mtge. was to be taken over, & H. declared himself a trustee of the property " for the persons or trusts above-named, & with power to myself or my exor. to vary the allotment if another division be found more satisfactory : "—*Held :* the document of May, 1916, was not an assignment within the above Act.—RADCLIFFE *v.* ABBEY ROAD & ST. JOHN'S WOOD PERMANENT BUILDING SOCIETY (1918), 87 L. J. Ch. 557 ; 119 L. T. 512 ; 62 Sol. Jo. 667 ; [1918–9] B. & C. R. 84.

B. The Affidavit.

8783. Who may make—Power of court to dispense with debtor making same.]—Where the requisitions of 1861 Act, s 192, have been complied with, in respect of a trust deed, the ct. will, in a proper case, dispense with the affidavit of debtor himself.—*Re* HUTCHINSON (1867), 2 Ch. App. 330 ; 36 L. J. Bcy. 16 ; 15 W. R. 388, L. JJ.

8784. —— Debtor absconding—Accountant.]—Debtor having executed a deed of arrangement under 1861 Act, s. 192, absconded. Upon the application of the trustee under the deed, the ct. made an order for registration on an affidavit by the accountant, who had prepared the list of creditors, stating that the list produced contained, to the best of his belief, a full & true account of all debts owing from debtor, thus dispensing with the affidavit of debtor himself.—*Re* BLAKEBOROUGH, *Ex p.* TRUSTEE (1864), 13 W. R. 105.

Annotation :—**Folld.** *Re* Grimwade, *Ex p.* Trustees (1866), 15 W. R. 49.

8785. —— One of two joint debtors dying after execution of deed—Person able to depose.]—Where, after the execution by debtors in partnership of a deed of composition under 1861 Act, s. 192, one of the partners dies, the ct. will allow registration, upon substitution for the affidavit of the deceased partner of an affidavit by some person able to depose thereto of the truth of the joint & separate accounts of the deceased partner.—ANON. (1867), 16 W. R. 308.

8786. —— Debtor dying after execution before registration of deed—Widow.] — Where debtor dies after his execution of a deed of assignment, but before registration, the ct. will dispense with the affidavit of debtor & will accept in lieu thereof an affidavit by the widow.—ANON. (1868), 16 W. R. 651.

8787. —— Not debtor's attorney—1914 (Deeds) Act, s. 5 (1).]—The affidavit required by the above sub-sect. must be sworn by debtor personally, and a deed of arrangement is void, if the affidavit is made by another person, *e.g.* debtor's attorney.—*Re* WILSON [1916] 1 K. B. 382 ; 85 L. J. K. B. 329 ; 32 T. L. R. 75 ; 60 Sol. Jo. 90 ; [1916] H. B. R. 17, D. C. ; *revsd.* on another point [1916] 1 K. B. 398, C. A.

Annotation :—**Apprvd.** *Re* Wilson, *Ex p.* Jones (1916), 85 L. J. K. B. 1408, C. A.

8788. *S. P. Re* WILSON, *Ex p.* JONES (1916), 85 L. J. K. B. 1408 ; 114 L. T. 969 ; [1916] H. B. R. 70, C. A.

8789. Before whom sworn—Solicitor to trustee of deed.]—A deed of arrangement was registered, but one of the affidavits required by 1887 Act, to

PART XXIII. SECT. 5, SUB-SECT. 2. —B.

o. *Sufficiency of—" True copy."*]—A deed of assignment for the benefit of creditors was registered within one month from its execution. The affidavit filed stated that the copy was a " true copy," instead of stating that the copy was an " examined copy " : —*Held :* the deed had been properly registered.—*Re* CLOSE, *Ex p.* NEW ZEALAND LOAN *v.* MERCANTILE AGENCY, LTD. (1901), 1 S. R. N. S. W. 7.—**AUS.**

p. —— *Consideration.*]—An affidavit filed with an assignment for the benefit of creditors must state that the assignment was made " for good consideration."—MASON *v.* THOMAS (1864), 23 U. C. R. 305.—**CAN.**

q. —— *Value of effects.*]—A statement in debtor's affidavit that the amount in value of his property, credits, estate & effects comprised in

Sect. 5.—The composition deed or deed of arrangement: Sub-sect. 2, B., C., D., E. & F.]

be filed with the deed for the purposes of registration had been sworn before a comr. for oaths, who was solr. to the trustee of the deed :—*Held :* the deed of arrangement was void as it had not been registered in the manner provided by the Act.—*Re* BAGLEY, [1911] 1 K. B. 317 ; 80 L. J. K. B. 168 ; 103 L. T. 470 ; 55 Sol. Jo. 48 ; 18 Mans. 1, C. A. ;

Annotations :—**Mentd.** *Re* Wilson, [1916] 1 K. B. 382, C. A. ; *Re* Wilson, *Ex p.* Jones (1916), 85 L. J. K. B. 1408, D. C.

8790. Whether joint & separate debts must be distinguished.]—The affidavit required by 1861 Act, s. 192, need not distinguish between joint & separate debts.—WALKER *v.* NEVILL (1865), 3 H. & C. 403 ; 34 L. J. Ex. 73 ; 11 L. T. 774 ; 11 Jur. N. S. 246 ; 13 W. R. 523 ; 159 E. R. 588.

Annotations :—**Refd.** Ray *v.* Jones (1865), 19 C. B. N. S. 416 ; Newton *v.* Hallett (1868), 19 L. T. 471.

8791. Whether names & addresses of secured creditors must be given—1887 Act, s. 6 (1).]—*Held :* (1) under the above sub-sect. it was not necessary to set out in the schedule to debtor's affidavit the names & addresses of those creditors whose debts were secured ; (2) an omission to do so did not render the registration bad.—CHAPLIN *v.* DALY (1894), 71 L. T. 569 ; 2 Mans. 1 ; 15 R. 32.

8792. Whether names & addresses of all creditors must be given—1887 Act, s. 6 (1).]—A deed of arrangement is not void, because the affidavit of debtor, required by the above sub-sect. to be filed upon the registration of the deed, does not contain the names & addresses of all the creditors.—MASKELYNE & COOKE *v.* SMITH, [1903] 1 K. B. 671 ; 72 L. J. K. B. 237 ; 88 L. T. 148 ; 51 W. R. 372 ; 19 T. L. R. 270 ; 47 Sol. Jo. 317 ; 10 Mans. 121, C. A.

C. Grounds for Refusal of Registration.

See also cases in Sect. 4, sub-sect. 2, B., *ante*, Sect. 6, sub-sect. 2, Sect. 10, sub-sect. 3, B., *post.*

8793. Deed not for benefit of all creditors.]—In 1849 Act, s. 224, relating to arrangements by deed, the word " creditors " includes those creditors with whom the arrangement has been entered into, & *semble :* in general, when debtors are a partnership, it means separate as well as joint creditors.

Where a deed of arrangement purporting to be made between the members of a firm & the creditors of them, or of some or one of them, was not shown by the certificate of the inspectors to have been executed by six-sevenths of the separate as well as of the joint creditors :—*Held :* the comr. had rightly declined certifying the execution of the deed. *Qu. :* whether the deed ought to have been executed by six-sevenths of each class of creditors.

A case may exist in which the ct., though not satisfied that a deed is within the sect., may, nevertheless, with propriety certify its execution, there being a discretion in such a case to be exercised according to the circumstances of it. —*Re* CALVERT, *Ex p.* CALVERT (1858), 3 De G. & J. 95 ; 27 L. J. Bcy. 42 ; 44 E. R. 1204, L. JJ.

Annotations :—**Refd.** Leonard *v.* Sheard (1859), 28 L. J. Q. B. 183 ; Tomlin *v.* Dutton (1868), 9 B. & S. 251.

See, also, No. 8772, *ante.*

8794. —— Deed not including all debtor's property.]—1861 Act, s. 192, is applicable only to deeds which contain provisions for the benefit of all the creditors, & a trust deed for the benefit of those creditors only, who shall execute same within twenty-eight days, is not within that sect., & cannot be registered except under s. 194.

It is not required by the above sect. that a deed for the benefit of creditors should comprise the whole of debtor's property.—*Re* WOODHOUSE, *Ex p.* MORGAN (1863), 1 De G. J. & Sm. 288 ; 1 New Rep. 339 ; 32 L. J. Bcy. 15 ; 7 L. T. 729 ; 9 Jur. N. S. 559 ; 11 W. R. 316 ; 46 E. R. 116, L. C.

Annotations :—**Follid.** Berridge *v.* Abbott (1863), 13 C. B. N. S. 507 ; Copeman *v.* Hart (1863), 14 C. B. N. S. 91 ; Ilderton *v.* Castrique (1863), 14 C. B. N. S. 99 ; Pearson *v.* Pearson (1866), L. R. 1 Exch. 308. **Consd.** *Re* Brooksbank, *Ex p.* Atkinson (1870), L. R. 9 Eq. 736 ; Clegg *v.* Rees (1871), 25 L. T. 261 ; Durant *v.* Robinson (1876), 34 L. T. 617 ; Benecke *v.* Whittall (1877), 2 App. Cas. 602, P. C. **Refd.** King *v.* Randall (1863), 14 C. B. N. S. 721 ; Clapham *v.* Atkinson (1864), 4 B. & S. 730, Ex. Ch. ; Turquand *v.* Moss (1864), 17 C. B. N. S. 15 ; Lloyd *v.* Harrison (1865), 6 B & S. 36 ; Giddings *v.* Penning (1866), 4 H. & C. 498 ; Hobson *v.* Thelluson (1867), L. R. 2 Q. B. 642 ; *Re* Roots, *Ex p.* Roots (1867), 2 Ch. App. 559, L. JJ. **Mentd.** *Re* Smith, *Ex p.* Cockburn (1864), 3 De G. J. & Sm. 175 ; *Re* Smith, *Ex p.* Smith (1864), 3 De G. J. & Sm. 218 ; Vizard's Trusts (1866), 1 Ch. App. 588 ; Williams *v.* Swansea Canal Navigation Co. (1868), L. R. 3 Exch. 158.

8795. Invalid clause capable of rejection.]—A power in a deed of assignment for the benefit of creditors, enabling the trustees to make such arrangements with the creditors whose debts are under £10, as they may deem expedient, is inconsistent with 1861 Act, but where the deed showed a clear intention that the estate should be administered as in bkpcy. :—*Held :* the particular power might be rejected as repugnant to the general tenor of the deed, & its existence formed no objection to the capacity of registering it.—*Re* JOSEPHS' ASSIGNMENT, *Ex p.* SPYER (1863), 1 De G. J. & Sm. 318 ; 2 New Rep. 560 ; 32 L. J. Bcy. 62 ; 8 L. T. 743 ; 9 Jur. N. S. 949 ; 11 W. R. 1008 ; 46 E. R. 128, L. C.

Annotations :—**Consd.** Leigh *v.* Pendlebury (1864), 15 C. B. N. S. 815 ; Durant *v.* Robinson (1876), 34 L. T. 617. **Refd.** Turquand *v.* Moss (1864), 17 C. B. N. S. 15 ; Pearson *v.* Pearson (1866), 4 H. & C. 316.

8796. Deed executed by attorney for debtor abroad.] — Debtor, being out of the jurisdiction, by a deed attested by a solr., appointed A. to be his attorney to execute a deed of composition. The execution of the composition deed by the attorney was attested by a solr. :—*Held :* this was a sufficient execution, within 1861 Act, s. 192. —*Re* BELL (1865), 2 De G. J. & Sm. 672 ; 6 New Rep. 392 ; 13 W. R. 1002 ; 46 E. R. 536, L. C.

8797. Deed signed before 1869 Act—Time not enlarged—" As in course of registration."]—*Held :* a deed of composition executed by debtor two days before the day upon which the above Act came into operation, but in respect of which no application had been made under 1868 Act, s. 3, to enlarge the time for registration, was to be regarded " as in course of registration," within General Rules of Jan. 1, 1870, r. 316, & as such entitled to be registered.—*Re* A TRUST DEED (1870), 21 L. T. 624.

8798. One partner not executing deed—Partnership dissolved at time of execution of deed.]—A partnership existing between two persons had been dissolved fifteen months. One of the partners in the late firm executed a composition deed under 1861 Act, s. 192 :—*Held :* the fact that the other partner had not executed the deed did not constitute a valid objection to registration.—*Re* HENDRY (1870), 18 W. R. 295.

a deed of arrangement, is under a certain sum, sufficiently complies with 1861 Act, s. 192.—RUSSELL *v.* MURPHY (1865), 16 I. Ch. R. 54.—IR.

r. *When dispensed with.*]—Where an arranging debtor became mentally incapable of swearing the affidavit leading to registration, the affidavit was dispensed with.—*Re* X. (AN ARRANGING DEBTOR) (1910), 44 I. L. T. 167.—IR.

D. Certificate of Registration.

8799. Sufficiency of—Signed by person "acting for" registrar.]—*Semble:* a certificate of registration under 1861 Act, s. 198, by a person professing to be "acting for" the chief registrar in bkpcy. is a sufficient certificate.—LEIGH *v.* PENDLEBURY (1864), 15 C. B. N. S 815; 3 New Rep. 475; 33 L. J. C. P. 172; 10 L. T. 30; 10 Jur. N. S. 296; 12 W. R. 468; 143 E. R. 1005.

Annotations:—**Refd.** Lloyd *v.* Harrison (1865), 6 B. & S. 36; Ames *v.* Colnaghi (1868), L. R. 3 C. P. 359. **Mentd.** Balder *v.* Pelt (1864), 5 B. & S. 213; Turquand *v.* Moss (1864), 17 C. B. N. S. 15; Skilton *v.* Symonds (1865), 18 C. B. N. S. 418; Coles *v.* Turner (1866), L. R. 1 C. P. 373, Ex. Ch.; Hickmott *v.* Simmonds (1866), L. R. 2 Eq. 462; *Re* Trust Deed, *Ex p.* Snibstone Colliery Co. (1867). 15 L. T. 545.

8800. Effect of—Primâ facie evidence—Of compliance with statutory requirements.]—The certificate of registration is sufficient *primâ facie* evidence that the terms of 1861 Act, ss. 192, 199, have been complied with.—ANON. (1863), 1 New Rep. 309.

8801. —— —— Of validity of deed.]—*Held:* though a certificate of registration was *primâ facie* evidence of the validity of a deed of trust, yet it was competent to a creditor to tender evidence in opposition, & the ct. would, before deciding the question of validity, hear further evidence on either side.—*Re* NEAL, *Ex p.* PAGE (1863), 1 De G. J. & Sm. 283; 32 L. J. Bcy. 14; 46 E. R. 114.

Annotations:—**Consd.** Anon. (1863), 1 New Rep. 309; Durant *v.* Robinson (1876), 34 L. T. 617. **Refd.** *Re* Greaves, *Ex p.* Greaves (1870), 5 Ch. App. 326, L. J.

—— **As bar to execution.**]—*See* Sect. 10, subsect. 3, C., *post.*

E. Cancellation of Registration.

8802. Jurisdiction of court.]—*Semble:* the Ct. of Bkpcy. has power to cancel the registration of an invalid deed.—LLOYD *v.* HARRISON (1865), 6 B. & S. 36; 6 New Rep. 25; 34 L. J. Q. B. 97; 11 Jur. N. S. 364; 13 W. R. 602; 122 E. R. 1111; *affd.* (1866), L. R. 1 Q. B. 502, Ex. Ch.

Annotations:—**Mentd.** Marks *v.* Hall (1866), 7 B. & S. 839; Parkin *v.* Ernest (1867), 16 L. T. 713; Staffordshire Banking Co. *v.* Emmott (1867), L. R. 2 Exch. 208; Williams *v.* Rose (1867), 17 L. T. 253; Ames *v.* Colnaghi (1868), L. R. 3 C. P. 359; Hargreaves *v.* Armitage (1868), L. R. 4 Q. B. 143; Rossi *v.* Bailey (1868), L. R. 3 Q. B. 621; Ames *v.* Waterlow (1869), L. R. 5 C. P. 53; Allen *v.* Carter (1870), L. R. 5 C. P. 414.

8803. ——.]—*Qu.:* whether the Ct. of Bkpcy. has jurisdiction to annul the registration of a creditor's deed.—*Re* SAVIN, *Ex p.* SAVIN (1866), 1 Ch. App. 616; 35 L. J. Bcy. 37; 15 L. T. 150, L. JJ.

Annotations:—**Consd.** *Re* Williams, *Ex p.* Williams (1866), 15 L. T. 451; *Re* Greaves, *Ex p.* Greaves (1870), 5 Ch. App. 326, L. J. **Mentd.** *Re* Hughes (1866), 15 L. T. 304; *Re* Prior, *Ex p.* Osenton (1869), 4 Ch. App. 690, L. JJ.; *Re* Pullen, *Ex p.* Williams (1870), L. R. 10 Eq. 57; *Re* Jones, *Ex p.* Jones (1873), L. R. 16 Eq. 386.

8804. —— Inadequate composition—Concealment.]—The ct. has jurisdiction to cancel the registration of a deed of composition, where there appears evidence that same was obtained by the concealment from an assenting creditor of the greater part of the amount really due, & if the composition is unreasonable, having regard to debtor's assets.—*Re* WILDE (1869), 19 L. T. 752; 17 W. R. 368.

Annotation:—**Apprvd.** *Re* Greaves, *Ex p.* Greaves (1870), 5 Ch. App. 326, L. J.

8805. —— —— Importing fraud.]—A creditor's deed, under 1861 Act, s. 192, when registered, is in the nature of a record, & the ct. has power to order the registration to be vacated for inadequacy of composition importing fraud.—*Re* PULLEN, *Ex p.* WILLIAMS (1870), L. R. 10 Eq. 57; 39 L. J. Bcy. 1; 18 W. R. 406.

Annotation:—**Mentd.** *Re* Harper, *Ex p.* Linsley (1873), 42 L. J. Bcy. 109.

8806. —— Fraud—Insufficient assent.]—Where a creditors' deed has been registered under 1861 Act, s. 192, without having been assented to as required by the Act, the ct. will not necessarily order the registration to be cancelled: but it will do so where the deed is fraudulent, & one to which the assenting creditors must be supposed to have assented on the assumption that it would not be registered unless the requisite amount of assents were obtained.

I do not say that in every case where a deed is bad as against dissentient creditors, the registration of that deed ought to be cancelled, but I do say that where a deed is fraudulent the registration unquestionably ought to be cancelled, if there is jurisdiction to cancel it, especially where no act has been done under the deed, & where every creditor must be taken to have assented on the supposition that a valid assent to the deed must be obtained, or that it could not be registered (GIFFARD, L.J.).—*Re* GREAVES, *Ex p.* GREAVES (1870), 5 Ch. App. 326; 22 L. T. 184; 18 W. R. 363, L. J.

Annotation:—**Mentd.** *Re* Pullen, *Ex p.* Williams (1870), L. R. 10 Eq. 57.

8807. Grounds for refusing application—Delay.]—A creditor's deed was registered on Mar. 16 under 1861 Act, s. 192. On Apr. 16, a non-assenting creditor became aware that a number of addresses of creditors in the account which had been filed with it, according to the General Order of May 22, 1862, were imperfect, so that letters sent to them had been returned through the Dead-Letter Office. On May 31, he gave notice to annul the registration:—*Held:* the time which had been allowed to elapse before the application was fatal to it.—*Re* SAVIN, *Ex p.* SAVIN (1866), 1 Ch. App. 616; 35 L. J. Bcy. 37; 15 L. T. 150, L. JJ.

Annotations:—**Folld.** *Re* Hughes (1866), 15 L. T. 304. **Distd.** *Re* Williams, *Ex p.* Williams (1866), 15 L. T. 451. **Consd.** *Re* Pullen, *Ex p.* Williams (1870), L. R. 10 Eq. 57. **Refd.** *Re* Prior, *Ex p.* Osenton (1869), 4 Ch. App. 690, L. JJ.; *Re* Jones, *Ex p.* Jones (1873), L. R. 16 Eq. 386. **Mentd.** *Re* Greaves, *Ex p.* Greaves (1870), 5 Ch. App. 326, L. J.

8808. —— ——.]—Mere delay in applying to set aside a creditors' deed for fraud is itself no ground for refusing an application to cancel the registration, if the position of the parties be not altered.—*Re* PULLEN, *Ex p.* WILLIAMS (1870), L. R. 10 Eq. 57; 39 L. J. Bcy. 1; 18 W. R. 406.

Annotation:—**Refd.** *Re* Harper, *Ex p.* Linsley (1873), 42 L. J. Bcy. 109.

F. Other Cases. *See* cases, *infra.*

PART XXIII. SECT. 5, SUB-SECT. 2.—D.

s. *Sufficiency of memorial.*]—The memorial of registration ought to be a copy of the entire sched. of property both real & personal but a failure in this respect does not render the deed void.—*Re* CURLE (1866), 3 W. W. & A'B. 56.—AUS.

PART XXIII. SECT. 5, SUB-SECT. 2.—F.

t. *What amounts to registration—Delivery at registrar's house.*]—An assignment was made for the benefit of creditors, which the assignee delivered to the Registrar of Deeds at his house, at 3 a.m. with instructions to file. The registrar did not mark it "filed," nor file it, but recorded it as a deed of land:—*Held:* the delivering of the instrument at the registrar's house, with instructions to file, was sufficient.—FISHER *v.* BISHOP (1854), 5 R. & G. 451.—CAN.

a. *Deed must be filed as well as registered.*]—C. assigned a mill, with the machinery in it, for creditors. The deed was registered on the day of execution, but not filed; on the day after the execution, the sheriff seized the machinery under a *fi. fa.*:—*Held:* for want of filing the assignment the *fi. fa.* must prevail.—CARSCALLEN *v.* MOODIE (1857), 15 U. C. R. 92.—CAN.

b. *Time for registration & filing of deed—Extension of.*]—The time for

Sect. 5.—The composition deed or deed of arrangement: Sub-sect. 3. Sect. 6: Sub-sect. 1, A. & B.]

SUB-SECT. 3.—CONSTRUCTION OF DEED.

See Sect. 7, *post.*

SECT. 6.—**APPROVAL BY COURT.**

NOTE.—*In considering the cases set out in this Section, regard must be had to the Note at the beginning of this Part.*

SUB-SECT. 1.—DISCRETION OF COURT.

A. Extent of Discretion.

8809. Whether bound to approve—Better terms unobtainable—Application under 1869 Act, s. 28.]—Under the above sect. the ct. is not bound to approve of resolutions passed by the creditors of bkpt. authorising the trustee to accept a composition, or assent to a general scheme of settlement of bkpt's. affairs, even if it sees that the majority have been acting *bonâ fide* in the interest of the creditors, & that better terms cannot be obtained for the creditors.—*Re* HICKMAN, *Ex p.* STRAWBRIDGE (1883), 25 Ch. D. 266; 53 L. J. Ch. 323; 49 L. T. 638; 32 W. R. 173, C. A.; *revsg.* S. C. *sub nom. Re* TAMLYN, *Ex p.* HICKMAN, 48 L. T. 913.

8810. —— Reasonable security provided.]—The ct. is not bound to approve a proposal for a scheme of arrangement, if it provides reasonable security for payment of not less than the statutory minimum on debtor's unsecured debts. If it provides such security it lies in the discretion of the ct., upon consideration of all the circumstances, to approve, or refuse to approve, the scheme.—*Re* BURR, *Ex p.* BOARD OF TRADE, [1892] 2 Q. B. 467; 61 L. J. Q. B. 591; 66 L. T. 553; 8 T. L. R. 515; 9 Morr. 133, C. A.

Annotations :—**Folld.** *Re* Webb, *Ex p.* Board of Trade, [1914] 3 K. B. 387, C. A. **Refd.** *Re* E. A. B. (1901), 85 L. T. 773; *Re* Utley (1901), 17 T. L. R. 349. **Mentd.** *Re* Baines, *Ex p.* Board of Trade (1902), 86 L. T. 691; *Re* Beer, *Ex p.* Beer, [1903] 1 K. B. 628.

8811. Whether bound to refuse to approve—Debtor guilty of offences—Barring immediate unconditional discharge.]—If it is manifest that the composition or scheme is the best thing for the creditors, the registrar is not bound to refuse to approve it because debtor has been guilty of offences, which would under 1883 Act have prevented an immediate & unconditional discharge.—*Re* GENESE, *Ex p.* KEARSLEY (1886), 18 Q. B. D. 168; 56 L. J. Q. B. 220; 56 L. T. 79; 3 T. L. R. 74; 3 Morr. 274, C. A.

Annotations :—**Refd.** *Re* Bottomley, *Ex p.* Bottomley (1893), 10 Morr. 262. **Mentd.** *Re* Barlow, *Ex p.* Thornber (1886), 56 L. T. 168; *Re* Waugh (1886), 3 T. L. R. 264; *Re* Reed, Bowen (1887), 3 T. L. R. 433; *Re* Wood (1888), 4 T. L. R. 277; *Re* Beer, *Ex p.* Beer, [1903] 1 K. B. 628, C. A.

8812. —— —— Under 1890 Act, s. 8 (3).]—Although debtor, by whom application is made to the ct. to approve a scheme of arrangement previously accepted by the creditors, may be proved to have committed an offence under the above sub-sect., the ct. is not for that reason absolutely bound to refuse to approve the scheme.

If the offences are proved, & the circumstances in which they are proved to have been committed are such that debtor, although he may have done wrong, yet need not in the interests of the State be treated as a person with whom the creditors ought not to be allowed to negotiate, the ct. is at liberty to approve the scheme, notwithstanding the commission of those offences.—*Re* BOTTOMLEY, *Ex p.* BOTTOMLEY (1893), 10 Morr. 262.

Annotation :—**Consd.** *Re* Webb, *Ex p.* Board of Trade, [1914] 3 K. B. 387, C. A.

8813. —— Reasonable security not provided.]—If a proposal for a scheme of arrangement does not provide security for the statutory minimum, the ct. is bound to refuse the proposal.—*Re* BURR, *Ex p.* BOARD OF TRADE, [1892] 2 Q. B. 467; 61 L. J. Q. B. 591; 66 L. T. 553; 8 T. L. R. 515; 9 Morr. 133, C. A.

Annotation :—**Consd.** *Re* Baines, *Ex p.* Board of Trade (1902), 86 L. T. 691, D. C. **Folld.** *Re* Webb, *Ex p.* Board of Trade, [1914] 3 K. B. 387, C. A. **Mentd.** *Re* E. A. B. (1901), 85 L. T. 773; *Re* Utley (1901), 17 T. L. R. 349; *Re* Beer, *Ex p.* Beer, [1903] 1 K. B. 628, C. A.

8814. —— —— Acceptance by creditors.]—The ct. has no discretion to approve a proposal for a scheme of arrangement, unless it is satisfied that the scheme provides reasonable security for the payment of 7*s.* 6*d.* in the pound within a reasonable time. In such a case the fact that the creditors have by the statutory majority accepted the scheme is immaterial.—*Re* WEBB, *Ex p.* BOARD OF TRADE, [1914] 3 K. B. 387; 83 L. J. K. B. 1386; 111 L. T. 175; 58 Sol. Jo. 581; 21 Mans. 169, C. A.

See, now, 1914 Act, s. 16 (10).

8815. May approve—Some creditors withdrawing—To allow statutory dividend to be paid.]—The ct. may sanction a composition or scheme under 1890 Act, s. 3 (9), though some of the unsecured creditors release or withdraw their claims, so as to allow for the payment of not less than 7*s.* 6*d.* in the pound to the rest of the unsecured creditors.—*Re* UTLEY (1901), 17 T. L. R. 349.

Annotations :—**Refd.** *Re* Ashmead-Bartlett (1901), 18 T. L. R. 68; *Re* Aron (1905), 21 T. L. R. 693.

See, now, 1914 Act, s. 16 (10).

filing a deed of arrangement was extended, on an affidavit being made by the town agent of the solr. that search had been made, & no other petition or deed of arrangement had been filed by debtor.—*Re* A. (1892), 26 I. L. T. Jo. 403.—**IR.**

c. —— ——.]—Where, through a fatality, the time prescribed by Deeds of Arrangement Act, s. 5, for registering an assignment for the benefit of creditor had elapsed, the ct. extended the time upon an affidavit of search in the Registry of Bills of Sale Office that no bill of sale had been registered since the date of the deed.—*Re* BLACK (1893), 28 I. L. T. 73.—**IR.**

d. —— ——.]—Where an arranging debtor became mentally incapable of swearing the affidavit leading to registration, & the statutory period for registering the deed was also exceeded the time for registration was extended.—*Re* X. (AN ARRANGING DEBTOR) (1910), 44 I. L. T. 167.—**IR.**

e. *Place for deposit of registered deeds.*]—The place prescribed by law for the deposit of deeds for registration & no other can be resorted to, & no other will be valid.—*Re* SAINT (1883), 6 Nfld. L. R. 477.—**NFLD.**

PART XXIII. SECT. 6, SUB-SECT. 1. —A.

f. *Whether bound to approve—No specific ground for rejection.*]—Where the proposal of an arranging debtor is accepted by the statutory majority of his creditors it ought to be acted on by the ct., unless there be some specific ground for rejecting it.—*Re* FRY, [1913] 2 I. R. 273; 46 I. L. T. 289.—**IR.**

g. *Whether bound to refuse to approve—Majority of creditors opposed to composition.*]—The ct. has not power to turn an arrangement into bkpcy., at the second meeting, on the ground that there is a majority of creditors against the trader's offer of a composition.—*Re* A. B. (1869), 3 I. L. T. Jo. 695.—**IR.**

8811 i. —— *Fraudulent conduct.*]—If a trader's conduct be fraudulent it may disentitle him to come in under the arrangement clauses at all. But negligent & improper trading, & loose statements made to creditors, without any fraudulent intent, will not prevent him doing so.—*Re* KELLY (1861), 13 Ir. Jur. 258.—**IR.**

8814 i. —— *Majority of creditors assenting to composition—Commercial dishonesty—Fraud.*]—The ct. should decline to sanction an arrangement even when assented to by a majority of creditors, where the scheme is unreasonable & debtor's conduct has been commercially immoral or reckless, or his debts were incurred fraudulently.—*Re* FRY, [1913] 2 I. R. 273; 46 I. L. T. 289.—**IR.**

k. —— *Debtor abandoning business—Repayment of apprenticeship fee.*]—Where a person, to whom an apprentice has been bound, petitions the cc.

8816. —— —— Withdrawal conditional.]—*Semble:* there may be cases, in which the ct. might approve a scheme which provided for the conditional withdrawal by some creditors of their claims.—*Re* FLEW, *Ex p.* FLEW, [1905] 1 K. B. 278; 74 L. J. K. B. 280; 92 L. T. 333; 53 W. R. 438; 12 Mans. 1, C. A.

8817. May inquire into debtor's statement of affairs—Not bound thereby—Although agreed by creditors.]—In determining whether it shall give sanction to resolutions for the liquidation of the affairs of debtor by arrangement, the ct. or registrar is not bound by the statement of affairs of debtor put forward & agreed to by the creditors, but such ct. or registrar is entitled to inquire into the statement for the purpose of seeing whether the composition or liquidation is reasonable & calculated to benefit the general body of creditors.—*Re* MCALPINE, *Ex p.* MCALPINE (1884), 1 Morr. 126.

8818. May act on own opinion—Not bound by opinion of creditors—Or of official receiver.]—The ct. is not bound by the opinion of the creditors themselves or by the opinion of the official receiver, but will act on its own opinion.—*Re* BROWNE & WINGROVE, *Ex p.* THE DEBTORS, [1890] W. N. 131, C. A.

8819. May reopen examination of bankrupt—Not bound to do so.]—Where the creditors of debtor, who has been adjudged bkpt. & whose public examination has been concluded, accept a proposal for a composition or scheme of arrangement, the ct. is not bound to reopen the public examination of bkpt. before approving the proposal. The ct. has power to reopen the examination under 1883 Act, s. 104 (1), but will only do so in cases where there appears to be good reason for making further investigation into bkpt.'s affairs.—*Re* HENCKE (1906), 22 T. L. R. 338.

B. Exercise of Discretion.

8820. Should be judicial—Decision should be given judicially—1869 Act, ss. 28, 126.]—In giving or withholding the approval of the ct. to a composition with creditors, accepted by the proper majority, the judge is exercising a judicial discretion, & is bound to give his decision judicially upon sufficient reasons.—*Re* DURHAM, *Ex p.* MERCHANT BANKING CO. OF LONDON (1881), 16 Ch. D. 623; 50 L. J. Ch. 606; 44 L. T. 358; 29 W. R. 363, C. A.

8821. —— Independent of creditors' wishes—1883 Act, ss. 18, 28.]—The registrar, in deciding whether he will or will not approve a composition or scheme of arrangement accepted by the creditors of bkpt., is exercising a judicial discretion, & it is his duty to form his own judgment, & not to be influenced by the wishes of the creditors.—*Re* WALLACE, *Ex p.* CAMPBELL (1885), 15 Q. B. D. 213; 54 L. J. Q. B. 382; 53 L. T. 208; 2 Morr. 167, C. A.

8822. —— —— 1883 Act, s. 18.]—In determining whether to approve a scheme accepted by creditors, the ct. must form its own judgment whether the scheme is reasonable & calculated to benefit the general body of creditors, & must not be influenced by the wishes of the majority of the creditors. If the registrar has refused to approve of such a scheme, the Ct. of Appeal will not reverse his decision unless it is satisfied that he has exercised his discretion wrongly.—*Re* REED, *Ex p.* REED (1886), 17 Q. B. D. 244; 55 L. J. Q. B. 244; 34 W. R. 493; 2 T. L. R. 458; 3 Morr. 90, C. A.; *subsequent proceedings, sub nom. Re* REED, BOWEN & CO., *Ex p.* RAILWAY CONSTRUCTION CO., LTD. (1887), 3 T. L. R. 517, C. A.

Annotations:—**Mentd.** *Re* Huslekoff & Marsden (1888), 4 T. L. R. 515; *Re* Morris, James *v.* London & County Banking Co. (1899), 47 W. R. 324, C. A.

8823. What must be considered—Facts as appearing when application made & not when resolution passed—Objections of dissenting creditors—1869 Act, ss. 28, 126.]—The ct. is bound to consider the objections brought before it by a dissentient creditor.

The propriety of the resolutions is to be judged of by the ct. upon the facts as they appear at the time when its approval is sought, not as they appeared at the time when the resolutions were passed.—*Re* DURHAM, *Ex p.* MERCHANT BANKING CO. OF LONDON (1881), 16 Ch. D. 623; 50 L. J. Ch. 606; 44 L. T. 358; 29 W. R. 363, C. A.

8824. —— Moral aspect of case—1869 Act, s. 28.]—It is the duty of the ct. to look at all the circumstances & to have regard to the moral aspect of the case.—*Re* HICKMAN, *Ex p.* STRAWBRIDGE (1883), 25 Ch. D. 266; 53 L. J. Ch. 323; 49 L. T. 638; 32 W. R. 173, C. A.; *revsg* S. C. *sub nom. Re* TAMLYN, *Ex p.* HICKMAN, 48 L. T. 913.

8825. —— Conduct of debtor & interest of creditors—1883 Act, ss. 18, 28.]—In the exercise of his discretion as to the approval of a composition or scheme, the registrar ought to consider both the interest of the creditors & the conduct of debtor.—*Re* GENESE, *Ex p.* KEARSLEY (1886), 18 Q. B. D. 168; 56 L. J. Q. B. 220; 56 L. T. 79; 3 T. L. R. 74; 3 Morr. 274, C. A.

Annotations:—**Folld.** *Re* Barlow, *Ex p.* Thornber (1886), 56 L. T. 168, D. C. **Consd.** *Re* Bottomley. *Ex p.* Bottomley (1893), 10 Morr. 262; *Re* Beer, *Ex p.* Beer, [1903] 1 K. B. 628, C. A. **Refd.** *Re* Waugh (1886), 3 T. L. R. 264; *Re* Reed, Bowen (1887), 3 T. L. R. 433; *Re* Wood (1888), 4 T. L. R. 277.

8826. —— —— Public interest—1883 Act, s. 28.]—On the question of granting or refusing the approval of the ct. to a composition or scheme of arrangement, the registrar must not take a one-sided view, but look at all the circumstances. He must consider on the one side the conduct of debtor, & on the other the interests of the creditors, & he must exercise his discretion both with regard to his duty to the public on the one hand, & his duty to the creditors on the other. The registrar must consider all the circumstances, & exercise his discretion thereon.—*Re* BARLOW, *Ex p.* THORNBER (1886), 3 T. L. R. 218; 3 Morr. 304, C. A.

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for an arrangement & intends to abandon his business, the ct. may under Irish 1857 Act, where circumstances render it reasonable, refuse to sanction the arrangement, until so much of the apprenticeship fee is repaid to the apprentice as would be ordered to be refunded to him if the proceedings were in bkpcy.—*Re* M., [1900] 2 I. R. 415.—IR.

8818 i. *May act on own opinion—Not bound by opinion of creditors—Majority favouring arrangement.*]—The ct. has discretionary powers to adjourn a case into bkpcy., notwithstanding that there may be a large majority of creditors in favour of an arrangement.—*Re* AN ARRANGING TRADER (1867), 1 I. L. T. Jo. 262.—IR.

PART XXIII. SECT. 6, SUB-SECT. 1.—B.

8825 i. *What must be considered—Conduct of debtor & interest of creditors.*]—Debtor having no assets, proposed to pay a dividend of 1*s.* 1*d.* in the pound with money obtained from outside. His indebtedness was due to depreciation in investments & losses on the Stock Exchange. The necessary majority of creditors supported the proposal, but among those was a person, whose debt would, if excluded, convert the majority into a minority. There were also money dealings of a peculiar character between debtor & his wife:—*Held:* the circumstances required investigation.—*Re* MOLESWORTH (1912), 47 I. L. T. 17.—IR.

8826 i. —— —— *Public interest.*]—It is the duty of the ct. to consider the conduct of debtor & the interests of the general public, as well as the wishes of the creditors.—*Re* P. W. (1914), 48 I. L. T. 61.—IR.

m. —— —— *Witnesses to fraud kept out of way.*]—In a case of fraud, where some of the witnesses to the fraud have been kept out of the way, the ct. will not entertain a composition outside the ct., till they are brought up to be examined.—*Re* WEEKES (1867), 1 I. L. T. Jo. 649.—IR.

Sect. 6.—Approval by court: Sub-sect. 1, B. & C.; sub-sect. 2.]

8827. —— Interest of creditors—Debtor's assets & liabilities—1883 Act, ss. 18, 28.]—In determining whether a composition accepted by the creditors is reasonable the ct. must exercise its own judgment, though it may take into account the fact that the creditors are mainly interested. It must have regard to debtor's assets & liabilities.—*Re* ROGERS, *Ex p.* ROGERS (1884), 13 Q. B. D. 438; 33 W. R. 354; 1 Morr. 159, D. C.

Annotation:—**Mentd.** *Re* Binko (1885), 1 T. L. R. 239.

8828. —— —— Requirements of commercial morality—1890 Act, ss. 3, 8.]—On an application to approve a composition the interest of the creditors is in the first instance to prevail, unless it would be contrary to commercial morality that they should be allowed to make an arrangement with debtor; & it is the duty of the ct. in each case to take into consideration the particular class of offence & the particular circumstance in which it is proved to have been committed, & then to ask itself the question whether it would be contrary to public morality for the sake of private interests to approve the scheme.—*Re* BOTTOMLEY, *Ex p.* BOTTOMLEY (1893), 10 Morr. 262.

Annotation:—**Consd.** *Re* Webb, *Ex p.* Board of Trade, [1914] 3 K. B. 387, C. A.

8829. —— —— —— 1883 Act, s. 123.]—The creditors of bkpt., whose discharge had been suspended for two & a half years, after the period of suspension had expired resolved by the proper majority to entertain a proposal by bkpt. to pay a composition of 7*s.* 11*d.* in the pound in addition to a dividend of 2*s.* 1*d.* in the pound which had been paid in the bkpcy., on condition that the bkpcy. should be annulled:—*Held:* in the exercise of its discretion as to the approval of the scheme, the ct. ought to consider, not only the interest of the creditors, but also the interests of the public & of commercial morality, &, having regard to the facts, found by the official receiver in his report on bkpt.'s application for his discharge, the bkpcy. ought not to be annulled.—*Re* BEER, *Ex p.* BEER, [1903] 1 K. B. 628; 72 L. J. K. B. 366; 88 L. T. 334; 51 W. R. 422; 19 T. L. R. 319; 10 Mans. 136; *sub nom. Re* B., 47 Sol. Jo. 367, C. A.

8830. —— Conduct of debtor as trader—Wishes of creditors & requirements of commercial morality—1883 Act, ss. 18, 23.]—Where application is made to the ct. to approve a composition or scheme it is the duty of the ct. to take into consideration not only the wishes of the creditors, but also the conduct of debtor & the requirements of commercial morality. In the case of a trader the ct. must look at the conduct of debtor with reference to his trading.—*Re* MCTEAR, *Ex p.* MCTEAR (1888), 59 L. T. 150; 5 Morr. 182, D. C.

8831. —— —— Keeping of proper books—1883 Act, s. 18.]—The ct. should attach great importance to the question whether debtor, if a trader, has kept proper books.—*Re* REED, *Ex p.* REED (1886), 17 Q. B. D. 244; 55 L. J. Q. B. 244; 34 W. R. 493; 2 T. L. R. 458; 3 Morr. 90, C. A.

Annotation:—**Refd.** *Re* Morris, James *v.* London & County Banking Co. (1899), 47 W. R. 324, C. A.

8832. —— Debtor charged with misdemeanour—1883 Act, s. 31—1890 Act, s. 9.]—Upon an application for the approval of a scheme of arrangement, where debtor is charged in the Official Receiver's report with having committed a misdemeanour, the Bkpcy. Ct. will itself try the charge, the words "has committed any misdemeanour" in 1890 Act, s. 8 (2), not meaning that debtor has been tried & convicted: but the ct. will only be satisfied of the truth of the charge by evidence which would satisfy a criminal ct.—*Re* PEEL (1903), 19 T. L. R. 207.

C. Interference by Appellate Court. *See* Sub-sect. 5, *post.*

SUB-SECT. 2.—GROUNDS FOR REFUSAL OF APPROVAL.

See, also, cases in Sect. 4, sub-sect. 2, B., Sect. 5, sub-sect. 2, C., *ante*, Sect. 10, sub-sect. 3, B., *post.*

8833. No benefit to creditors—No benefit beyond what creditors would get in bankruptcy.]—The ct. will not approve of a scheme, unless it can see that it would benefit the creditors.

If a scheme gives the creditors no greater benefit than they would get in a bkpcy., it gives them no benefit at all.—*Re* BROWNE & WINGROVE, *Ex p.* THE DEBTORS, [1890] W. N. 131, C. A.

8834. —— ——.]—The ct. declined to approve a scheme, which did not secure any benefit to creditors or any property beyond what would vest in the trustee under a bkpcy.—*Re* WOOD (1888), 4 T. L. R. 277.

8835. —— ——.]—A scheme to be within 1890 Act, s. 3 (8), must provide something more than the creditors would receive in bkpcy.—*Re* E. A. B. (1901), 85 L. T. 773; *sub nom. Re* ASHMEAD-BARTLETT, 18 T. L. R. 68; *affd.* on other points, S. C., [1902] 1 K. B. 457, C. A.

Annotations:—**Mentd.** *Re* Baines, *Ex p.* Board of Trade (1902), 86 L. T. 691, D. C.; *Re* Pilling, *Ex p.* Board of Trade, [1903] 2 K. B. 50, C. A.; *Re* Aron (1905), 21 T. L. R. 693; *Re* Keet, [1905] 2 K. B. 666, C. A.

8836. —— —— Creditors deprived of some of their powers—& of control of court—Incorporation of 1883 Act, s. 27, by agreement.]—A scheme of arrangement of the affairs of debtor provided that his property, which would become divisible among his creditors, if he were adjudged bkpt., should vest in a trustee to be appointed by the creditors, & that the trustee should administer the property under the supervision of a committee of inspection in the like manner, & with the like powers & duties, & subject to the like conditions in all respects, as though debtor had been adjudged bkpt., & the trustee had been appointed trustee in the bkpcy., & that 1883 Act, s. 27, relating to the discovery of the property of bkpt., should, so far as same was applicable, apply to the proceedings under the scheme:—*Held:* as s. 27 did not apply to a scheme of arrangement under s. 18, & could not by agreement between debtor & his creditors be incorporated in such a scheme, the scheme gave the creditors no greater advantage than they would have had in a bkpcy., while it deprived them of some of the powers which they would have had, & of the control of the ct. in the administration of

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8827 i. —— *Interest of creditors.*]—If the ct. is of opinion that an offer made by debtor is not "reasonable & proper to be executed under the direction of the ct.," it should consider whether petitioner ought to be made a bkpt. or not.—*Re* B. (1914), 48 I. L. T. 99.—IR.

8827 ii. —— ——.]—The ct. has to consider, not whether the assignment was, when made, more beneficial to the creditors than bkpcy. would have been, but whether bkpcy. would be at least as advantageous as allowing the administration of the estate under the deed.—*Re* MATHESON, *Ex p.* HALLETT (1899), 18 N. Z. L. R. 556.—N.Z.

PART XXIII. SECT. 6, SUB-SECT. 2.

8833 i. *No benefit to creditors—Less benefit than what creditors would get in bankruptcy.*]—A scheme should be rejected where creditors would get a substantially larger sum, if the estate were wound up in bkpcy.—*Re* FRY, [1913] 1 I. R. 273.—IR.

the estate, & the scheme was neither reasonable nor calculated to benefit the general body of creditors, & ought not to be approved by the ct.—*Re* AYLMER, *Ex p.* BISCHOFFSHEIM (1887), 19 Q. B. D. 33; 56 L. J. Q. B. 460; 56 L. T. 801; 35 W. R. 532; 3 T. L. R. 582; 4 Morr. 152, C. A.

Annotations:—**Distd.** *Re* Staniar, Roberts, *Ex p.* Smith (1888), 5 Morr. 67, D. C. **Consd.** *Re* Brown & Wingrove, *Ex p.* Debtors, [1890] W. N. 131. **Refd.** *Re* E. A. B. (1901) 85 L. T. 773; *Re* Beer, *Ex p.* Beer (1903), 88 L. T. 334, C. A.

See, now, 1914 Act, s. 16 (17).

8837. —— Whether unreasonable—Doubtful but recommended by committee & accountant.]—Debtors were merchants in England & South America. Assets of large amount, forming the principal part of the estate, were in South America without the jurisdiction. A scheme was proposed for the sale of those assets to one of the partners who resided in South America for about their estimated value, the purchase-money to be paid by quarterly instalments extending over four years. The trustee was to insure the purchaser's life for about one-sixth of the amount payable, but there was no other provision as to security. The scheme was recommended by the committee of inspection, who were creditors for a large amount, & by an accountant, who, at their instance, had gone to South America & examined the affairs of the house there. The official receiver also made a report in its favour:—*Held:* the scheme ought to be approved by the ct. as being reasonable & for the benefit of the general body of the creditors.—*Re* STANIAR, ROBERTS & CO., *Ex p.* SMITH (1888), 20 Q. B. D. 544; 58 L. T. 884; 36 W. R. 608; 5 Morr. 67, D. C.

8838. —— —— Small composition—No assets.]—In the absence of assets a scheme securing 1*s.* in the pound:—*Held:* for the benefit of creditors, & approved.—*Re* BAILLIE (1887), 3 T. L. R. 281.

See, now, 1914 Act, s. 16 (10).

8839. —— —— —— Offences for which discharge refused.]—Debtor carried on business & became bkpt., paying no dividend. After two years he started in business again in a partnership, into which he brought no capital, & failed, a dividend of 3*s.* 3*d.* in the pound being paid, but his discharge was absolutely refused for offences under Bkpcy. Acts. Debtor subsequently offered, & the majority of the creditors accepted, a composition of 1*s.* in the pound, on payment of which the bkpcy. was to be annulled:—*Held:* the ct. was right in refusing to approve such composition.—*Re* MCTEAR, *Ex p.* MCTEAR (1888), 59 L. T. 150; 5 Morr. 182, D. C.

8840. —— —— Arrangement to enable debtor to prosecute disputed claim.]—A firm of contractors failed with a nominal surplus of assets, which consisted almost entirely of a claim against the Govt., who disputed liability. To enable the claim to be prosecuted it was arranged that debtors should take over the outstanding estate & prosecute the claim, 50 per cent. of any amount recovered to be applied for the benefit of the estate & the remainder to belong to debtors:—*Held:* the scheme was reasonable, & calculated to benefit the creditors, & the ct. should grant the application for approval.—*Re* BULL & SONS (1886), 3 T. L. R. 113.

8841. —— —— Provision for discharge when committee should resolve.]—A scheme of arrangement, assented to by the creditors, contained a provision that "debtors shall be discharged when the committee of inspection shall so resolve":—*Held:* such provision was not in accordance with the intention of 1883 Act, & was unreasonable, & though debtors asked that the scheme might be approved by the ct., the approval ought not to be given.—*Re* CLARK, *Ex p.* CLARK (1884), 13 Q. B. D. 426; 53 L. J. Ch. 1063; 51 L. T. 584; 32 W. R. 775; 1 Morr. 143, C. A.

Annotations:—**Refd.** *Re* Beer, *Ex p.* Beer (1903), 88 L. T. 334, C. A. **Mentd.** *Re* Croom, England & Provincial Assets Co., [1891] 1 Ch. 695.

8842. —— —— Conditions imposed ultra vires—Scheme illusory.]—The provisions of 1883 Act, s. 28 (6), cannot, by agreement between debtor & his creditors, be incorporated into a scheme of arrangement of debtor's affairs under s. 18, nor can a jurisdiction, similar to that which is conferred on the ct. by s. 28 (6) in the case of a bkpcy., be given to the ct. by agreement between debtor & his creditors in the case of a scheme of arrangement.

A scheme of arrangement of debtor's affairs, accepted by his creditors under s. 18, provided that debtor should, before the approval of the scheme, consent to judgment being entered against him by the trustee under the scheme for the full amount of the debts provable thereunder, such judgment to have the same effect, & to be enforceable in the like manner & to the like extent as though debtor had been adjudged bkpt. under the proceedings, & the ct. had granted him an order of discharge conditional upon his consenting to judgment being entered against him by the trustee, & such judgment had been entered accordingly:—*Held:* as the judgment could not be enforced either at common law, or under the Act, or by agreement, the scheme, so far as it purported to give the judgment, was illusory, & of no effect, & ought not to be approved by the ct.—*Re* AYLMER, *Ex p.* BISCHOFFSHEIM (1887), 20 Q. B. D. 258; 57 L. J. Q. B. 168; 36 W. R. 231; 4 T. L. R. 174, C. A.

Annotation:—**Apld.** *Re* Wood (1888), 4 T. L. R. 277.

8843. Reasonable security not provided for—Provision for sale to debtor—No provision for securing price.]—At a meeting of creditors it was resolved (*inter alia*) that trustees, in whom debtor's property was to be vested, should be at liberty, within two months after approval of the scheme, to sell the estate to debtor for such sum as would secure full payment of all preferential debts &

8838 i. ——*Whether unreasonable—Small composition.*]—A proposal to pay 3*s.* in the pound by debtor, who had become insolvent through losses on the Stock Exchange, although three-fifths in number & value of the creditors supported the offer:—*Held:* not to be "reasonable & proper."—*Re* C. (1897), 32 I. L. T. 40.—**IR.**

8838 ii. ——.]—An offer by bkpt. of a composition of 1*s.* in the pound, although accepted by the statutory majority of creditors, is not "reasonable & proper to be executed under the control of the ct.," in the absence of evidence of merits.—*Re* HARRIS, [1918] 2 I. R. 577.—**IR.**

8843 i. *Reasonable security not provided for—Agreement to accept debtor's note at three months.*]—A proposal to accept a composition of 7*s.* 6*d.* in the pound by the promissory note of debtor at three months, & that the trader should at the same time, upon the mere delivery of such notes to his creditors, receive his certificate, which had been assented to by the statutory majority of the creditors, was rejected as unreasonable & not proper to be executed under the direction of the ct.—*Re* O'NEILL (AN ARRANGING TRADER) (1871), 19 W. R. 500.—**IR.**

8843 ii. ——*Execution involving breach of trust.*]—Where a proposal of composition in arrangement is to be secured by an agreement, the execution of which would involve the commission of a breach of trust, the ct. will hold the proposal not reasonable & proper.—*Re* W. M. (1873), 7 I. L. T. 32.—**IR.**

8843 iii. ——.]—An arranging debtor at the date of presenting his petition, had policies of insurance on his own life for £163,120, the surrender value of which was £12,697. The total liabilities, exclusive of fully secured creditors, were £33,533. Debtor's proposal was to vest by deed in a trustee his interest in the policies, by way of security for the ultimate payment of the debts & interest out of the policies, the deed was

Sect. 6.—*Approval by court: Sub-sects.* 2, 3 & 4.]

3*s.* 6*d.* in the pound for all other provable debts, but there was no provision as to requiring security for the payment of debtor of the composition :—*Held :* the resolution was unreasonable & the ct. could not sanction the scheme in its then shape.—*Re* WAUGH (1886), 3 T. L. R. 264.

8844. —— No security beyond property vested in trustee.]—Though the ct. will generally be reluctant to refuse to approve of a proposed scheme of arrangement by debtor with his creditors which has been approved by the creditors, yet it is the duty of the ct. to consider whether the scheme is for the benefit of the creditors, & in particular whether it provides reasonable security for the payment of 7*s.* 6*d.* in the pound on all the unsecured debts provable against debtor's estate, & to refuse to give the approval of the ct. if it is not satisfied on these points.

A proposed scheme of arrangement with creditors which had been approved by the creditors by the proper majority, provided (*inter alia*) that the property of debtors, which would have been divisible among their creditors if they were bkpt., should vest in a trustee & should be administered by him as in bkpcy. The trustee was, on the approval of the scheme by the ct., to pay in full all fees, costs, & expenses, including the remuneration of the trustee, & all preferential debts, & was then to pay to all the unsecured creditors, in respect of all debts provable under the receiving order, & in satisfaction of same, a composition of 20*s.* in the pound, payable in instalments of not less than 2*s.* 6*d.* in the pound, as & when the realisation of debtors' assets would allow. The payment of the preferential debts, fees, etc., & of the composition was to be secured by the vesting of debtors' property in the trustee :—*Held :* the scheme did not provide "reasonable security" for the payment of a composition of 7*s.* 6*d.* in the pound, & ought not to be approved by the ct.—*Re* FLEW, *Ex p.* FLEW, [1905] 1 K. B. 278 ; 74 L. J. K. B. 280 ; 92 L. T. 333 ; 53 W. R. 438 ; 21 T. L. R. 150 ; 12 Mans. 1, C. A.

See, now, 1914 Act, s. 16 (10).

8845. —— What is reasonable security—Security for payment now or within short time.]—"Reasonable security for the payment of not less than 7*s.* 6*d.* in the pound" does not mean for payment at a distant time, such as a year hence, but means reasonable security for payment now or within a short time.—*Re* PAINE, *Ex p.* PAINE, [1891] W. N. 208, C. A.

Annotation :—**Folld.** *Re* Webb, *Ex p.* Board of Trade, [1914] 3 K. B. 387, C. A.

See, now, 1914 Act, s. 16 (10).

8846. —— —— Security providing reasonable commercial probability of payment.]—The "reasonable security" for payment of not less than 7*s.* 6*d.* in the pound required to be provided by a scheme put forward by debtor, who would not be entitled to an unconditional order of discharge if he were adjudged bkpt., does not mean such security as it would be reasonable that a prudent man would invest money upon. The reasonableness must in each case be judged of according to the standard of the state of affairs presented to the creditors, & where the ct. is fully satisfied that the scheme is the best thing for the creditors, who would otherwise get nothing, & that there is a reasonable commercial probability that a sum exceeding 7*s.* 6*d.* in the pound will be realised under it, the ct. will not feel inclined to construe the words in question with the greatest strictness.—*Re* BOTTOMLEY, *Ex p.* BOTTOMLEY (1893), 10 Morr. 262.

Annotation :—**Consd.** *Re* Webb, *Ex p.* Board of Trade, [1914] 3 K. B. 387, C. A.

See, now, 1914 Act, s. 16 (10).

8847. —— What debts must be secured—Debt for which release delivered as escrow—Pending approval of scheme.]—In the absence of fraud the security required by 1890 Act, s. 3 (9), need not extend to debts, releases for which have been executed & delivered as escrows, to take effect on the approval of the scheme by the ct.—*Re* BAINES, *Ex p.* BOARD OF TRADE (1902), 86 L. T. 691, D. C.

Annotations :—**Dbtd.** *Re* Pilling, *Ex p.* Board of Trade, [1903] 2 K. B. 50, C. A. That decision again appears to me to have been arrived at upon a misapprehension as to the decision in the case I have already referred to, *Re* E. A. B., No. 8848, *post* (COLLINS, M.R.). **Consd.** *Re* Aron (1905), 21 T. L. R. 693.

8848. Security rendered sufficient by withdrawal of some creditors—Withdrawal secured by third party without debtor's knowledge.]—Where a scheme of arrangement is submitted by debtor under 1890 Act, s. 3, & part of the arrangement is that certain creditors withdraw their debts, the ct. will not refuse its sanction to the scheme merely on the ground that the withdrawals are on terms giving those creditors an advantage over the other creditors, provided the withdrawals have not been obtained by debtor himself, or by any person with the knowledge & on behalf of debtor.

A scheme of arrangement submitted by debtor, against whom a receiving order had been made, secured payment to the unsecured creditors, except two who had withdrawn their debts, of a sum of not less than 7*s.* 6*d.* in the pound. The withdrawals had been obtained by debtor's brother, who had, without any knowledge on the part of debtor, given them a security placing them, it was alleged, in a better position than the other creditors under the scheme :—*Held :* as the security given to the two withdrawing creditors was, neither in form nor in substance, the result of any bargain made by or with the knowledge of debtor himself, it was not a ground for the ct. refusing to sanction the scheme.—*Re* E. A. B., [1902] 1 K. B. 457 ; 71 L. J. K. B. 356 ; 85 L. T. 773 ; 50 W. R. 229 ; 9 Mans. 105 ; *sub nom. Re* ASHMEAD-BARTLETT, 18 T. L. R. 213 ; 46 Sol. Jo. 150, C. A.

Annotations :—**Apld.** *Re* Baines, *Ex p.* Board of Trade (1902), 86 L. T. 691, D. C. **Distd.** *Re* Pilling, *Ex p.* Board of Trade, [1903] 2 K. B. 50, C. A. **Refd.** *Re* Aron (1905), 21 T. L. R. 693. **Mentd.** *Re* Keet, [1905] 2 K. B. 666, C. A.

See, now, 1914 Act, s. 16 (10).

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to contain a covenant by debtor for payment of interest on the debts, & for the upkeep of the policies, &, in case of default by debtor in making those payments, the creditors were to be remitted to their original rights :—*Held :* the omission to vest the equity of redemption in the policies in the official assignees was not of itself sufficient to render the proposal unreasonable & improper.—*Re* M., [1901] 2 I. R. 51.—**IR.**

p. *Composition extending over twelve months.*]—A composition arrangement extending over a period of more than twelve months, or unsecured "is not reasonable or proper to be executed."—*Re* MACLURE (1873), I. R. 7 Eq. 176.—**IR.**

q. —— *Exceptional circumstances.*]—Where the great majority of the creditors were willing to accede to the proposed composition debtor promising to aid towards paying them by carrying on his trade, & furnishing returns thereof when required :—*Held :* though the period over which the composition was to extend exceeded twelve months, exceptional circumstances existed, rendering the proposal reasonable & proper.—*Re* S. S. A. (1873), 7 I. L. T. 71.—**IR.**

r. *False claim & proof—Connivance of debtor.*]—When a false claim & proof of debt was put in in an arrangement matter with the connivance of the arranging debtor, the arrangement was turned into bkpcy.—*Re* HESLOP & SON (1897), 31 I. L. T. Jo. 332.—**IR.**

8849. —— Withdrawal secured by debtor without disclosure—Withdrawal conditional.]—Where in a scheme of arrangement between debtor & his creditors debtor proposes to pay a composition of the statutory minimum on all provable debts, & that such creditors as released their debts should not be included in the payment of the composition, & it turns out that debtor has himself entered into an arrangement with the majority of his creditors, with a view to facilitating the payment of the composition, that they should release their debts, but the circumstances in which the releases were obtained are not fully disclosed, & the releases are conditional on the scheme being approved by the ct., the ct. will, in the exercise of its discretion, refuse to sanction the scheme.—*Re* PILLING, *Ex p.* BOARD OF TRADE, [1903] 2 K. B. 50; 72 L. J. K. B. 392; 88 L. T. 667; 51 W. R. 465; 19 T. L. R. 388; 47 Sol. Jo. 435; 10 Mans. 142, C. A.

Annotations:—**Consd.** *Re* Flew, *Ex p.* Flew (1904), 74 L. J. K. B. 280, C. A. **Distd.** *Re* Keet, [1905] 2 K. B. 666, C. A. **Refd.** *Re* Aron (1905), 21 T. L. R. 693.

Debts contracted without reasonable prospect of ability to pay.]—*See* Part XVIII., *ante*.

Trading with knowledge of insolvency.]—*See* Part XVIII., *ante*.

Reckless extravagance.]—*See* Part XVIII., *ante*.

8850. Gross misconduct—Rash & hazardous speculation contributing to bankruptcy.]—The ct. will not refuse to approve a scheme of arrangement, on the ground of debtor's misconduct, except in cases of a gross character. The mere fact that debtor has contributed to his bkpcy. by rash & hazardous speculations is not a sufficient reason for refusing to approve a scheme, which otherwise complies with 1890 Act, s. 3 (9).—*Re* E. A. B., [1902] 1 K. B. 457; 71 L. J. K. B. 356; 85 L. T. 773; 50 W. R. 229; 9 Mans. 105; *sub nom. Re* ASHMEAD-BARTLETT, 18 T. L. R. 213; 46 Sol. Jo. 150, C. A.

Annotations:—**Mentd.** *Re* Baines, *Ex p.* Board of Trade (1902), 86 L. T. 691, D. C.; *Re* Pilling, *Ex p.* Board of Trade, [1903] 2 K. B. 50, C. A.; *Re* Aron (1905), 21 T. L. R. 693; *Re* Keet, [1905] 2 K. B. 666, C. A.

—— —— **What is rash & hazardous speculation.**]—*See* Part XVIII., *ante*.

8851. Debtor not proper person to carry on business.]—The ct. should not leave the control of a business in the hands of debtor, who has conducted it in an improper way.—*Re* REED, *Ex p.* REED (1886), 17 Q. B. D. 244; 55 L. J. Q. B. 244; 34 W. R. 493; 2 T. L. R. 458; 3 Morr. 90, C. A.

Annotation:—**Refd.** *Re* Morris, James *v.* London & County Banking Co. (1899), 47 W. R. 324, C. A.

8852. ——.]—Where by the conduct of debtor it is clearly shown that he is not a fit person to carry on business, the ct. ought to refuse its approval.—*Re* MCTEAR, *Ex p.* MCTEAR (1888), 59 L. T. 150; 5 Morr. 182, D. C.

8853. Large proportion of proofs not tendered.]—If for a large proportion of the debts proofs have not been tendered, or if the ct. considers those that have been tendered require to be investigated by a trustee, it ought to decline to approve the composition.—*Re* ROGERS, *Ex p.* ROGERS (1884), 13 Q. B. D. 438; 33 W. R. 354; 1 Morr. 159, D. C.

8854. Money paid under scheme to hush up discreditable transaction.]—It is the duty of the ct. not to give its approval to the proposed arrangement, although it may be for the benefit of the creditors, if the ct. can see that the money which the creditors are to receive under it is to be paid in order to hush up & prevent investigation into some discreditable transaction.—*Re* HICKMAN, *Ex p.* STRAWBRIDGE (1883), 25 Ch. D. 266; 53 L. J. Ch. 323; 49 L. T. 638; 32 W. R. 173, C. A.; *revsg.* S. C. *sub nom. Re* TAMLYN, *Ex p.* HICKMAN, 48 L. T. 913.

8855. Failure to comply with terms as to deposit of instalment—Debts released to ensure payment of first instalment.]—Debtor lodged a proposal for paying his creditors 20*s.* in the pound by two instalments of 15*s.* & 5*s.* each, the first instalment to be secured by a deposit with the official receiver of a sum sufficient for the purpose before the application to the ct. to approve the composition. The proposal was accepted by all the creditors. In consequence of the assets realising less than was expected, debtor was unable to lodge with the official receiver sufficient to pay the first instalment to all the creditors, & thereupon three of the creditors withdrew their proofs & released their debts for the purpose of allowing the proposal to be carried through. The sum deposited with the official receiver was sufficient to pay the first instalment on the remaining debts. The ct. refused to approve the proposal, upon the ground that its terms as to the deposit of the first instalment had not been complied with, there being no reference to the releases of debts in the proposal as accepted by the creditors.—*Re* ARON (1905), 21 T. L. R. 693.

SUB-SECT. 3.—EFFECT OF REFUSAL.

Whether court bound to adjudicate debtor bankrupt.]—*See* Part V., Sect. 1, *ante*.

SUB-SECT. 4.—EFFECT OF APPROVAL.

8856. General rule.]—The approval of the ct. is equivalent to an order of discharge.—*Re* CROOM, ENGLAND *v.* PROVINCIAL ASSETS CO., [1891] 1 Ch.

s. *Misrepresentations of debtor.*]—An arranging trader made, with regard to his circumstances, untrue representations, whereby he obtained from his creditors an extension of time. A majority of his creditors agreed to accept the composition he offered:—*Held*: the case should be turned into bkpcy.—*Re* M'CLELAND (1868), 2 I. L. T. Jo. 688.—IR.

t. *Trading after knowledge of insolvency.*]—Where a firm continued to trade after a date when they knew they were insolvent, an arrangement, by which they offered to pay 5*s.* in the pound, which was accepted by more than the requisite number & value of the creditors who had proved, was turned into bkpcy.—*Re* A. & B. (1912), 46 I. L. T. 142.—IR.

a *Obtaining credit by false representations.*]—The discretionary power of the ct. to turn an arrangement case into bkpcy. was exercised, when debtor had obtained credit by false representations as to his solvency.—*Re* AN ARRANGING TRADER (1867), 1 I. L. T. Jo. 263.—IR.

See, further, Part XVIII., *ante*.

b. *Schedule unsatisfactory — Wishes of dissentient creditors.*]—When an arranging trader's sched. is untrue & contradictory, & does not present an accurate statement of his affairs, the ct. will, at the suggestion of dissatisfied creditors, turn the case into bkpcy., though the statutable majority vote for the trader's proposal.—*Re* MOOREHEAD (1866), 2 I. L. T. Jo. 121.—IR.

c. *Partnership debts not provided for.*]—Petitioner was a member of a subsisting copartnership, & a large proportion of the debts for which petitioner proposed to arrange were partnership debts. No agreement had been made between petitioner & the remaining partners whereby the latter were to take on themselves the payment of the partnership debts. The ct. left petitioner to proceed in bkpcy.—*Re* PARROTT (1859), 8 I. Ch. R. 391.—IR.

8855 i. *Failure to comply with terms as to deposit of instalment.*]—Where the last instalment of a composition is secured by the indorsement of a third party, the bills must be lodged before the ct. will approve & confirm.—*Re* AN ARRANGING TRADER (1868), 2 I. L. T. Jo. 93.—IR.

e. *Doubt as to jurisdiction—Composition after bankruptcy.*]—After an adjudication in bkpcy. & discharge thereunder bkpt. entered into a deed of composition. A motion was made to confirm this deed & transfer all property in the hands of the trustee to the compounding debtor:—*Held*: the motion was unprecedented, & the ct. would require clear proof of its jurisdiction to make such order.—*Re* MCKAY (1885), 7 Nfld. L. R. 44.—NFLD.

PART XXIII. SECT. 6, SUB-SECT. 4.

f. *Whether final & conclusive.*]—

Sect. 6.—Approval by court: Sub-sects. 4, 5 & 6. Sect. 7.]

695 ; 60 L. J. Ch. 373 ; 64 L. T. 53 ; 39 W. R. 286 ; 7 T. L. R. 216.

8857. On action begun before approval.]—A change or transmission of interest or liability within R. S. C. Ord. 17, r. 4, takes place when a composition or scheme is approved by the ct., so as to render it necessary that the official receiver should become a party to an action commenced before the approval of the composition or scheme. —*Re* BERRY, DUFFIELD *v.* WILLIAMS, [1896] 1 Ch. 939 ; 65 L. J. Ch. 245 . 74 L. T. 306 ; 44 W. R. 346 ; 40 Sol. Jo. 275 ; 3 Mans. 11.

SUB-SECT. 5.—APPEALS.

8858. Who may appeal—Creditor whose proof has not been admitted or tendered.]—A creditor may appeal against an order approving a scheme of arrangement by his debtor under 1890 Act, s. 3, as a person " aggrieved " within 1883 Act, s. 104, though at the date of the order approving the scheme proof of his debt has not been admitted or even tendered.—*Re* LANGTRY (1894), 1 Mans. 169, D. C.

8859. —— Board of Trade—Official receiver supporting scheme.]—*Held :* 1890 Rules, r. 24, gave the Board of Trade a right to appeal against an order approving of a scheme, even though the official receiver supported, or did not oppose, the application for approval.—*Re* BURR, *Ex p.* BOARD OF TRADE, [1892] 2 Q. B. 467 ; 61 L. J. Q. B. 591 ; 66 L. T. 553 ; 8 T. L. R. 515 ; 9 Morr. 133, C. A.

Annotations :—**Mentd.** *Re* E. A. B. (1901), 85 L. T. 773. *Re* Utley (1901), 17 T. L. R. 349 ; *Re* Baines, *Ex p.* Board of Trade (1902), 86 L. T. 691, D. C. ; *Re* Beer, *Ex p.* Beer, [1903] 1 K. B. 628, C. A. ; *Re* Webb, *Ex p.* Board of Trade, [1914] 3 K. B. 387, C. A.

8860. On what grounds—Discretion wrongly exercised.]—The exercise of the discretion is subject to appeal, but the Ct. of Appeal ought not to interfere, unless it is clearly shown that the judge has exercised his discretion wrongly.—*Re* DURHAM, *Ex p.* MERCHANT BANKING CO. OF LONDON (1881), 16 Ch. D. 623 ; 50 L. J. Ch. 606 ; 44 L. T. 358 ; 29 W. R. 363, C. A.

8861. —— ——.]—The Ct. of Appeal will not interfere with the exercise of the discretion as to approval of a composition, unless it is clearly satisfied that the discretion has been wrongly exercised.—*Re* ROGERS, *Ex p.* ROGERS (1884), 13 Q. B. D. 438 ; 33 W. R. 354 ; 1 Morr. 159, D. C.

Annotations :—**Mentd.** *Re* Binko (1885), 1 T. L. R. 239 ; *Re* Freeman (1909), 25 T. L. R. 365.

8862. —— ——.]—The Ct. of Appeal will not review the discretion of the registrar in approving of a composition or scheme, unless it is clear that he has exercised it wrongly.—*Re* GENESE, *Ex p.* KEARSLEY, (1886) 18 Q. B. D. 168 ; 56 L. J. Q. B. 220 ; 56 L. T. 79 ; 3 T. L. R. 74 ; 3 Morr. 274, C. A.

Annotations :—**Refd.** *Re* Barlow, *Ex p.* Thornber (1886), 56 L. T. 168, D. C. **Mentd.** *Re* Malden, Gibson, *Ex p.* James (1886), 3 Morr. 185 ; *Re* Wilson, *Ex p.* Watkinson (1887), 35 W. R. 668, D. C. ; *Re* Bottomley, *Ex p.* Bottomley (1893), 10 Morr. 262 ; Williams Torrey *v.* Knight, The Lord of the Isles, [1894] P. 342 ; *Re* Beer, *Ex p.* Beer, [1903] 1 K. B. 628, C. A.

8863. *S. P. Re* POSTLETHWAITE, *Ex p.* LEDGER (1886), 3 Morr. 169, C. A.

8864. *S. P. Re* REED, BOWEN & CO., *Ex p.* RAILWAY CONSTRUCTION CO., LTD. (1887), 3 T. L. R. 517, C. A.

8865. —— Debtor's concealment of assets—Burden of proof.]—H. O. & E., having for some time previous to 1879 carried on business in partnership, & the firm being at that time largely indebted, H. O., at that date, retired in favour of F. O., his son, leaving to him his share of the debts & liabilities. H. O. retained a lien upon the partnership property. On July 12, 1879, H. O. died, having executed a codicil to his will authorising his exors. to sell his share in the business. The exors. allowed E. & F. O. to carry on the business subject to a lien upon the property, machinery, etc., retained by the exors. In May, 1880, F. O. & E. filed their petition, & a receiver was appointed, who carried on the business as tenant to the exors., & to whom E. & F. O. rendered a statement of affairs, from which it was alleged that a certain claim which the firm had against J. was omitted, & in which a patent, which was afterwards sold for £800, was said to have been mentioned as being of no value. On May 20 a composition of 1*s.* 8*d.* was accepted, & the bkpcy. was closed. The trustee applied to reopen the bkpcy. :—*Held :* if it had been proved that bkpts. were aware of their claims against J., & of the value of the patent at the time when the statement of affairs was made, the bkpcy. ought to be reopened, but the trustee had failed to make out an affirmative case, & the burden of proof lay upon him.—*Re* OWTRAM, MARSHALL *v.* EDELSTON (1884), 50 L. T. 592.

SUB-SECT. 6.—COSTS AND FEES.

8866. Costs of appeal—From refusal to approve.]—On an appeal from a decision refusing to approve a scheme, the trustee was ordered to pay the costs personally.—*Re* HICKMAN, *Ex p.* STRAWBRIDGE (1883), 25 Ch. D. 266 ; 53 L. J. Ch. 323 ; 49 L. T. 638 ; 32 W. R. 173, C. A. ; *revsg.* S. C. *sub nom. Re* TAMLYN, *Ex p.* HICKMAN, 48 L. T. 913.

8867. Fee—When payable.]—As a general rule the fee chargeable on an application by debtor to the ct. to approve a scheme of arrangement must be actually paid before the hearing of the application will be proceeded with.—*Re* BOTTOMLEY, *Ex p.* BOTTOMLEY (1893), 10 Morr. 262.

Annotation :—**Mentd.** *Re* Webb, *Ex p.* Board of Trade, [1914] 3 K. B. 387, C. A.

SECT. 7.—CONSTRUCTION OF COMPOSITION DEED, SCHEME OR DEED OF ARRANGEMENT.

NOTE.—*In considering the cases set out in this Section, regard must be had to the Notes at the beginning of the Part & of Sect.* 2, *ante.*

See also, cases in Sect. 8, sub-sect. 3, A., Sect. 10, sub-sect. 3, C. (c) ii., *post.*

Deed of composition pleaded was not executed by the requisite proportion of creditors in number & value, owing to a claim having been improperly withdrawn :—*Held :* the confirmation of the deed was final & conclusive.—ROONEY *v.* LYON (1877), 40 U. C. R. 366 ; 2 A. R. 53.—CAN.

PART XXIII. SECT. 6, SUB-SECT. 5.

8860 i. *On what grounds—Discretion wrongly exercised.*]—An arranging debtor having filed a proposal for the payment or compromise of his debts, to be carried out under the ct., petitioner & his creditors were desirous that the matter should be taken out of ct., as petitioner had agreed with his creditors to execute a trust deed of his property for their benefit. Petitioner was adjudged a bkpt. :—*Held :* the judge had wrongly exercised his discretion in forcing the matter into bkpcy., & order discharged.—*Re* Q. (1902), 37 I. L. T. 5.—IR.

PART XXIII. SECT. 7.

g. To what debtors deed applicable.]—A deed of assignment in trust for creditors was expressed to be made between " N. G. R. G. & W. carrying on business at Geelong as N. & R. G. & Co., & the said N. G. & R. G. carrying on in Melbourne a separate business as N. & R. G. of the second part," etc. The sched. to the deed contained a column headed " Estate " & opposite each creditor's name was inserted

8868. To what creditors deed applicable.]—At a meeting of deft.'s creditors, the following agreement, to which pltf. was an assenting party, was made & signed by all the creditors present :—"We the undersigned creditors of B., in consideration of 10*s.* in the pound on our respective debts set opposite to our respective names, hereby agree to accept same in discharge of our debts, on the understanding that no concealment or fraud has been practised by B., the whole of the creditors receiving not exceeding a like sum in discharge of their debts." :—*Held :* the agreement was limited to the creditors signing it.—CAREY *v.* BARRETT (1879), 4 C. P. D. 379, D. C.

8869. —— Period at which creditor's position to be ascertained.]—The registration, not the execution, of the deed is the period at which the relative position of the creditors is to be ascertained.—*Re* PETRIE, *Ex p.* PETRIE (1868), 3 Ch. App. 232 ; 37 L. J. Bcy. 13 ; 18 L. T. 169 ; 16 W. R. 467, L. JJ.

Annotations :—**Mentd.** Beddall *v.* King (1869), L. R. 4 C. P. 549 ; *Re* Broadridge, *Ex p.* Cyrus (1869), 5 Ch. App. 176, L. J. ; Hooper *v.* Marshall (1869), L. R. 5 C. P. 4.

—— Exclusion of certain creditors.]—*See* Sect. 10, sub-sect. 3, B. (c) ii., *post.*

8870. Admissibility of letters—To show intention with which agreement entered into.]—In order to prove an agreement under which it was alleged deft. agreed to pay, & pltfs. agreed to accept a composition, deft. put in a letter from one of pltfs., containing the terms of the agreement for the composition :—*Held :* evidence of a previous conversation, when pltf. made inquiries as to what the other creditors were likely to do, was admissible to show the motive which induced him to write the letter, & the intention with which the agreement was entered into.—REAY *v.* RICHARDSON (1835), 2 Cr. M. & R. 422 ; 1 Gale, 219 ; 5 Tyr. 931 ; 4 L. J. Ex. 236 ; 150 E. R. 182.

Annotation :—**Reld.** Clapham *v.* Atkinson (1864), 4 B. & S. 722.

8871. Recital amounting to covenant.]—A recital in a deed of composition, that debtor has agreed to pay a composition of a given amount to all his creditors, amounts to a covenant.—BROOKS *v.* JENNINGS (1866), L. R. 1 C. P. 476 ; Har. & Ruth. 414 ; 14 L. T. 19 ; 12 Jur. N. S. 341 ; 14 W. R. 440.

Annotations :—**Consd.** M'Laren *v.* Baxter (1867), L. R. 2 C. P. 559. **Mentd.** Kitchin *v.* Hawkins (1866), L. R. 2 C. P. 22 ; Tetley *v.* Wanless (1866), 15 L. T. 255 ; Isaacs *v.* Green (1867), L. R. 2 Exch. 352.

8872. Whether reference to recitals admissible—Deed ambiguous.]—Where the language of the operative part of a composition deed is ambiguous, reference may be had to the recitals where they are clear to construe the deed.—*Re* MOON, *Ex p.* DAWES (1886), 17 Q. B. D. 275 ; 55 L. T. 114 ; 34 W. R. 752 ; 2 T. L. R. 506, C. A.

Annotations :—**Consd.** Crouch *v.* Crouch, [1912] 1 K. B. 378. **Mentd.** *Re* Garnett, Robinson *v.* Gandy (1886), 55 L. T. 562, C. A. ; *Re* James, Clutterbuck *v.* James (1890), 62 L. T. 454 ; *Re* Knight & Tabernacle Permanent Bldg. Soc. (1892), 67 L. T. 403, C. A. ; *Re* Sartoris's Estate, Sartoris *v.* Sartoris, [1892] 1 Ch. 11, C. A. ; *Re* Gates (1895), 39 Sol. Jo. 331 ; *Re* Riggs, *Ex p.* Lovell, [1901] 2 K. B. 16 ; *Re* Cotgrave, Mynors *v.* Cotgrave, [1903] 2 Ch. 705 ; Postmaster General *v.* National Telephone Co. (1908), 72 J. P. 307, C. A. ; Loraine *v.* Loraine & Murphy (1912), 82 L. J. P. 29, C. A. ; Cohen *v.* Popular Restaurants, [1917] 1 K. B. 480.

8873. What clauses may be rejected—Absolute release in event of creditor suing.]—A deed of composition, under 1861 Act, contained a covenant that if any creditor should sue debtor, unless & until default should be made in meeting at maturity bills of exchange & promissory notes given as a security for the composition, debtor's estate & effects should be thenceforth absolutely released & discharged from the debt :—*Held :* the covenant could not be rejected.—DELL *v.* KING (1863), 2 H. & C. 84 ; 3 New Rep. 436 ; 33 L. J. Ex. 47 ; 9 L. T. 576 ; 10 Jur. N. S. 427 ; 12 W. R. 280 ; 159 E. R. 36.

Annotations :—**Consd.** Hidson *v.* Barclay (1864), 3 H. & C. 361, Ex. Ch. ; Lyne *v.* Wyatt (1865), 18 C. B. N. S. 593. **Distd.** Walker *v.* Nevill (1865), 3 H. & C. 403. **Reld.** *Re* Trust-Deed, *Ex p.* Hutchinson (1864), 10 L. T. 728 ; *Re* Roots, *Ex p.* Roots (1867), 2 Ch. App. 559, L. JJ. ; Jenney *v.* Bell (1876), 45 L. J. Ch. 369. **Mentd.** Ipstones Park Iron Ore Co. *v.* Pattinson (1864), 3 New Rep. 514 ; *Re* Wardell & Rolls, *Ex p.* Watts (1864), 10 L. T. 74 ; *Re* Wyatt, *Ex p.* Smith (1864), 12 W. R. 692 ; *Re* Hughes (1866), 15 L. T. 304.

8874. —— Power to deal with small creditors.]—A clause enabling the trustees to make such arrangements as they may claim expedient with creditors under £10 may be rejected as repugnant, where the deed shows a clear intention that the estate should be administered as in bkpcy.—*Re* JOSEPHS' ASSIGNMENT, *Ex p.* SPYER (1863), 1 De G. J. & Sm. 318 ; 2 New Rep. 560 ; 32 L. J. Bcy. 62 ; 8 L. T. 743 ; 9 Jur. N. S. 949 ; 11 W. R. 1008 ; 46 E. R. 128, L. C.

Annotations :—**Mentd.** Leigh *v.* Pendlebury (1864), 15 C. B. N. S. 815 : Turquand *v.* Moss (1864), 17 C. B. N. S. 15 ; *Re* Wardell & Rolls, *Ex p.* Watts (1864), 10 L. T. 74 ; *Re* Wyatt, *Ex p.* Wyatt (1864), 10 L. T. 311 ; Pearson *v.* Pearson (1866), L. R. 1 Exch. 308 ; Durant *v.* Robinson (1876), 34 L. T. 617.

8875. —— Provision as to payment of costs.]—*Qu. :* whether a provision in a deed, directing the administration of the property comprised in the deed to be subject to the usual costs, charges & expenses of investigating the accounts & position of debtors, & of & incidental to the

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either "N. & R. G. & Co." or "N. & R. G." :—*Held :* the deed did not amount to an admission that the two firms were distinct, & as regarded the creditors there was only one firm.—HEAPE *v.* HAWTHORNE (1865), 2 W. W. & A'B. 76.—**AUS.**

8868 i. *To what creditors deed applicable—Persons having unrecognised & unascertained claims.*]—A deed of assignment for the benefit of creditors was drawn on the basis of the assignor's debts being known to the parties, & recited that the creditors named in the sched. were to the best of the assignor's belief all his creditors, & the trustees, after sale & conversion of the assignor's property, were to pay & divide the net proceeds amongst such creditors :—*Held :* the intention of the parties did not contemplate claims unrecognised & unascertained, which could not be established without subsequent investigation & adjustment, & children of the assignor should not be permitted to rank as creditors in respect of money, the proceeds of shares taken up by the assignor from time to time in trust for them as a substitute for life assurance on his life, where he had never till after the deed of assignment was executed regarded himself as indebted to his children, or the shares as being out of his own control, & had used the proceeds from time to time in his business without crediting the children with them in his books.—WEBSTER *v.* RAE (1893), 19 V. L. R. 717.—**AUS.**

8868 ii. —— *Creditors named—Instalments.*]—A mtgee. executed a declaration that he held the security in trust to pay the first instalment payable thereon to two creditors named, & out of the balance secured by the said mtge. remaining after the said first payment to pay over to each of eight named creditors :—*Held :* none of the eight creditors was entitled to share in the first instalment.—WIGLE *v.* MCLEAN (1877), 24 Gr. 237.—**CAN.**

8868 iii. —— *Whether joint & separate creditors included.*]—A deed of composition by a partnership covenanted that one of the partners would pay all the creditors a "compensation" in respect of their respective claims against the insolvent firm :—*Held :* the deed provided for the payment of firm creditors only, & did not include separate creditors.—MCKITRICK *v.* HALEY (1881), 46 U. C. R. 246.—**CAN.**

h. *Instrument construed as a whole —"Draw against freight."*]—D., who had acted as ship's husband for certain vessels of which pltf. was a part owner, assigned for the general benefit of creditors. The sched. attached to the deed contained the words "co-owners of ships, proportions of earnings of vessels against the freights of which we have drawn, & not paid to them" : —*Held :* the word "against" could not be rejected as surplusage because the rule of construction requires effect to be given to every part of the document to be construed if possible.—PITCHER *v.* BINGAY (1888), 21 N. S. R. 31.—**CAN.**

Sect. 7.—Construction of composition deed or deed of arrangement.]

preparation of the deed, can be rejected or regarded as surplusage so as not to invalidate the deed.—*Re* WARDELL & ROLLS, *Ex p.* WATTS (1864), 10 L. T. 74.

8876. —— Power to sell on credit without security.]—A power to trustees to sell upon credit, & with or without taking security, as they may think proper, is discretionary, & may be rejected, if repugnant.—*Re* WYATT, *Ex p.* WYATT (1864), 10 L. T. 311 ; *sub nom. Re* WYATT, *Ex p.* SMITH, 12 W. R. 692

8877. —— Provision as to when non-assenting creditor's dividends should become due.]—A deed of composition, purporting to be made between debtor & the whole of his creditors, contained a covenant to pay each creditor 10*s.* in the pound with a proviso that, " in case any creditors should not at the date of the deed assent to it, the composition should be considered to become due to them within ten days from their assent being received or left at debtor's abode " :—*Held :* the proviso could not be rejected.—ARMITAGE *v.* BAKER (1864), 10 L. T. 526.

8878. —— " Whose names & seals are hereunto set & affixed.]—By a deed made between debtors of the first part, trustees of the second part, & " the several persons joint & separate creditors of debtors whose names & seals are hereunto set & affixed," of the third part, after reciting that the parties of the first part stood indebted on their joint account to the several persons & in the several sums set opposite their respective names in the schedules thereunder, & were also severally indebted to certain other persons, & that, being unable to pay their joint & separate creditors the whole of their demands, they had agreed to convey all their joint & separate estate to the parties of the second part in trust for themselves & the rest of the creditors rateably & in such manner as the same joint & separate estate would be distributable under a fiat of bkpcy., & that the parties of the second & third parts had agreed to release the debtors, the parties of the first part " by & with the consent of the creditors parties hereto " conveyed all their estate, etc., to the parties of the second part, upon trust to convert same, & " to pay & apply so much of the trust money as should arise from the conversion of the partnership property of debtors in & towards payment & discharge of the several debts due & owing to the several joint creditors of debtors, parties hereto of the second & third parts, or so much of the same debts as the same trust moneys will extend to pay rateably & in proportion, but so as the same shall be paid & applied in the same way as would be done in bkpcy.," & to pay & apply so much of the trust money as arose from the conversion of the separate property of debtors respectively in payment of their separate debts. The deed contained also a covenant by the trustees to make a faithful distribution of the money " unto & amongst the several joint & separate creditors of debtors, according to their respective rights & interests & the true intent & meaning of these presents," a release of debtors by the parties of the second & third parts, & a declaration that the trustees should take all possible steps for making the deed " binding upon all the creditors of the joint & separate estates of debtors, whether parties to the deed or not." The deed, which was duly registered, was executed by all the joint creditors, but no sums or amounts were set opposite their names, & there was no creditor who had not taken his benefit under it :—*Held :* the evident intention on the face of the deed being that it should be a good deed under 1861 Act, & one by which all the creditors would be entitled to benefit, the words appended to the description of the parties of the third part, apparently limiting its operation to the creditors " whose names & seals are hereunder set & affixed," might be rejected as a *falsa demonstratio*, & they did not control or overrule the general intention of the deed that all the creditors, & not a portion of them only, were to be benefited. —DURANT *v* ROBINSON (1876), 34 L. T. 617.

8879. Whether satisfaction inferred—Cessio bonorum.]—Though a composition deed contained no release or stipulation that the dividend was to be taken in full satisfaction of the debts :—*Held :* satisfaction ought to be inferred, as the deed constituted a *cessio bonorum*.—WHITMORE *v.* TURQUAND (1861), 3 De G. F. & J. 107 ; 30 L. J. Ch. 345 ; 4 L. T. 38 ; 7 Jur. N. S. 377 ; 9 W. R. 488 ; 45 E. R. 819, L. C.

Annotations :—**Distd.** Jones *v.* Morris (1865), 6 B. & S. 198 ; *Re* Foster, *Ex p.* Foster (1883), 52 L. J. Ch. 577, C. A. **Consd.** Ratcliff & Dealtry *v.* Mendelssohn, [1902] 2 K. B. 653, C. A. ; *Re* Mendelssohn, *Ex p.* Mendelssohn, [1903] 1 K. B. 216, C. A. **Refd.** *Re* A Disputed Adjudication (1860), 3 L. T. 634 ; *Re* Composition Deed, *Ex p.* Shettle (1862), 7 L. T. 366 ; Mendelssohn *v.* Ratcliff (1904), 91 L. T. 204, H. L. **Mentd.** Durant *v.* Robinson (1876), 34 L. T. 617 ; *Re* Cutler, Shoolbred *v.* Leslie (1892), 8 T. L. R. 584.

8880. Whether resulting trust for debtor.]—Under a deed of assignment for the benefit of creditors, there is a resulting trust of any surplus for debtor (LORD HATHERLEY, C.).—GREEN *v.* WYNN (1869), 4 Ch. App. 204 ; 38 L. J. Ch. 220 ; 20 L. T. 131 ; 17 W. R. 385, L. C.

Annotations :—**Mentd.** Bateson *v.* Gosling (1871), L. R. 7 C. P. 9 ; Forbes *v.* Jackson (1882), 19 Ch. D. 615 ; *Re* Whitehouse, Whitehouse *v.* Edwards (1887), 37 Ch. D. 683.

8881. ——.]—The creditors of a liquidating debtor resolved to accept a composition, & that as security for the payment of the composition debtor should assign all his property to B., who was appointed trustee, & that the security of B. should be accepted for the composition. B. took an

j. ——.]—All clauses of a deed of assignment must be regarded &, where the clauses singly are harmless & unobjectionable to creditors who may wish to take under the deed & do not constitute badges of fraud, the addition of them together will not have that effect.—HART *v.* MAGUIRE (1896), 29 N. S. R. 181; *affd.* (1897), 28 S. C. R. 272.—**CAN.**

k. *Whether deed controlled by schedule.*]—Where property is conveyed by deed, to which a sched. is attached enumerating a portion of the chattels, the list of chattels in the sched. will control the deed.—*Re* CRAIG (1869), I. R. 4 Eq. 158.—**IR.**

l. *Intention of debtor—What may be considered.*]—The question as to the intention of debtor in executing an assignment for benefit of creditors is a question of fact rather than of law, & in determining such question the conditions & trust subject to which the assignment is made may be considered. —STEPHENSON *v.* BAUMGARTNER, BAUMGARTNER *v.* STEPHENSON (1868), 3 Agra, 104, 321.—**IND.**

m. *Whether absolute or conditional.*]—By a deed of composition made between insolvents & creditors, insolvents agreed with all creditors to pay to them the amount, of the composition agreed upon, by several instalments, & for securing payment of the last three instalments insolvents covenanted to give the assignee their composition notes :—*Held :* the deed was absolute, & not conditional on a delivery of the composition notes being made.—LEWIS *v.* TUDHOPE (1877), 27 C. P. 505.—**CAN.**

8880 i. *Whether resulting trust for debtor.*]—A deed of assignment provided that any balance of the assets remaining, after distribution in various proportions among the creditors, should be paid to the assignor by the assignee : —*Held :* a resulting trust was created in favour of debtor.—WHITMAN *v.* UNION BANK OF HALIFAX (1887), 20 N. S. R. 194 ; 16 S. C. R. 410.—**CAN.**

8880 ii. ——.]—In an assignment for benefit of creditors, the surplus, as a matter of course, would be payable, after discharging all liabilities, to the assignor. — NELSON *v.* ARCHIBALD (1888), 20 N. S. R. 534.—**CAN.**

assignment to himself absolutely, paid the composition, & realised a surplus :—*Held :* (1) B. was absolutely entitled to the property; (2) there was no resulting trust of the surplus in favour of debtor.—*Re* WILCOCKS, *Ex p.* WILCOCKS (1874), 44 L. J. Bcy. 12 ; 31 L. T. 520.

8882. ——.]—The partners in a business, by a deed reciting the inability of the firm to pay their creditors, assigned the business & property to trustees upon certain trusts for the creditors. The deed contained no provision for the eventuality of a surplus, but that eventuality occurred :—*Held :* there was, on the construction of the deed, an absolute disposal for the benefit of the creditors, & no resulting trust for the assignors could be implied.—SMITH *v.* COOKE, STOREY *v.* COOKE, [1891] A. C. 297 ; 60 L. J. Ch. 607 ; 65 L. T. 1 ; 40 W. R. 67, H. L.

Annotations :—**Consd.** Cunnack *v.* Edwards, [1896] 2 Ch. 679, C. A. **Mentd.** *Re* Printers & Transferers, Amalgamated Trades Protection Soc. (1899), 47 W. R. 619.

8883. General words of release.]—By a deed conveying the real & personal estate of debtor to trustees for the benefit of his creditors the creditors executing the deed covenanted that it should operate & enure, & might be pleaded in bar, as a good & effectual release & discharge of all & all manner of actions, suits, bills, bonds, writings, obligations, debts, duties, judgments, extents, executions, claims & demands, both at law & in equity, which they or any of them had or might have against debtor or his estate or effects, for or by reason of all or any of the debts or engagements to them respectively due or owing by him, such covenant not to destroy any mtge., pledge, lien or other specific security which any creditor possessed :—*Held :* such general words had not the effect of releasing a judgment previously obtained by one of the creditors who executed the deed, so as to affect the priority of the creditor as between himself & a judgment creditor who was not a party to the deed, or so as to preclude the judgment creditor who executed the deed from enforcing the right which the judgment gave him as against the estate vested in the trustees.—SQUIRE *v.* FORD (1851), 9 Hare, 47 ; 20 L. J. Ch. 308 ; 17 L. T. O. S. 119 ; 15 Jur. 619 ; 68 E. R. 408.

Annotations :—**Mentd.** Fessard *v.* Mugnier (1865), 18 C. B. N. S. 286 ; Adams *v.* Angell (1877), 5 Ch. D. 634, C. A. ; Gokuldoss Gopaldoss *v.* Rambux Seochand (1884), L. R. 11 Ind. App. 126, P. C.

8884. —— **Restricted by other parts of deed.**]—Where in a composition deed under 1861 Act the release is in general terms, its generality may be restricted by the language of the other parts of the deed.—HASELGROVE *v.* HOUSE (1865), L. R. 1 Q. B. 101 ; 6 B. & S. 975 ; 12 Jur. N. S. 333 ; 14 W. R. 128 ; 122 E. R. 1453 ; *sub nom.* HAZELGROVE *v.* HOUSE, 35 L. J. Q. B. 1 ; 13 L. T. 462.

8885. —— ——.] — A composition deed, in consideration of a covenant by debtor to pay a certain composition, released debtor from all actions, debts, contracts, etc :—*Held :* the general words of the release were to be restrained by the general provisions of the deed.—GRESTY *v.* GIBSON (1866), L. R. 1 Exch. 112 ; 4 H. & C. 28 ; 35 L. J. Ex. 74 ; 13 L. T. 676 ; 12 Jur. N. S. 319 ; 14 W. R. 284.

Annotations :—**Mentd.** Brooks *v.* Jennings (1866), L. R. 1 C. P. 476 ; Reeves *v.* Watts (1866), L. R. 1 Q. B. 412 ; Isaacs *v.* Green (1867), L. R. 2 Exch. 352 ; M'Laren *v.* Baxter (1867), L. R. 2 C. P. 559 ; Cairncross *v.* Wills (1869), 20 L. T. 529.

8886. Whether release—By non-executing creditors.]—A deed made between deft. of the first part, E. of the second part, & L. of the third part, E. & the several other persons whose names & seals were thereunto set, or who in writing had assented to or approved of the deed, of the fourth part, & the several persons named in the second schedule of the fifth part, after reciting that deft. was possessed of or entitled to certain personal property, & was indebted to E. & the several other persons parties thereto of the fourth part, & to the persons parties thereto of the fifth part, in the sums mentioned & set opposite to their names in the first & second schedules respectively, & that an arrangement had been made that all the creditors should take in full discharge of their respective debts a composition of 10*s.* in the pound by two instalments of 7*s.* 6*d.* in the pound & 2*s.* 6*d.* in the pound, & that it was, at the request of E., agreed that the personal estate should remain under the control & disposal of deft., & that E., at the request of deft., & in consideration, etc., agreed to enter into the covenants thereinafter contained, & that it was agreed that the deed should contain the release & other provisoes thereinafter appearing, witnessed that, in consideration of the premises, deft. & E. covenanted with L. to pay him, on registration of the deed, such sum as should be sufficient to pay to all the creditors 7*s.* 6*d.* in the pound on the amount of their respective debts, provided that as regarded the liabilities under the covenants, the separate liability of E. should be treated as being in priority to the joint & several liabilities of him & deft., & also to the separate liability of deft., & deft. & E. covenanted with L. that they would, before the expiration of twelve months from the date of the deed, pay to L. such sum as should be sufficient to pay the remaining instalment of 2*s.* 6*d.* in the pound to all the creditors, other than E., & deft. covenanted with E. to pay him on the registration of the deed, & on or before the expiration of twelve months from the date, the instalments of 7*s.* 6*d.* in the pound & 2*s.* 6*d.* in the pound respectively, & it was declared that L. should stand possessed of the sums to be paid in respect of the instalments upon trust, after the registration of the deed, upon demand in writing by E. & the other persons creditors of deft., to pay E. & the other persons the instalment of 7*s.* 6*d.* in the pound, & after the expiration of twelve months after the date of the deed, upon such demand, to pay the creditors the remaining instalment of 2*s.* 6*d.* in the pound, & E. & the persons parties thereto of the fourth part released deft. from all debts & demands which the parties of the second & fourth parts had against him. It was alleged that a majority in number representing three-fourths in value of the creditors of deft., whose debts respectively amounted to £10 & upwards, had in writing assented to & approved of the deed :—*Held :* the deed was a valid deed within 1861 Act, s. 192, as it was a release of the non-executing creditors as well as of those who executed it.—WELLS *v.* HACON (1864), 5 B. & S. 196 ; 4 New Rep. 99 ; 33 L. J. Q. B. 204 ; 10 L. T. 411 ; 10 Jur. N. S. 862 ; 12 W. R. 790 ; 122 E. R. 804.

Annotations :— **Folld.** Bissell *v.* Jones (1868), L. R. 4 Q. B. 49. **Reld.** Garrod *v.* Simpson (1864), 3 H. & C. 395 ; Hernulewicz *v.* Jay (1865), 6 New Rep. 257 ; *Re* A Trust Deed, *Ex p.* James (1866), 15 L. T. 193.

8887. —— **Pleadable in bar as such.**]—A composition deed under 1861 Act, s. 192, professing to be made between debtor, a surety, & all the creditors, whether assenting or bound under the Act, recited that debtor had agreed to pay his creditors 5*s.* in the pound upon their debts by two instalments of 2*s.* 6*d.* in the pound each, the first in cash, the second by the joint & several

Sect. 7.—Construction of composition deed or deed of arrangement. Sect. 8: Sub-sect. 1.]

promissory notes of debtor & the surety, at four months' date, & that the statutory majority of creditors had consented to accept such composition. It then witnessed that, in consideration of the premises, the several creditors released debtor, in the largest possible terms, from all debts, claims, & demands, "save & except their rights, claims, & demands under & by virtue of this deed, & of the promissory notes for the second instalment of the composition," with a proviso saving their remedies against third persons, & the surety covenanted not to accept any security, preference, or benefit, until the full amount of the composition should have been paid:—*Held:* the deed amounted to an absolute release, & might be pleaded in bar as such.—LAY *v.* MOTTRAM (1865), 19 C. B. N. S. 479; 12 Jur. N. S. 6; 144 E. R. 874.

Annotations:—**Folld.** Gresty *v.* Gibson (1866), 4 H. & C. 28. **Mentd.** Brooks *v.* Jennings (1866), L. R. 1 C. P. 476; Reeves *v.* Watts (1866), 7 B. & S. 523.

See, further, Nos. 9503 *et seq., post.*

8888. —— Of debts then due.]—Shortly before a co. was wound up a shareholder executed a deed of arrangement with his creditors, which contained no *cessio bonorum*, but only covenants by the creditors that they would not enforce payment within two years, & by debtor that he would pay in full at the end of that period. Debtor was at that time liable for two calls made by the co., which were not included in the schedule sent in to the registrar, & another call subsequently made by the official liquidator:—*Held:* the deed only applied to debts actually due & the official liquidator might proceed against the shareholder for the subsequent calls.—*Re* RICHMOND HILL HOTEL CO., *Ex p.* KING (1867), 3 Ch. App. 10; 38 L. J. Ch. 541; 17 L. T. 188; 16 W. R. 57, L. J.

Annotations:—**Refd.** *Re* Bank of Hindustan, China & Japan, Mitchell's Case (1870), 5 Ch. App. 401, n. **Mentd.** Bailey *v.* Bowen (1868), L. R. 3 Q. B. 133; *Re* Bank of Hindustan, China & Japan, Mitchell's Case (1870), 5 Ch. App. 400, L. J.; *Re* Universal Banking Corpn., Mackreth's & Strang's Case (1870), 22 L. T. 85.

8889. —— Subject to avoidance on default.]—To a declaration on a bill of exchange deft. pleaded a composition deed under 1861 Act, s. 192, containing a release by the creditors respectively, with a proviso that in case default should be made in payment of the composition to the creditors respectively, the release should be thenceforth at an end. The plea did not aver payment or tender of the composition, but contained a general averment that all things necessary in that behalf having happened & been done, pltfs. became & were bound by the deed, as if they had been parties thereto & had executed same. Pltfs. replied that default was made by deft. in payment of the composition to divers of the creditors other than pltfs.:—*Held:* the release was an absolute release by each of the creditors of his own debt, subject to be avoided as against him, if the instalments due to him were not paid.—HART *v.* SMITH (1868), L. R. 4 Q. B. 61; 9 B. & S. 543; 38 L. J. Q. B. 25; 19 L. T. 419; 17 W. R. 158.

Annotations:—**Mentd.** *Re* Wilde (1868), 19 L. T. 752; *Re* Pullen, *Ex p.* Williams (1870), L. R. 10 Eq. 57; *Re* Harper, *Ex p.* Linsley (1873), 42 L. J. Bcy. 109.

8890. —— Or only licence to debtor to live unmolested.]—Debtor conveyed his life interest in certain property in trust for creditors, parties to the deed, and the creditors, in consideration thereof, granted to debtor licence to reside & attend to his affairs in any place he might think proper, without suit or molestation, in his person or his goods, chattels & effects, by any such creditors, & that, in case of any suit or molestation, by any of such creditors, contrary to the true intent & meaning of such licence, debtor should be wholly released & acquitted of the debt, & the deed might be pleaded in bar:—*Held:* this amounted only to a licence by the creditors to debtor to live unmolested, & did not operate as a release of the debt or a discharge of debtor's estate.—O'BRIEN *v.* OSBORNE (1852), 10 Hare, 92; 20 L. T. O. S. 201; 16 Jur. 960; 68 E. R. 852.

8891. —— Or only covenant not to sue.]—By a deed of arrangement under 1861 Act, s. 192, purporting to be made between debtor of the first part, & the several executing creditors, on behalf of themselves & all & every other the creditors who might assent to or become bound by the deed, of the second part, debtor covenanted to pay all his creditors the amount of their respective debts by nine monthly instalments, & the parties of the second part agreed to accept such instalments, & covenanted that, "while the instalments were duly & regularly paid by debtor, they would not sue him or enforce any judgment or other proceedings against him or his estate":—*Held:* this amounted only to a covenant not to sue for a limited time, & was not pleadable in bar as a release.—RAY *v.* JONES (1865), 19 C. B. N. S. 416; 34 L. J. C. P. 306; 12 L. T. 737; 11 Jur. N. S. 812; 13 W. R. 1018; 144 E. R. 848.

8892. —— ——.]—A deed of composition provided that debtor would, on or before May 8, pay his creditors 5*s.* in the pound in full discharge, with a proviso that if he should make default after fourteen days, the release should be void:—*Qu.:* whether the deed was a release or merely a covenant not to sue.—FESSARD *v.* MUGNIER (1865), 18 C. B. N. S. 286; 5 New Rep. 307; 34 L. J. C. P. 126; 11 L. T. 635; 11 Jur. N. S. 283; 13 W. R. 388; 144 E. R. 453.

Annotations:—**Consd.** Lay *v.* Mottram (1865), 19 C. B. N. S. 479. **Refd.** Hatch *v.* Hatch (1872), 28 L. T. 506; The Eider, [1893] P. 119, C. A. **Mentd.** Hart *v* Smith (1868), 9 B. & S. 543; *Re* Bishop, *Ex p.* Paper Staining Co. (1873), 37 J. P. 660; Duval *v.* Gans (1904), 91 L. T. 308, C. A.

8893. —— ——.]—Debtor, by deed, assigned his property to a trustee on trust to sell & divide the proceeds amongst his creditors, the creditors releasing debtor from the debts due to them respectively, but there was a proviso in the deed that nothing therein should affect any right or remedy which any creditor might have against any other person in respect of any debt due by debtor:—*Held:* such deed only amounted to a covenant not to sue debtor.—GREEN *v.* WYNN (1869), 4 Ch. App. 204; 38 L. J. Ch. 220; 20 L. T. 131; 17 W. R. 385, L. C.

Annotations:—**Apld.** *Re* Whitehouse, Whitehouse *v.* Edwards (1887), 37 Ch. D. 683. **Refd.** Bateson *v.* Gosling (1871), L. R. 7 C. P. 9. **Mentd.** Forbes *v.* Jackson (1882), 19 Ch. D. 615.

8891 i. *Whether release—Or only covenant not to sue.*]—An assignment for the benefit of creditors generally, which contains a clause reserving all rights & remedies against third parties, but releasing the assignor from his liability, operates only as a covenant not to sue, & not as a release.—HALL *v.* THOMPSON (1859), 9 C. P. 257.—CAN.

8891 ii. —— ——.]—A composition deed was executed between B. & his creditors, by which the creditors agreed that they would not sue B. on account of any debt owing to them by B., provided certain securities given for the composition were realised & paid:—*Held:* creditors by executing the deed, accepted the securities in satisfaction of their debts, & the deed operated as a general release.—THOMPSON *v.* NEILL (1848), 12 I. L. R. 547.—IR.

p. *Whether power given to assign estate.*]—A deed of inspection entered into between Z. & his creditors contained the following clause:—"It shall & may be lawful for the inspectors to summon a general meeting of all the creditors, at which all the creditors shall have a right to be present & vote in all the orders & resolutions to be made & the resolution of the major part in number & value of the creditors then present shall be binding on all

8894. "Molestation or interference"—What amounts to.]—A., a trader, entered into an arrangement, by deed, with his creditors, by which it was agreed that he should have a letter of licence for five years, during which period he should carry on the trade under the inspection of certain persons therein named, & it was provided, that, if any creditor should, during the continuance of the licence, molest or interfere with A., contrary to the true intent & meaning of the indenture, A. should thenceforth be relieved, exonerated, acquitted & discharged of & from all debts & demands of the creditor by whom the letter of licence should be so contravened, & that the indenture should or might be pleaded in bar to such respective debts or demands accordingly:—*Held:* the bringing of an action by a creditor, party to the deed, within the five years, was a "molestation or interference" with A., within the proviso.—GIBBONS *v.* VOUILLON (1849), 8 C. B. 483; 7 Dow. & L. 266; 19 L. J. C. P. 74; 14 Jur. 66; 137 E. R. 596.

Annotations:—**Refd.** Taylor *v.* Best (1854), 14 C. B. 487; Andrews *v.* Garrett (1859), 6 C. B. N. S. 262. **Mentd.** Phillips *v.* Surridge (1859), 9 C. B. 743; Belshaw *v.* Bush (1851), 11 C. B. 191; Corner *v.* Sweet (1856), L. R. 1 C. P. 456; McNaught *v.* Russell (1857), 5 W. R. 360; Legg *v.* Cheesebrough (1859), 5 C. B. N. S. 741; Ray *v.* Jones (1865), 19 C. B. N. S. 416; Emptage *v.* McCulloch (1867), 17 L. T. 67; Newington *v.* Levy (1870), L. R. 5 C. P. 607; Ellis *v.* M'Henry (1871), L. R. 6 C. P. 228.

8895. "Forthwith"—When time begins to run.]—Where a composition deed provides for the delivery of bills "forthwith," the time for the delivery of the bills runs from the registration of the deed.—*Re* SULLIVAN, *Ex p.* SULLIVAN (1866), 36 L. J. Bcy. 1; 15 L. T. 434; 15 W. R. 185, L. JJ.

Annotations:—**Mentd.** *Re* Prior, *Ex p.* Osenton (1869), 4 Ch. App. 690, L. JJ.; *Re* Pullen, *Ex p.* Williams (1870), L. R. 10 Eq. 57.

8896. "According to the law of bankruptcy."]—By a deed of assignment executed in favour of pltf. for the benefit of those creditors of deft. in his business as an underwriter who signified their assent to the deed, pltf. was to collect & recover the book debts & other claims of debtor, & was to stand possessed of the net proceeds realised in trust to apply them "in paying & discharging rateably, according to the law of bkpcy., & without prejudice or priority, & by such dividends as [he] shall think fit, the debts due or to become due from debtor to the creditors":—*Held:* the words "according to the law of bkpcy." were only descriptive of a rateable payment without prejudice or priority & by a series of instalments or dividends, & did not import into the distribution of the money the obligation of allowing a set-off under 1883 Act, s. 38, to a person who had not signified his assent to the deed.—BAKER *v.* ADAM (1910), 102 L. T. 248; 15 Com. Cas. 227; 11 Asp. M. L. C. 368.

Whether deed confers right to interest on debt.]—*See* No. 9313, *post.*

SECT. 8.—PROPERTY AVAILABLE.

NOTE.—*In considering the cases set out in this Section, regard must be had to the Notes at the beginning of the Part & of Sect. 2, ante.*

SUB-SECT. 1.—GENERAL POSITION OF TRUSTEE IN REGARD TO PROPERTY OF DEBTOR.

8897. Whether property passes—Misdescription of trustee.]—A trader assigned all his property & effects to a trustee for the benefit of his creditors, the trustee being therein described throughout as "James James, of, etc., tailor," but executing the deed by his true name of "James Janes":—*Held:* the misdescription did not prevent the property from passing to him.—JANES *v.* WHITBREAD (1851), 11 C. B. 406; 20 L. J. C. P. 217; 17 L. T. O. S. 78; 138 E. R. 530.

Annotations:—**Mentd.** Coates *v.* Williams (1852), 7 Exch. 205; Hickman *v.* Cox (1857), 3 C. B. N. S. 523, Ex. Ch.; Cox *v.* Hickman (1860), 8 H. L. Cas. 268, H. L.; Hidson *v.* Barclay (1864), 3 H. & C. 361, Ex. Ch.; Mason *v.* Briton Medical & General Life Assocn. (1888), 4 T. L. R. 755, C. A.

8898. —— Application of 1861 Act, s. 192.]—*Semble:* the 7th condition of the above sect. does not apply to a case where no trustee is appointed, nor to a simple composition deed providing for the payment of a certain sum in discharge of the debt.—*Re* COMPOSITION DEED, *Ex p.* SHETTLE (1862), 7 L. T. 366; 11 W. R. 45; *revsd.* on other points, *sub nom. Re* SHETTLE, *Ex p.* GODDEN, 1 De G. J. & Sm. 260, L. JJ.

Annotations:—**Mentd.** *Re* Bryant (1862), 7 L. T. 442; *Re* Llewellyn (1862), 1 New Rep. 230; *Re* T. W. (1862), 7 L. T. 475; Berridge *v.* Abbott (1863), 13 C. B. N. S. 507; Dewhurst *v.* Kershaw (1863), 1 H. & C. 726; Hodgson *v.* Wightman (1863), 1 H. & C. 810; Ilderton *v.* Castrique (1863), 14 C. B. N. S. 99; King *v.* Randall (1863), 14 C. B. N. S. 721; *Re* Smith, *Ex p.* Smith (1864), 3 De G. J. & Sm. 218, L. C.; Turquand *v.* Moss (1864), 17 C. B. N. S. 15; *Re* Wardell & Rolls, *Ex p.* Watts (1864), 10 L. T. 74; Gregory *v.* Baillon (1865), 4 F. & F. 1069, N. P.; Whittaker *v.* Lowe (1865), L. R. 1 Exch. 74, Ex. Ch.; Brooks *v.* Jennings (1866), Har. & Ruth. 414; *Re* Johnson, *Ex p.* Johnson (1866), 15 L. T. 163; Reeves *v.* Watts (1866), 35 L. J. Q. B. 171.

8899. —— Requisite proportion of creditors not assenting to deed.]—A deed in the form given in 1861 Act, sched. D., whereby debtor conveyed all his estate to trustees "to be applied & administered for the benefit of his creditors in like manner as if he had been at the date thereof duly adjudged bkpt.," was duly registered & complied with the other provisions of the Act, but was not shown to have been assented to by the requisite proportion of creditors under s. 192:—*Held:* the deed was good to pass the property at common law. *Qu.:* whether it was within the operation of s. 197.—SYMONDS *v.* GEORGE (1865), 3 H. & C. 996; 6 New Rep. 318; 34 L. J. Ex. 187; 13 L. T. 190; 11 Jur. N. S. 713; 13 W. R. 922 Ex. Ch.

Annotations:—**Consd.** Johnston *v.* Osenton (1869), L. R. 4 Exch. 107; *Re* Brooksbank, *Ex p.* Atkinson (1870), L. R. 9 Eq. 736; Glegg *v.* Rees (1871), 25 L. T. 261. **Expld.** Benecke *v.* Whittall (1877), 2 App. Cas. 602, P. C. **Refd.** Stanger *v.* Miller (1865), L. R. 1 Exch. 58.

8900. —— ——.]—A bill stated that, by an indenture made between A., of the first part, B. of the second part, & the several other persons whose names & seals were, or were intended to be, thereunto subscribed as creditors of A., of the third part, A. assigned all his personal estate to B. upon trusts for the creditors of A.:—*Held:* (1) this was not an averment of the execution of the deed by any of creditors":—*Held:* an assignment of the estate was beyond the scope of the deed.—HAMILTON, ROSS & CO. *v.* ZEEDERBERG (1884), 3 S. C. 184.—S. AF.

q. "*Debts due & owing.*"]—A bank agent, who was a member of a business firm, procured from a bank customer, accommodation drafts which he discounted as agent &, without indorsing the drafts, used the proceeds, in the business of his firm. The firm assigned all their property in trust to pay "all debts by the assignors or either of them due & owing or accruing or becoming due & owing" to the bank as first preferred creditor. In a suit to enforce carrying out the trusts created by the assignment:—*Held:* the drafts were "debts due & owing" from the insolvents to the bank & within the first preference created by the deed.—MERCHANTS BANK OF HALIFAX *v.* WHIDDEN (1891), 19 S. C. R. 53.—CAN.

PART XXIII. SECT. 8, SUB-SECT. 1.

8898 i. *Whether property passes—Application of statute.*]—A deed of assignment, though not good under stat. may be good at common law, & sufficient to pass the property.—WHITE *v.* YOUNG (1870), 1 V. L. R. 188.—AUS.

8898 ii. —— —— *Deed not in statutory form.*]—A deed purporting to be executed under 5 Vict. No. 9, but not executed in accordance therewith, may pass the property at common law.—WOOD *v.* MASON BROTHERS, LTD. (1892), 13 N. S. W. L. R. 66.—AUS.

Sect. 8.—Property available: Sub-sects. 1 & 2.]

the creditors; (2) the deed nevertheless would operate as an assignment of the personal estate, so as to enable B. to maintain a suit against a trustee to whom certain personal estate had been assigned in trust for A., & that the creditors need not be parties to the suit.—GLEGG *v.* REES (1871), 7 Ch. App. 71; 41 L. J. Ch. 243; 25 L. T. 612; 20 W. R. 193, L. C.

Annotation:—**Refd.** *Re* Sanders' Trusts (1878), 47 L. J. Ch. 667.

8901. —— No assent to deed by trustees.]—A conveyance by debtor of his goods to two creditors for the benefit of themselves & the other creditors passes the property at once on the execution of the deed by debtor without any assent on the part of the trustees.—HOBSON *v.* THELLUSON (1867), L. R. 2 Q. B. 642; 8 B. & S. 476; 36 L. J. Q. B. 302; 16 L. T. 837; 15 W. R. 1037.

Annotations:—**Refd.** Muller's Margarine *v.* I. R. Comrs. (1899), 69 L. J. Q. B. 291, C. A. **Mentd.** Woodhouse *v.* Murray (1867), 8 B. & S. 464; *Re* Davies, *Ex p.* Williams 1872), 26 L. T. 303, L. JJ.; Ehlers, Seel *v.* Kauffman & Gates, Wendt & Charles, Claimants (1883), 49 L. T. 806, D. C.; Hodder *v.* Williams, [1895] 2 Q. B. 663, C. A.

See, also, Nos. 9532, *et seq., post.*

8902. —— Deed not registered.]—A deed of assignment of chattels by debtor to trustees, void as against assignees in bkpcy. of debtor for want of registration, is nevertheless operative as between the immediate parties to it from the time of its operation until the proceedings in bkpcy., so as to pass the property in the chattels from debtor.—R. *v.* CREESE (1874), L. R. 2 C. C. R. 105; 43 L. J. M. C. 51; 29 L. T. 897; 38 J. P. 229; 22 W. R. 375; 12 Cox. C. C. 539, C. C. R.

Annotation:—**Distd.** R. *v.* Humphris, [1904] 2 K. B. 89, C. C. R.

8903. Whether trustees in same position as trustee in bankruptcy.]—A deed was executed by debtor under 1861 Act, conveying the whole of his property to trustees for the benefit of his creditors to be administered by them as in bkpcy.:—*Held:* the trustees were as fully masters of the property with all the incidents attaching to that ownership as the assignees would have been, if debtor had actually become bkpt.—*Re* PRICE, *Ex p.* BANK OF ENGLAND (1867), 2 Ch. App. 662; 36 L. J. Bcy. 24; 16 L. T. 760; 15 W. R. 1066, L. JJ.

8904. ——.]—An assignment for the benefit of creditors under 1861 Act, vests the property of the assignor in the trustees of the deed, as completely as his actual bkpcy. would have vested it in his assignees.—FENTON *v.* QUEEN'S FERRY WIRE ROPE Co. (1868), L. R. 7 Eq. 267; 38 L. J. Ch. 136; 20 L. T. 297; 17 W. R. 155.

8905. When property passes—Not until possession.]—Property of an assignor does not become the property of the trustee under a deed of assignment for the benefit of creditors until it has come into the possession of the trustee.—R. *v.* HUMPHRIS, [1904] 2 K. B. 89; 73 L. J. K. B. 464; 90 L. T. 555; 68 J. P. 325; 52 W. R. 591; 20 T. L. R. 425; 48 Sol. Jo. 509; 20 Cox. C. C. 620, C. C. R.

8906. Whether property continues vested in trustee—After discharge of debtor.] —All the property of a debtor which is vested in the trustee at the time of his liquidation continues vested in him, notwithstanding his release & the discharge of debtor.—*Re* ARMSTRONG, *Ex p.* WITT (1879), 40 L. T. 836; 27 W. R. 888.

8907. —— Bankruptcy (Discharge & Closure) Act, 1887 (c. 66).]—The above Act, s. 3 (1), does not apply to a liquidation by arrangement under 1869 Act, so as to close the liquidation & vest the property of the liquidating debtor in the Official Receiver.—*Re* BARTON, TOMLINS *v.* LATIMER, [1909] 2 K. B. 841; 79 L. J. K. B. 29; 101 L. T. 407; 16 Mans. 269, C. A.

SUB-SECT. 2.—RELATION BACK OF TRUSTEE'S TITLE.

8908. Application of rule.]—A trader, by a bill of sale dated Apr. 24, 1860, assigned to M. all his household furniture, stock-in-trade, & effects for securing £180 & any further advances which M. might make to him, with a proviso for

r. *Trustee takes only such title as assignor had.*]—ROBINSON *v.* COOK (1884), 6 O. R. 590.—**CAN.**

s. *S. P.*—THIBAUDEAU *v.* PAUL (1895), 26 O. R. 385.—**CAN.**

. —— *At date of execution of deed.*]—Trustees, being in the position of purchasers, can claim only such rights as debtor was legally entitled to at the date of the execution of the deed of trust.—MCMASTER *v.* CLARE (1859), 7 Gr. 550.—**CAN.**

a. —— *Unless otherwise provided by statute.*]—In absence of a statutory title to sue as representing creditors, such as is conferred by bkpcy. & insolvency statutes, an assignee in trust for creditors can only enforce the same rights as the person making the assignment to him could have enforced.—BURLAND *v.* MOFFATT (1884), 11 S. C. R. 76; *overd.* PORTEOUS *v.* REYNAR (1887), 13 App. Cas. 120, P. C.—**CAN.**

8903 i. *Whether trustees in same position as trustee in bankruptcy.*]—In a suit by trustees appointed under a deed executed by bkpt. under Bkpcy. Ordinance, 1864, of Hong Kong, art. 165 (corresponding to English 1861 Act, s. 194), to set aside certain conveyances of real property made by bkpts.:—*Held:* a deed executed under art. 165 must be registered, or it would be inadmissible in evidence, but not coming within art. 167 (corresponding to English 1861 Act, s. 197), it did not give the trustees appointed thereunder all the rights of action which would have accrued to assignees in bkpcy.—BENECKE *v.* WHITTALL (1877), 2 App. Cas. 602; 46 L. J. P. C. 81; 37 L. T. 73; 25 W. R. 913, P. C.—**HONG KONG.**

b. *Protection of assets.*]—The assignment protects the assigned assets from all creditors.—BAPUJI AUDITRAM *v.* UMEDBHAI HATHESING (1871), 8 Bom. A. C. 245.—**IND.**

8905 i. *When movable property passes—Not until delivery.*]—The execution of a deed of assignment by a debtor does not vest his movable property in the assignee without delivery.—BARTON *v.* WARREN'S ASSIGNEE (1908), T. S. 534.—**S. AF.**

c. *Whether property continues vested in original trustee—Nomination of new trustee.*]—A deed declared that in case either of the trustees should die or be desirous of being discharged from, or become incapable to act in the trusts, it should be the duty of the other trustees for the time being to call a general meeting of the creditors, & that it should be lawful for a majority of the creditors present to appoint any other person to be trustee in addition to the trustees thereby appointed, with the like powers to such new trustee to act & perform the trusts as fully as if he had been originally a trustee:—*Held:* the nomination of S. by the creditors as a trustee in the place of M., one of the five trustees named in the deed, vested no estate in the land in S., but that the legal estate vested in M. by the deed remained in him until he parted with it by a legal conveyance.—WRIGHT *v.* ROBERTSON (1845), 5 N. B. R. (3 Kerr) 78.—**CAN.**

d. —— *After approval by court.*]—An arranging debtor having, subsequently to the confirmation of his proposal, agreed to sell a portion of his property, which had been vested in the official assignees pending the payment of his composition not yet due, the ct. refused to make an order for revesting debtor's property *pro tanto.*—*Re* T. D. (1873), 7 I. L. T. 172.—**IR.**

e. —— *After composition accepted.*]—Where bkpt.'s offer of composition is accepted, & his bkpcy. annulled, his property does not thereupon revert to him, but remains vested in the assignees, who are necessary parties to a conveyance by bkpt.—*Re* FIRTH & HUGHES (1880), 14 I. L. T. 100.—**IR.**

f. —— *Assignment followed by composition.*]—Insolvent assigned to trustees for the benefit of creditors, & afterwards compounded with his creditors:—*Held:* the position of the trustees under the assignment was not interfered with, & the property remained vested in them.—MORRIS *v.* TOBIN & BRADSHAW & ANDERSON, TOBINS TRUSTEES (1898), 8 Nfld. L. R. 100.—**NFLD.**

PART XXIII. SECT. 8, SUB-SECT. 2.

g. *Statutory requirements complied with—Relation back—Effect on execution.*]—MCINNES *v.* BENEDICT, 8 C. L. J. 22.—**CAN.**

redemption on payment, & a power to M. to seize & sell if the money should not be paid on demand. Three days after the date of the bill of sale, K., another creditor, applied to the trader for payment of his debt, & by pressure obtained from him goods to the value of £39 9*s*., being part of those comprised in M.'s bill of sale, having notice at the time that the whole had been already assigned to M. On May 7, W., to whom the trader owed £74 at the time he gave the bill of sale to M., petitioned for an adjudication of bkpcy. against him. A meeting of the creditors took place, &, M. having consented to give up the proceeds of the goods which he had sold under the bill of sale, it was agreed that the trader should execute a deed of assignment for the benefit of all his creditors under 1861 Act, which was done, & applts. were appointed trustees, & the deed duly registered :—*Held :* the title of the trustees under the deed of assignment by virtue of s. 197 related back to the execution of the bill of sale, & so overrode the transaction of Apr. 27, & they were entitled to recover from K. the value of the goods which he had obtained after notice of the act of bkpcy.—TOPPING *v.* KEYSELL (1864), 16 C. B. N. S. 258 ; 4 New Rep. 197 ; 33 L. J. C. P. 225 ; 10 L. T. 526 ; 10 Jur. N. S. 774 ; 12 W. R. 756 ; 143 E. R. 1127.

Annotations :—**Distd.** Symons *v.* George (1865), 11 Jur. N. S. 713, Ex. Ch. **Consd.** Exley *v.* Inglis (1868), L. R. 3 Exch. 247. **Refd.** *Re* Vizard's Trusts (1866), 1 Ch. App. 588, L. JJ. **Mentd.** *Re* A Trust-Deed, *Ex p.* James (1866), 15 L. T. 193.

8909. ——.]—*Semble :* the rights of a trustee under a liquidation relate back in the same manner as those of a trustee under a bkpcy.—*Re* NORTON, *Ex p.* TODHUNTER (1870), L. R. 10 Eq. 425 ; 39 L. J. Bcy. 17 ; 25 L. T. 313 ; 18 W. R. 890.

Annotations :—**Refd.** *Re* Adams, *Ex p.* Birmingham Gaslight & Coke Co. (1870), L. R. 11 Eq. 204. **Mentd.** *Re* Gwynn, *Ex p.* Veness (1870), 39 L. J. Bcy. 23 ; *Re* Skinner, *Ex p.* Keys (1870), 39 L. J. Bcy. 28 ; *Re* Hall, *Ex p.* Rocke (1871), 6 Ch. App. 795, L. C. & L. JJ. ; Slater *v.* Pinder (1871), L. R. 6 Exch. 228 ; *Re* Johnson, *Ex. p.* Rayner (1872), 41 L. J. Bcy. 26 ; Lucas *v.* Dicker (1880), 6 Q. B. D. 84, C. A.

8910. ——.]—The title of the trustee in a liquidation by arrangement relates back to an act of bkpcy. committed by debtor before the filing of the petition in the same way as that of a trustee in a bkpcy.—*Re* EDWARDS, *Ex p.* EYLES (1873), L. R. 16 Eq. 99 ; 42 L. J. Bcy. 55 ; 37 J. P. 596 ; 21 W. R. 574.

Annotation :—**Apprvd.** *Re* Matanle, *Ex p.* Schulte (1874), 30 L. T. 478, L. JJ.

8911. When deed equivalent to adjudication in bankruptcy—All requirements complied with.]—A deed for the benefit of creditors under 1861 Act, all the requirements of which have been complied with so as to bring s. 197 into operation, is, when registered, equivalent to an adjudication in bkpcy.—WOOD *v.* DUNN (1866), L. R. 2 Q. B. 73 ; 7 B. & S. 94 ; 36 L. J. Q. B. 27 ; 15 L. T. 411 ; 15 W. R. 180, Ex. Ch.

Annotations :— **Mentd.** London Corpn. *v.* Cox (1867), L. R. 2 H. L. 239, H. L. ; Barnfather *v.* Barrow, Barrow, Page & Draper (1877), 37 L. T. 231 ; Turnbull *v.* Robertson, Blackburn Garnishee (1878), 47 L. J. Q. B. 294 ; Cronmire *v.* McColla (1893), 9 T. L. R. 549, C. A. ; Martin *v.* Nadel, [1906] 2 K. B. 26, C. A. ; Ponsford, Baker *v.* Union of London & Smith's Bank, [1906] 2 Ch. 444, C. A. ; Ranson *v.* Platt, [1911] 2 K. B. 291, C. A.

8912. When rule in bankruptcy applicable—Estate to be administered as in bankruptcy.]—Where a deed under 1861 Act, s. 192, conveys all the estate & effects of debtor to trustees, to be held & administered by them for the benefit of the creditors, as if debtor had been adjudicated bkpt., the title of the trustees has, by virtue of s. 197, relation back.—EXLEY *v.* INGLIS (1868), L. R. 3 Exch. 247 ; 37 L. J. Ex. 145 ; 18 L. T. 645 ; 16 W. R. 938.

8913. —— ——.]—When the creditors have resolved to accept a composition in satisfaction of their debts under 1869 Act, s. 126, the property of debtor is not taken from him nor vested in a trustee ; it is not " distributed in the same manner as in bkpcy." On the contrary, debtor is left in the possession of his assets for the very purpose, it may be, of enabling him to fulfil the engagement he has entered into with his creditors to pay them the stipulated composition. The terms agreed to are binding upon all the creditors, may be embodied in a deed & secured by covenants, if the creditors so will, & may be enforced by the ct., as any order of the ct. may be. But there is no power in this latter case to deprive secured creditors of their securities, no relation of title to any act of bkpcy. prior to the presentation of the petition or otherwise, nor anything in which the creditors, who have resolved to accept a composition, have any interest beyond enforcing the performance of that condition on which they have agreed to accept the composition (BACON, C.J.).—*Re* ADAMS, *Ex p.* BIRMINGHAM GASLIGHT & COKE CO. (1870), L. R. 11 Eq. 204 ; 40 L. J. Bcy. 1 ; 24 L. T. 42 ; *sub nom.* BIRMINGHAM GAS CO. *v.* ADAMS, 19 W. R. 123.

Annotation :—**Mentd.** *Re* Fanshaw & Yorston, *Ex p.* Birmingham & Staffordshire Gaslight Co. (1871), 40 L. J. Bcy. 52. *See, also,* No. 8760, *ante.*

8914. To what date—Approval of scheme.]—On May 21, 1855, S. filed a petition in a bkpcy. ct. for a private arrangement with his creditors, & by an order of the district comr., made on the same day, protection was granted until June 18 then next. The registrar of the ct., on June 2, made another order, purporting to grant protection from process to the person & property of S. until June 9 then next. That order for protection purported to be under a petition by S., presented on June 1. No petition had been presented by S. on June 1, but the petition of May 21 appeared to have been on that day allowed to be refiled, & was so indorsed. Pltf. on June 5 recovered & entered up judgment against S. for a debt & costs. By indenture, dated Aug. 27, S. assigned certain specified lands & other property to trustees for the benefit of certain creditors therein mentioned, among whom pltf. was included by name, but he never executed or assented to the deed. Pltf. filed his bill for the purpose of having a declaration that his judgment was binding on the lands comprised in the indenture of Aug. :—*Held :* the execution of a deed of arrangement did not relate back to the date of filing the petition, or of the order for protection, but took effect from the approval of the whole transaction by the comr.—SOUTHERN *v.* SIDNEY (1857), 30 L. T. O. S. 182 ; 3 Jur. N. S. 1239.

8915. —— **" Date of appointment of trustee " substituted for " date of adjudication."**]—Where debtor's estate is being liquidated by arrangement under 1869 Act, instead of in bkpcy., the words " date of the appointment of the trustee " must be substituted for the words " date of adjudication " in s. 95 (3).—*Re* GWYNN, *Ex p.* VENESS (1870), L. R. 10 Eq. 419 ; 39 L. J. Bcy. 23 ; 25 L. T. 311 ; 18 W. R. 979.

Annotations :—**Consd.** *Re* Skinner, *Ex p.* Keys (1870), 39 L. J. Bcy. 28 ; Slater *v.* Pinder (1871), L. R. 6 Exch. 228. **Mentd.** *Re* Adams, *Ex p.* Birmingham Gaslight & Coke Co. (1870), L. R. 11 Eq. 204 ; *Re* Hall, *Ex p.* Rocke (1871), 6 Ch. App. 796, n. ; *Re* Johnson, *Ex p.* Rayner (1872), 41 L. J. Bcy. 26.

8916. Whether resolution for composition has retrospective effect.]—A resolution for composition has no retrospective effect, so as to invalidate

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securities obtained by a creditor in the interval between the filing of the petition & the first meeting of creditors.—*Re* JONES, *Ex p.* JONES (1875), 10 Ch. App. 663; 44 L. J. Bcy. 124; 33 L. T. 116; 23 W. R. 886, L. JJ.

Annotations:—**Distd.** *Re* Chidley, *Re* Lennard (1875), 1 Ch. D. 177, C. A.; *Re* Balbirnie, *Ex p.* Jameson (1876), 3 Ch. D. 488, C. A.; *Re* Lewis, *Ex p.* Mauthner (1876), 3 Ch. D. 113. **Consd.** Sneary *v.* Abdy (1876), 1 Ex. D. 299, C. A. **Folld.** *Re* Kearley & Clayton's Contract (1878), 7 Ch. D. 615. **Refd.** Crew *v.* Terry (1877), 2 C. P. D. 403; *Re* McColla, *Ex p.* McLaren (1881), 16 Ch. D. 534, C. A.

8917. Whether liquidation by arrangement has retrospective effect.]—*Qu.:* whether there is any relation back to an act of bkpcy. in cases of liquidation by arrangement.—LOMAX *v.* BUXTON (1871), L. R. 6 C. P. 107; 40 L. J. C. P. 150; 24 L. T. 137; 19 W. R. 441.

Annotations:—**Mentd.** *Re* Ash, *Ex p.* Fisher (1872), 7 Ch. App. 636, L. JJ.; R. *v.* Creese (1874), L. R. 2 C. C. R. 105, C. C. R.; Philps *v.* Hornstedt (1875), 1 Ex. D. 62, Ex. Ch.; Heath *v.* Cochrane (1877), 46 L. J. Q. B. 727; *Re* Hemingway, *Ex p.* Hauxwell (1883), 23 Ch. D. 626, C. A.; *Re* Hughes, *Ex p.* Hughes (1893), 62 L. J. Q. B. 358.

SUB-SECT. 3.—WHAT PROPERTY PASSES.

A. In General.

8918. Chose in action.]—By a deed made between debtors of the first part, trustees of the second part, & "the several persons joint & separate creditors of debtors whose names & seals are hereunto set & affixed," of the third part, after reciting that the parties of the first part stood indebted on their joint account to the several persons & in the several sums set opposite their respective names in the schedules thereunder, & were also severally indebted to certain other persons, & that, being unable to pay their joint & separate creditors the whole of their demands, they had agreed to convey all their joint & separate estate to the parties of the second part in trust for themselves & the rest of the creditors ratably & in such manner as the same joint & separate estate would be distributable under a fiat of bkpcy., & that the parties of the second & third parts had agreed to release debtors, the parties of the first part "by & with the consent of the creditors parties hereto" conveyed all their estate, etc. to the parties of the second part, upon trust to convert same, & "to pay & apply so much of the trust money as should arise from the conversion of the partnership property of debtors in & towards payment & discharge of the several debts due & owing to the several joint creditors of debtors, parties hereto of the second & third parts, or so much of same debts as the same trust money will extend to pay ratably & in proportion but so as same shall be paid & applied in the same way as would be done in bkpcy.," & to pay & apply so much of the trust money as arose from the conversion of the separate property of debtors respectively in payment of their separate debts. The deed contained also a covenant by the trustees to make a faithful distribution of the money "unto & amongst the several joint & separate creditors of debtors, according to their respective rights & interests & the true intent & meaning of these presents;" a release of debtors by the parties of the second & third parts, & a declaration that the trustees should take all possible steps for making the deed "binding upon all the creditors of the joint & separate estates of debtors, whether parties to the deed or not." The deed, which was duly registered, was executed by all the joint creditors, but no sums or amounts were set opposite their names, & there was no creditor who had not taken his benefit under it:—*Held:* the deed, as against deft. who was not a party to it, was good to pass a chose in action.—DURANT *v.* ROBINSON (1876), 34 L. T. 617.

8919. Contract—Containing obligations of personal character.]—A contractor entered into an agreement for the completion of a building at a certain time, in a certain specified manner, & it was agreed that the contractor was "to set out the work & be responsible for errors," to "provide & employ" workmen, to provide & keep at the building a competent general foreman," to "provide materials, labour," etc., & also that if the contractor should, from any cause, not comply with the terms of the contract within three days after being requested to do so in writing, the

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PART XXIII. SECT. 8, SUB-SECT. 3.—A.

h. *All property.*]—M. & Son executed a deed for the benefit of such creditors as should join in the deed, whereby they vested all their estate in a trustee:—*Held:* trustee was entitled to the goods included in the transfer.—GRAHAM *v.* BELL (1884), 5 R. & G. 90.—**CAN.**

k. ——.]—All the estate of assignor is in the hands of the assignee for general distribution among the creditors.—BLAIN *v.* PEAKER (1889), 18 O. R. 109.—**CAN.**

l. *Benefit of fund of benevolent society, R. S. O.* 1887.]—The benefit to which debtor is entitled in the fund of a society properly incorporated under Benevolent Societies Act, 1887, does not pass to the assignee.—*Re* UNITT & PROTT (1892), 23 O. R. 78.—**CAN.**

m. *Benefit of indemnity covenant by stranger.*]—The benefit of a covenant by a third person to indemnify one of the partners against a mtge. does not pass to the assignee under a deed of assignment made by a trading partnership of all the several & joint property of each partner, notwithstanding the deed expressly mentions "mtges."—BALL *v.* TENNANT (1895), 21 A. R. 602.—**CAN.**

n. *Chattels not included in schedule.*]—W. by deed assigned all his "estate, goods, chattels, book debts, stock-in-trade etc. particulars whereof, so far as the assignor can set forth same, are comprised in the sched. hereto":—*Held:* sewing machines not included in the sched. passed by the deed.—WOOD *v.* MASON BROTHERS, LTD. (1892), 13 N. S. W. L. R. 66.—**AUS.**

8918 i. *Chose in action.*]—A chose in action was assigned, *inter alia*, for the general benefit of creditors, all the parties interested being before the ct., & the Crown making no objection, the ct. gave effect to such assignment.—R. *v.* MCCURDY (1891), 2 Exch. C. R 311.—**CAN.**

o. *Dividends on shares — Debtor liable for unpaid calls.*]—H. assigned for the benefit of his creditors. At that time a co. owed a debt to H. The co. subsequently went into liquidation, & H. was placed upon the list of contributories liable to pay calls, which were not paid:—*Held:* the liquidators of the co. must pay to H.'s trustees the full amount of the dividend on the debt due by the co. to H.—*Re* MCKAY HARVESTING MACHINERY CO. (IN LIQUIDATION) (1894), 20 V. L. R. 153.—**AUS.**

p. *Entailed property.*]—When real property is held in tail by debtor, a deed of assignment for the benefit of creditors passes a bare fee only.—*Re* SWINDEN'S ESTATE (1882), 16 S. A. L. R. 7.—**AUS.**

q. *Exempt property.*]—The wearing apparel of the assignor is properly excepted from the assignment.—*Re* CURLE (1866), 3 W. W. & A'B. 56.—**AUS.**

r. —— *Selection—Onus of proof.*]—A deed of assignment of the estate & effects of insolvents for the benefit of their creditors, excepted "such personal property as may be selected by debtors under Homestead Act & Homestead Amendment Act, 1890":—*Held:* the *onus* was on claimant to show that the claim was not within the exception to the right of exemption provided by the above Act, in regard to goods seized in "satisfaction of a debt contracted for or in respect of such identical goods."—*Re* SHARP (1896), 5 B. C. R. 117.—**CAN.**

s. —— *Loss of right to claim.*]—Debtors assigned all their personal property, credits & effects that might be seized & sold under execution, & afterwards claimed, as exempt, chattels to the amount of $500:—*Held:* by the form of assignment claimants were precluded from claiming exemption.—*Re* LEY (1900), 7 B. C. R. 94.—**CAN.**

t. —— ——.]—A fur vendor assigned for the benefit of her creditors all her property & effects which might be seized sold or attached under

architect should have power to prevent his further execution of the works, & cause the same to be finished by others. After he had received notice from the employer that he was neglecting & delaying to complete & finish the building, the contractor, on the following day, entered into a composition deed for the benefit of his creditors under 1861 Act, ss. 192 *et seq.*, in the form prescribed by that Act:—*Held:* the trustees of the deed were not at liberty to adopt the contract, containing, as it did, obligations of a personal character.—KNIGHT *v.* BURGESS (1864), 33 L. J. Ch. 727; 10 L. T. 90; 10 Jur. N. S. 166.

8920. Hired property—Under hire-purchase agreement.]—A person, in possession of a gas engine under a hire-purchase agreement, assigned to a trustee for creditors all his stock, machinery, etc. The trustee took possession of the stock, including the gas engine, but subsequently the person from whom the engine was hired broke into the premises & seized the engine. In an action for trespass by the trustee:—*Held:* the engine not being the property of the assignor, but only hired, did not pass to the trustee under the assignment.—KITTO *v.* BILBIE, HOBSON & Co. (1895), 72 L. T. 266; 11 T. L. R. 214; 2 Mans. 122; 15 R. 188.

8921. Insurance policy—Assignment of all personal estate & "all writings belonging to same"—Right of trustee to recover policy money paid to executors of deceased debtor.]—A., by deed, conveyed all his property to trustees for the benefit of his creditors. The conveyance contained general words (*inter alia*) "all & singular other the personal estate & effects whatsoever," & all "writings" belonging to same. A. was possessed, at the time, of a policy of insurance on his own life, the existence of which was not known to the trustees, & which remained in his possession. A. died, & the trustees, having afterwards learned the existence of the policy, claimed it from his exor., who refused to deliver it up, & who obtained the money from the insurance office:—*Held:* the legal property in the writing, & the beneficial interest in the contract, passed to the trustees by the deed, & they might maintain trover for the policy against the exor., the proper measure of the damages in the circumstances being the amount of the money obtained by it.—WATSON *v.* MACLEAN (1858), E. B. & E. 75; 6 W. R. 721; 120 E. R. 435, Ex. Ch.

8922. —— Assignment of "credits, estate & effects"—Policy renewable annually with consent of insurer.]—An accident policy of assurance with a co. provided for the payment of a premium for one year from the date thereof, & was capable of being renewed only by consent of the co. The assured assigned all his property, "credits, estate & effects, whatsoever" to trustees for the benefit of his creditors, & died two years afterwards from an accident, while the renewal policy was subsisting:—*Held:* the money payable thereunder did not pass to the trustees under the deed, but belonged to the exors. of the assured.—STOKELL *v.* HEYWOOD, [1897] 1 Ch. 459; 65 L. J. Ch. 721; 74 L. T. 781; 12 T. L. R. 463.

8923. Life interest—Not mentioned in schedule.]—A deed of composition executed by debtor, who had filed a bkpcy. petition, recited that debtor was possessed of or entitled to the real & personal estate specified in a schedule to the deed, & that in accordance with his desire to pay his creditors 20*s.* in the pound, & in order that the composition should be secured, he had agreed with the trustee to assign to him all the property set forth in the schedule, upon the trusts thereinafter contained. By the operative part debtor, "for effectuating the desire, & in pursuance of the agreement," assigned to the trustee "all & singular the several properties, chattels, & effects set forth in the schedule hereto, & all the estate, right, title, interest, claim, & demand," of debtor "in to, & upon the chattels, properties, & effects, & all other the estate, if any," of debtor. Debtor was, under the trusts of a post-nuptial settlement, entitled to a life interest in certain property. The life interest was not mentioned in the schedule:—*Held:* the life interest did not pass to the trustee.—*Re* MOON, *Ex p.* DAWES (1886), 17 Q. B. D. 275; 55 L. T. 114; 34 W. R. 752; 2 T. L. R. 506; 3 Morr. 105, C. A.

Annotations:—**Refd.** *Re* Gates (1895), 39 Sol. Jo. 331. **Mentd.** *Re* Garnett, Robinson *v.* Gandy (1886), 55 L. T. 562, C. A.; *Re* James, Clutterbuck *v.* James (1890), 62 L. T. 454; *Re* Knight & Tabernacle Permanent Bldg. Soc. (1892), 67 L. T. 403, C. A.; *Re* Sartoris's Estate, Sartoris *v.* Sartoris, [1892] 1 Ch. 11; *Re* Riggs, *Ex p.* Lovell, [1901] 2 K. B. 16; *Re* Cotgrave, Mynors *v.* Cotgrave, [1903] 2 Ch. 705; Postmaster General *v.* National Telephone Co. (1908), 72 J. P. 307, C. A.; Crouch *v.* Crouch, [1912] 1 K. B. 378; Loraine *v.* Loraine & Murphy (1912), 82 L. J. P. 29 C. A.; Cohen *v.* Popular Restaurants, [1917] 1 K. B. 480.

8924. Partnership property—Joint deed assigning all real & personal estate of debtors—Only passes joint estate.]—A husband, who was entitled to a sum of money under his marriage-settlement, executed conjointly with his partner in business a deed of assignment, whereby "all the real &

execution, & delivered possession thereof, without making any claim to exemption under Homestead Act. The assignee then lent the assignor certain of the goods, implements for carrying on work, for which he obtained a receipt. Subsequently the assignor refused to return the goods, claiming them as an exemption:—*Held:* exemption under the Act was a special privilege, which might be waived by debtor, & the failure to make a claim within a reasonable time operated as an abandonment of the privilege.—ROY *v.* FORTIN (1915), 22 B. C. R. 282; 9 W. W. R. 407; 32 W. L. R. 790.—CAN.

a. *Fund set apart by debtor.*]—On Sept. 18, 1878, M. sent a sum of money, which he had received in payment of certain debts, to his solr. to hold for him. On Dec. 9, 1879, M. executed a deed of assignment conveying to trustees all real & personal estate belonging to him in Mar., 1878, for the benefit of his creditors. On Oct. 6, 1880, M. filed a declaration of insolvency, & the money which M. had remitted to his solr. was transferred to the Public Trustee:—*Held:* M. had divested himself from all claim to the money on executing the deed of Dec. 9, & it passed to the trustees of that deed, to be distributed by them in accordance with the trusts declared in it.—MACKAY *v.* MORRIN (1889), 8 N. Z. L. R. 272.—N.Z.

b. *Gift to wife during marriage.*]—A deed of assignment for the benefit of creditors recited that debtor assigned "all his estate movable & immovable without exception nothing excepted":—*Held:* the assignment covered property given by debtor to his wife during marriage.—VAN DER BYL'S ASSIGNEES *v.* VAN DER BYL (1886), 5 S. C. 170.—S. AF.

8920 i. *Hired property—Under conditional sale agreement.*]—Property purchased by the assignor, under a conditional sale agreement, does not, prior to the fulfilment of the condition, pass to an assignee for benefit of creditors by virtue of Assignments Act, 1907.—*Re* HODGES, JOHN DEERE PLOW CO. *v.* TRUSTS & GUARANTEE CO., LTD., [1917] 1 W. W. R. 317; 11 Alta L. R. 198.—CAN.

8921 i. *Insurance policy—Equitable assignment—Right of trustee to policy money.*]—Debtor had given a mtge. in which he covenanted to insure & assign a policy to the mtgee. No notice of mtge. was given to the insurance co. A fire having occurred the insurance co. paid the proceeds of policy to the assignee of debtor for benefit of creditors:—*Held:* the mtgee. was entitled to the insurance money, the insurance covenant in the mtge. being an equitable assignment.—WOOD *v.* JAGGER (1908), 9 W. L. R. 120.—CAN.

d. *Interest in chattel mortgages.*]—On May 26, 1880, two chattel mtges. were executed by pltf. to J. On July 22, R. & J., who had been trading in partnership, assigned to O. & K., upon trust for the benefit of creditors all mtges. & all other personal estate wheresoever situate of the assignors, of either of them, or in which any of them had any right or interest:—*Held:* the terms of the deed of assignment were sufficient to include the chattel mtges. & the goods comprised

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personal estate & effects" of the assignors were assigned to trustees for the benefit of their creditors. Subsequently the husband, on his own petition, became bkpt.:—*Held:* the trustees under the deed were entitled only to the joint estate of debtors, & not to the separate estate of either debtor.—*Re* LOWDEN'S SETTLEMENT (1864), 10 L. T. 261.

8925. —— Whether separate estate vests in trustee—After appointment of trustee of joint estate.]—On the appointment of a trustee of the joint estate under a liquidation petition filed by partners, the separate estate of each of the partners also vests by law in such trustee.—*Re* MOORE, *Ex p.* PHILPS (1874), L. R. 19 Eq. 256; 44 L. J. Bcy. 40; 31 L. T. 735; *sub nom. Re* MORRE, *Ex p.* PHILPS, 23 W. R. 230.

Annotation:—**Refd.** Ebbs *v.* Boulnois (1875), 10 Ch. App. 479, L. JJ.

8926. —— Whether separate & joint estates vest in trustee—After resolution of joint creditors.]—Where proceedings for liquidation have been instituted by partners, & the joint creditors have passed a resolution for liquidation & appointed a trustee, the separate estate of each partner, as well as the joint estate, vests in the trustee so appointed.—EBBS *v.* BOULNOIS (1875), 10 Ch. App. 479; 33 L. T. 342; 23 W. R. 820, L. JJ.

Annotations:—**Mentd.** *Re* Caughey, *Ex p.* Ford (1876), 1 Ch. D. 521; Meggy *v.* Imperial Discount Co. (1878), 3 Q. B. D. 711, C. A.; *Re* Chatterton, *Ex p.* Hemming (1879), 13 Ch. D. 163, C. A.; *Re* Wainwright, *Ex p.* Wainwright (1881), 19 Ch. D. 140, C. A.; *Re* Smith, Green *v.* Smith (1883), 24 Ch. D. 672; Cholmeley School Highgate *v.* Sewell, [1894] 2 Q. B. 906; Imray *v.* Oakshette, [1897] 2 Q. B. 218, C. A.; *Re* Powell, Powell *v.* Powell (1904), 20 T. L. R. 374.

8927. —— —— On execution of deed under 1861 Act, s. 192.]—In accordance with 1861 Act, s. 192, & in the form of Sched. D to that Act, two partners conveyed all their estate & effects to trustees for the benefit of their creditors:—*Held:* the separate estate, as well as the joint estate of the assignors, passed under the deed.—EASTWOOD *v.* WARD (1876), 35 L. T. 502, C. A.

B. Property subject to Distress, Execution, or Garnishee Order.

See, also, Sect. 10, sub-sect. 3, B., *post,* Part XX., Sect. 10, *ante.*

8928. Issue of execution after composition perfected.]—A deed, executed at 10 a.m. on Dec. 3, in pursuance of a resolution passed at a meeting of creditors on Nov. 25, whereby debtor assigns all his property to trustees for the benefit of his creditors, "being such persons as would have been entitled to rank as creditors in bkpcy. if he had been adjudicated bkpt. on a petition filed Nov. 25," passes the property to the trustees, as against a judgment-creditor who signs judgment & issues execution at 11.30 a.m. on Dec. 3.—EVANS *v.* JONES (1864), 3 H. & C. 423; 5 New Rep. 95; 34 L. J. Ex. 25; 11 L. T. 636; 11 Jur. N. S. 784; 159 E. R. 595.

8929. Issue of execution before deed of assignment for creditors—Debtor aware that writ of execution out—Whether goods bound by delivery of writ.]—The knowledge of debtor, at the time of making a deed of assignment for the benefit of his creditors, that a writ of execution is out against his goods must be taken to be the knowledge of the trustees within the proviso of Mercantile Law Amendment Act, 1856 (c. 97), s. 1; & the trustees' title is not protected by that sect. & the goods are bound by the delivery of the writ to the sheriff.—HOBSON *v.* THELLUSON (1867), L. R. 2 Q. B. 642; 8 B. & S. 476; 36 L. J. Q. B. 302; 16 L. T. 837; 15 W. R. 1037.

Annotations:—**Apld.** Ehlers, Seel *v.* Kauffman & Gates, Wendt & Charles, Claimants (1883), 49 L. T. 806. **Mentd.** Woodhouse *v.* Murray (1867), 8 B. & S. 464; *Re* Davies, *Ex p.* Williams (1872), 26 L. T. 303, L. JJ.; Hodder *v.* Williams, [1895] 2 Q. B. 663, C. A.; Muller's Margarine *v.* I. R. Comrs. (1899), 69 L. J. Q. B. 291, C. A.

in them.—SUTTON *v.* ARMSTRONG (1881), 32 C. P. 11.—**CAN.**

e. *Interest under will—All property & effects.*]—An interest under a will, though its enjoyment is dependent on a contingency, may be a vested interest passing under an assignment for creditors of "all property & effects of whatever nature."—PETER *v.* SHIPWAY (1908), 7 C. L. R. 232.—**AUS.**

f. *Lease.*]—A lessee from pltfs. made an assignment to deft., who took possession, &, on threat of distress, agreed to guarantee the rent so long as he remained in occupation. After three months, he quitted the premises & notified the landlord that he would no longer be responsible for or pay the rent. In an action for breach of the covenants of the lease & to recover the rent accruing to the end of the term:—*Held:* by the effect of the assignment & entry into possession the term of the lease passed to the official assignee.—NORTH WEST THEATRE CO. *v.* MACKINNON (1915), 52 S. C. R. 588.—**CAN.**

8927 i. *Partnership property—Whether separate & joint estates vest in trustee.*]—An assignment, under R. S. O., 1887, c. 124, for the general benefit of creditors, made by the members of a trading partnership, vests in the assignee all the properties of each of the partners, several as well as joint.—BALL *v.* TENNANT (1895), 25 O. R. 50; 21 A. R. 602.—**CAN.**

h. *Property in which debtor has no beneficial interest.*]—*Qu.:* whether an accommodation note passes to an assignee under a voluntary deed of conveyance for the benefit of creditors.—MACARTHUR *v.* MACDOWALL (1892), 1 Terr. L. R. 345; *affd.* (1893), 23 S. C. R. 571.—**CAN.**

k. *Property subject to equities.*]—B., having created an equitable charge on his land in favour of pltfs., subsequently executed a deed of assignment to deft. as trustee for creditors. The assignment was as follows:—"Debtor, according to his estate & interest therein & as fully & effectually as he lawfully can or may, by these presents doth hereby grant unto the trustee all the real estate, lands, tenements, & hereditaments of debtor, of or to which he may have any estate, right, title or interest of any kind or description with the appurtenances";—*Held:* such deed purported to deal only with such interest as the assignor then had & did not operate so as to convey the land free from the equitable charge previously given to pltfs.—CANADIAN PORT HURON CO. *v.* BURNETT (1907), 17 Man. L. R. 55.—**CAN.**

l. *Surplus after secured creditor satisfied.*]—A mtgor. owed his solr. considerable sums for costs, & transferred the mortgaged property to him in full of his indebtedness. Thereafter the mtgor. filed his petition for liquidation:—*Held:* the trustee was entitled to the balance remaining after satisfaction of the indebtedness.—*Re* WRIGHT (1906), 3 Tas. L. R. 1.—**AUS.**

m. ——.]—After a sale of mortgaged premises the mtgor. assigned for the benefit of his creditors under R. S. O. 1887, c. 124, before execution creditors had established their claims to the balance of purchase money, after satisfying the amount of the mtge.:—*Held:* the assignee for creditors was entitled to such balance freed from any liability to satisfy the executions out of it.—CARTER *v.* STONE (1890), 20 O. R. 340.—**CAN.**

n. *Trade name.*]—Debtor assigned to D., as trustee for the benefit of all his creditors, all real & personal effects & choses in action to which he was entitled. No reference in specific terms was made to the goodwill of his business or to his trade name:—*Held:* the trade name passed to D.—FERNE *v.* WILSON (1900), 26 V. L. R. 422.—**AUS.**

PART XXIII. SECT. 8, SUB-SECT. 3.—B.

8928 i. *Issue of execution after deed of assignment for creditors—Assignor continuing in possession.*]—Debtor, before executions issued against his property, assigned it all for the benefit of his creditors, but remained in the possession of the goods, & the property was taken under the executions. In trespass by the trustees against the sheriff:—*Held:* a verdict for deft. was correct.—ARMSTRONG *v.* MOODIE (1843), 6 O. S. 538.—**CAN.**

8929 i. *Issue of execution before deed of assignment for creditors—Right of creditor to proceed with execution.*]—An execution was handed to the sheriff on June 28, & the execution debtor assigned for the benefit of creditors on July 16. The execution creditor ratified the assignment on Aug. 28:—*Held:* the execution creditor's rights under the execution were not diverted.—MCWHIRTER *v.* LEARMOUTH (1868), 18 C. P. 136.—**CAN.**

8929 ii. —— *Whether creditor has priority.*]—P., the registered owner of certain lands, against which were registered various executions, made an assignment under Assignments Act:—*Held:* the assignee was not entitled to have a certificate of title issued to him

8930. Issue of execution after liquidation petition—Right of creditor to proceed with execution.]—A creditor sued out a writ of *fi. fa.* & delivered it to the sheriff. Earlier in the same day debtor filed a petition for liquidation or composition, & he afterwards obtained an injunction restraining the proceedings in execution. At the first meeting of creditors a resolution was passed to accept a composition :—*Held :* the creditor was entitled to proceed with his execution.—*Re* JONES, *Ex p.* JONES (1875), 10 Ch. App. 663 ; 44 L. J. Bcy. 124 ; 33 L. T. 116 ; 23 W. R. 886, L. JJ.

Annotations :—**Apld.** *Re* Chidley, *Re* Lennard, [1875] 1 Ch. D. 177, C. A. **Distd.** *Re* Balbirnie, *Ex p.* Jameson (1876), 3 Ch. D. 488, C. A. **Consd.** *Re* Lewis, *Ex p.* Mauthner (1876), 3 Ch. D. 113. **Apld.** Sneary *v.* Abdy (1876), 1 Ex. D. 299. **Consd.** *Re* Kearley & Clayton's Contract (1878), 7 Ch. D. 615 ; *Re* McColla, *Ex p.* McLaren (1881), 16 Ch. D. 534, C. A. **Refd.** Crew *v.* Terry (1877), 2 C. P. D. 403.

8931. —— —— Creditor aware of order restraining further proceedings in action.]—On the filing of a liquidation petition an injunction was at once granted *ex p.*, restraining a creditor from proceeding further in an action in which he had recovered judgment against debtor. The next day the creditor delivered a writ of *fi. fa.* to the sheriff. He did not deny that, before he did so, he knew of the restraining order. The creditors resolved upon a composition :—*Held :* the judgment creditor was not entitled, after the registration of the resolution, to enforce his execution against debtor.—*Re* LEWIS, *Ex p.* MAUTHNER (1876), 3 Ch. D. 113 ; 45 L. J. Bcy. 125 ; 34 L. T. 662.

8932. Seizure & sale after deed of assignment for creditors—Duty of creditor to account for proceeds to trustees of deed.]—H. consigned pearls to B., with directions to sell & pay the proceeds to P., to whom H. was at the time indebted, on account. B. acknowledged the receipt of the consignment, & undertook to perform the directions, but no notice was given to P., H. subsequently wrote to B., requesting the pearls to be sent to America, & there disposed of, & afterwards, being insolvent, made an assignment of all his effects in trust for the benefit of his creditors. P. had no express notice of the consignment, but, on receiving information of it after he knew of the failure of H., laid an attachment on the pearls in the hands of B., on which he had proceeded to judgment, & actually sold the pearls under it :—*Held :* as the directions accompanying the consignment amounted to no more than a mere mandate, which was revoked by the subsequent disposition of the property, P., who had also executed the trust-deed as a creditor, was bound to account with the trustees for the proceeds.—SCOTT *v.* PORCHER (1817), 3 Mer. 652 ; 36 E. R. 250.

Annotations :—**Distd.** Bailey *v.* Culverwell (1828), 8 B. & C. 448. **Consd.** Fitzgerald *v.* Stewart (1828), 2 Sim. 333 ; Garrard *v.* Lauderdale (1831), 2 Russ. & M. 451, L. C. **Apld.** Baron *v.* Husband (1833), 4 B. & Ad. 611 ; Brind *v.* Hampshire (1836), 1 M. & W. 365. **Consd.** Hutchinson *v.* Heyworth (1838), 9 Ad. & El. 375. **Folld.** Malcolm *v.* Scott (1843), 3 Hare, 39. **Refd.** Frith *v.* Forbes (1862), 4 De G. F. & J. 409, L. JJ. **Mentd.** *Re* Douglas & Anderson, *Ex p.* Cotterell, Hill (1837), 3 Deac. 12, Ct. of R. ; Sims *v.* Brutton & Clipperton (1850), 5 Exch. 802.

See, generally, CHOSES IN ACTION ; CONTRACT.

8933. Seizure after deed of assignment for creditors—Deed communicated to some creditors—Executed by none—Execution creditor with no knowledge of deed.]—A deed of assignment of debtor's personal property to a trustee, for the benefit of his creditors who should execute or accede to the deed, was *bonâ fide* made & executed by both debtor & the trustee, & the property taken possession of under it. Afterwards the trustee, by his agent, communicated the contents of the deed & all that had been done to three of the creditors, each of whom expressed himself satisfied with the arrangement, but neither they nor any others of the creditors signed the deed, or did any act under it. In an interpleader issue between the trustee & a creditor, at whose suit the property had subsequently been taken in execution :—*Held :* the deed passed the property to the trustee as against such execution creditor, although not one of those to whom the contents of the deed had been made known.—HARLAND *v.* BINKS (1850), 15 Q. B. 713 ; 20 L. J. Q. B. 126 ; 15 L. T. O. S. 344 ; 14 Jur. 979 ; 117 E. R. 629.

Annotations :—**Apld.** Forbes *v.* Limond (1853), 1 Sm. & G. 554. **Consd.** Siggers *v.* Evans (1855), 5 E. & B. 367. **Distd.** Biron *v.* Mount (1857), 24 Beav. 642. **Consd.** *Re* Sanders' Trusts (1878), 47 L. J. Ch. 667. **Apld.** Runtz *v.* Longbourne (1892), 8 T. L. R. 568. **Consd.** Sier *v.* Bullen (1915), 84 L. J. K. B. 1288, D. C. **Mentd.** Janes *v.* Whitbread (1851), 11 C. B. 406 ; Hobson *v.* Thelluson (1867), 8 B. & S. 476.

8934. —— Act of bankruptcy on which fiat issued.]—In Oct., 1852, E. a trader, assigned to pltf. all his household furniture & effects then on his premises, as a security for money lent, with a power, in default of payment, to seize & take possession of the property thereby assigned, & all other goods, chattels, & effects which might be found on the premises. In Jan., 1855, E. assigned all his estates & effects to trustees for the benefit of the creditors. In the following Feb., pltf. seized the goods, etc., then on the premises of E., & in Mar. a fiat in bkpcy, issued against E., the act of bkpcy. being the above assignment of his estate & effects to trustees. In an action by pltf. against the assignees for selling the goods so seized by him :—*Held :* though the assignment by E., of his estate & effects to trustees was void as against creditors, yet it operated to transfer to the assignees the property not included in the assignment to pltf., & so defeated his title, which would otherwise have been valid by the seizure.—CARR *v.* ACRAMAN (1856), 11 Exch. 566 ; 25 L. J. Ex. 90 ; 156 E. R. 956.

8935. Seizure before composition perfected—No sale until after composition perfected.]—Debtor, whose goods had been taken in execution under a writ of *fi. fa.*, before their sale, executed a composition under 1861 Act, s. 192, which was duly registered :—*Held :* by s. 198, the execution was no longer available, & the sheriff must withdraw from possession.—ROGERS *v.* ROBERTS (1866), L. R. 2 Exch. 35 ; 4 H. & C. 609 ; 36 L. J. Ex. 40 ; 15 L. T. 254 ; 15 W. R. 340.

Annotations :—**Folld.** Buckland *v.* Tomkinson (1867), L. R. 2 C. P. 503, n. ; Drew *v.* Myers (1869), 19 L. T. 740.

8936. —— ——.]—A debtor was sued by two creditors, &, being involved, executed a deed of composition, which was perfected between the issue of the writs of *fi. fa.* at the suit of those creditors & the sale by the sheriff. The sheriff seized the goods, but they were claimed by the trustee under the deed :—*Held :* the deed was a

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clear of the executions.—*Re* PRYOR, LUTZ *v.* DOMINION TRUST CO. (1916), 34 W. L. R. 172 ; 10 W. W. R. 418.—**CAN.**

8933 i. *Seizure after deed of assignment for creditors—Whether creditor entitled to proceeds—Affidavit filed with assignment defective.*]—M. made an assignment to pltf. for the benefit of creditors. The sheriff subsequently levied under an execution :—*Held :* pltf. entitled as against the sheriff, notwithstanding the affidavit filed with assignment was defective.—MCMULLIN *v.* BUCHANAN (1893), 26 N. S. R. 146.—**CAN.**

8935 i. *Seizure before deed of assignment for creditors—Execution not completely executed—Right of creditor to costs.*]—An assignment for the general benefit of creditors has precedence of executions not completely executed by payment, subject to the lien of any execution creditor for his costs, which lien is not confined to the costs of issuing the execution, but covers all the costs of the action.—CLARKSON *v.* RYAN (1890), 17 S. C. R. 251.—**CAN.**

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bar to the execution, unless it could be proved that some of the statutory requirements had not been complied with.—DREW *v.* MYERS (1869), 19 L. T. 740.

8937. Seizure after composition perfected.]—P. having filed a petition for liquidation by arrangement or composition under 1869 Act, his creditors except G., resolved to accept a composition of 5*s.* in the pound payable by instalments. W. became surety for the composition, & P. assigned his property to W., by a duly registered bill of sale. W., bought the debt due to G., & was thereby enabled to vote in his name at the second meeting of creditors. The resolutions for composition had not been set aside. Pltfs. having obtained judgment against P., seized a stack of hay comprised in the bill of sale:—*Held:* the resolutions not having been set aside, the bill of sale could not be impeached, & pltf. could not enforce his execution against the property assigned to W.—SEYMOUR *v.* COULSON (1880), 5 Q. B. D. 359; 49 L. J. Q. B. 604, C. A.

Annotations:—**Mentd.** Morgan *v.* Rees (1881), 6 Q. B. D. 508, C. A.; Clarkson *v.* Musgrave (1882), 9 Q. B. D. 386; Gardner *v.* Ingram (1889), 61 L. T. 729; Smith *v.* Baker, [1891] A. C. 325, H. L.; Abrahams *v.* Dimmock, [1915] 1 K. B. 662, C. A.

8938. —— Trustees of deed with notice of writ before composition perfected.]—On July 11 defts. closed their place of business in order to prevent executions being levied, & kept them closed until July 16, when they filed a petition for the liquidation of their affairs by arrangement or composition under 1869 Act, & at a meeting of creditors on Aug. 27, it was resolved that a composition of 7*s.* 6*d.* in the pound should be accepted & secured by an assignment of the whole of the assets of defts. to trustees, & that a proper deed of assignment should be executed by defts. Pltfs. signed judgment against defts. on July 12, & on the same day delivered a writ of *elegit* to the sheriff, & on Sept. 11 the trustees received a written notice from pltfs. that the writ of *elegit* had been lodged with the sheriff. On Sept. 17, defts. executed the deed of assignment to the trustees in pursuance of the resolution of the creditors. The sheriff did not seize the goods until Sept. 20 when they were in the possession of the trustees:—*Held:* pltfs. were entitled to the goods.—EHLERS, SEEL & CO. *v.* KAUFFMAN & GATES, WENDT & CHARLES, CLAIMANTS (1883), 49 L. T. 806.

8939. Seizure before liquidation petition.]—A distress under a statutory power was levied by a gas co. against the goods of debtor, who, on the day of but after the seizure, filed a petition for liquidation by arrangement, & obtained an *ex p.* injunction restraining the sale of the goods seized. At the first meeting of creditors a composition under 1869 Act, s. 126, was resolved upon by the requisite majority of creditors, & the resolution was afterwards duly confirmed & registered. Subsequently, on the application of debtor, an order was made, directing the co. to deliver up the goods seized by them under the distress:—*Held:* the order must be discharged.—*Re* ADAMS, *Ex p.* BIRMINGHAM GASLIGHT & COKE CO. (1870), L. R. 11 Eq. 204; 40 L. J. Bcy. 1; 24 L. T. 42; *sub nom.* BIRMINGHAM GAS CO. *v.* ADAMS, 19 W. R. 123.

Annotation:—**Distd.** *Re* Fanshaw & Yorston, *Ex p.* Birmingham & Staffordshire Gaslight Co. (1871), 40 L. J. Bcy. 52.

8940. ——.]—The goods of a trader having been taken in execution for a debt exceeding £50, he on the following day presented a petition for liquidation by arrangement, under which resolutions for liquidation were come to & a trustee appointed. The execution creditor claimed the benefit of his execution, on the ground that the seizure alone was not an act of bkpcy., & that no sale had taken place when the petition was presented:—*Held:* the trustee was entitled to the goods.—*Re* JOHNSON, *Ex p.* RAYNER (1872), 7 Ch. App. 325; 41 L. J. Bcy. 26; 26 L. T. 306; 20 W. R. 456, L. JJ.

Annotations:—**Consd.** *Re* Gourlay, *Ex p.* Abbott (1880), 15 Ch. D. 447, C. A. **Refd.** *Re* Bremner, *Ex p.* Harper (1875), 44 L. J. Bcy. 57, L. JJ.; Howes *v.* Young, Howes *v.* Stone (1876), 34 L. T. 739; *Re* Curtoys, *Ex p.* Pillers (1881), 17 Ch. D. 653, C. A. **Mentd.** Sneary *v.* Abdy (1876), 1 Ex. D. 299.

8941. —— Right of creditor to proceeds of sale.]—Goods of a non-trading debtor were seized on Feb. 18; debtor filed a petition for liquidation on Feb. 22:—*Held:* the execution creditor was entitled to the proceeds of the execution.—*Re* JECKS, *Ex p.* BAILEY (1871), L. R. 13 Eq. 314; 41 L. J. Bcy. 1; 25 L. T. 918; 20 W. R. 76.

Annotations:—**Refd.** Slater *v.* Pinder (1872), 26 L. T. 482. Ex. Ch. **Mentd.** *Re* Stevens, *Ex p.* M'George (1882), 20 Ch. D. 697, C. A.

8942. —— —— Sale taking place before appointment of trustee.]—A petition for liquidation was presented after the goods of debtor, a non-trader, had been seized in execution, & a sale took place before the appointment of a trustee:—*Held:* the creditor was entitled to the proceeds.—*Re* NORTON, *Ex p.* TODHUNTER (1870), L. R. 10 Eq. 425; 39 L. J. Bcy. 17; 25 L. T. 313; 18 W. R. 890.

Annotations:—**Distd.** *Re* Adams, *Ex p.* Birmingham Gaslight & Coke Co. (1870), L. R. 11 Eq. 204. **Folld.** Slater *v.* Pinder (1871), L. R. 6 Exch. 228. **Consd.** *Re* Johnson, *Ex p.* Rayner (1872), 41 L. J. Bcy. 26. **Refd.** *Re* Gwynn, *Ex p.* Veness (1870), 39 L. J. Bcy. 23; *Re* Skinner, *Ex p.* Keys (1870), 39 L. J. Bcy. 28; Lucas *v.* Dicker (1880), 6 Q. B. D. 84, C. A. **Mentd.** *Re* Hall, *Ex p.* Rocke (1871), 6 Ch. App. 795, L. C. & L. JJ.

8943. —— Injunction to restrain sale—Goods sold by sheriff & money paid into court—Who entitled to proceeds.]—After the sheriff, acting under a writ of *fi. fa.*, had seized the goods of debtor, debtor presented a petition for liquidation by arrangement, thereby committing an act of bkpcy., & on the same day obtained an injunction restraining the sheriff from proceeding to a sale. The sheriff sold the goods, & paid the balance of the proceeds of the sale into ct.:—*Held:* the execution creditor, & not the trustee under the liquidation, was entitled to the money in ct.—*Re* HALL, *Ex p.* ROCKE (1871), 6 Ch. App. 795; 40 L. J. Bcy. 70; 25 L. T. 287; 19 W. R. 1129, L. C. & L. JJ.

Annotations:—**Consd.** *Re* Johnson, *Ex p.* Rayner (1872), 41 L. J. Bcy. 26. **Folld.** Slater *v.* Pinder (1872), L. R. 7 Exch. 95. **Consd.** *Re* Adams, *Ex p.* Greenaway (1873), L. R. 16 Eq. 619. **Distd.** *Re* Edwards, *Ex p.* Eyles (1873), L. R. 16 Eq. 99. **Folld.** *Re* Peacock, *Ex p.* Lovering (1874), L. R. 17 Eq. 452; **Consd.** Crew *v.* Terry (1877), 2 C. P. D. 403. **Refd.** *Re* Jecks, *Ex p.* Bailey (1871), L. R. 13 Eq. 314; *Re* Chapman (1872), L. R. 15 Eq. 75; *Re* Davies,

8939 i. *Seizure before liquidation petition—Restraint of sale.*]—Two days after seizure made by an execution creditor, the trader filed a petition under the arrangement clauses, for protection from process, but did not inform the ct. of the seizure. The ct. granted protection, & as sale was part of the process, ordered the bailiff to be withdrawn, & a sale prevented, upon a sufficient sum being lodged to meet the creditor's demand, if the arrangement failed.—*Re* R. D. (1861), 13 Ir. Jur. 91.—**IR.**

q. *Sequestration before arrangement—Whether sequestrators discharged.*]—A writ of sequestration having been issued, the sequestrators put the writ into effect by entry & seizure. Debtor, subsequently arranged with his creditors, & his estate was vested in his trustees:—*Held:* debtor's estate vested in his trustees subject to the writ of sequestration, & the sequestrators should not be discharged.—*Re* VERNON *v.* WOOD, *Ex p.* JAMES (1875), 10 I. L. T. 3.—**IR.**

r. *Attachment after assignment.*]—A *bonâ fide* assignment by a debtor of his entire property to trustees for the benefit of his creditors divests him of

Ex p. Williams (1872), 7 Ch. App. 314, L. JJ.; *Re* Keyworth, *Ex p.* Banner (1874), 9 Ch. App. 380, n.; Lowe *v.* Blakemore (1875), L. R. 10 Q. B. 485; *Re* Bannister, *Ex p.* Vale (1881), 18 Ch. D. 137, C. A. **Mentd.** *Re* Mead, *Ex p.* Cochrane (1875), L. R. 20 Eq. 282.

8944. Seizure after liquidation petition—Of which creditor has notice.]—Where a petition is filed for liquidation by arrangement in the form prescribed by 1870 Rules, the vesting of debtor's goods in the trustee relates back to the filing of the petition, so that an execution creditor, with notice of the petition, cannot seize the goods of debtor, & hold them as against a subsequently appointed trustee. —*Re* BISSELL, *Ex p.* DUIGNAN (1871), 6 Ch. App. 605; 40 L. J. Bcy. 68; 25 L. T. 286; 19 W. R. 1127, L. C. & L. JJ.

Annotations:—**Expld.** *Re* Walton, *Ex p.* Hoare (1873), L. R. 16 Eq. 625. **Refd.** *Re* Hall, *Ex p.* Rocke (1871). 40 L. J. Bcy. 70, L. C. & L. JJ. **Mentd.** Megrath *v.* Gray, Gray *v.* Megrath (1874), L. R. 9 C. P. 216.

8945. Seizure after suspension of bankruptcy by resolution of creditors—Title of non-assenting creditor to goods—Bankruptcy not annulled.]—Bkpt. proposed at a meeting of his creditors that the bkpcy. should be suspended under 1861 Act, s. 110, & that he should receive back his estate & pay a composition of 2*s.* 6*d.* in the pound. The creditors, by a resolution duly confirmed, accepted the proposal. The resolution did not purport to revest the estate in bkpt. until after the payment of the composition. The messenger of the Ct. of Bkpcy. then went out of possession, but the creditors' assignee who had guaranteed the messenger his fees, retained the keys of the premises. Subsequently & before payment of the composition, a judgment creditor, who was not present at the meeting & had not assented to the resolution, issued execution & seized goods belonging to bkpt.'s estate. On an interpleader summons between the assignee & the execution creditor:—*Held:* the fact of the bkpcy. being suspended under s. 110 did not revest the estate in bkpt., & the assignee was entitled to the goods.—MACDONALD *v.* THOMPSON (1869), L. R. 4 C. P. 747; 39 L. J. C. P. 364; 20 L. T. 666; 17 W. R. 919.

8946. —— —— Bankruptcy annulled.] — T. recovered judgment against C., whose goods were seized by the sheriff under a writ of execution. C. thereupon filed a petition for liquidation, & an order was granted restraining the sheriff from selling. The order was afterwards discharged, & C. was adjudged bkpt., but a fresh restraining order was granted under the bkpcy. The sheriff then withdrew voluntarily. Afterwards the creditors of C. resolved under 1869 Act, s. 28, to accept a composition of 5*s.* in the pound upon "the debts proved & admitted in the bkpcy.," & they further resolved that the order of adjudication should be annulled forthwith, & that the property of C. should be handed back to him. T. did not assent to the resolution. The Ct. of Bkpcy. affirmed the resolutions, & ordered the adjudication to be annulled. Afterwards, under the same writ of execution, the sheriff again seized the goods of C. under the direction of T.:—*Held:* under 1869 Act, s. 81, the property in C.'s goods reverted to him upon the annulment of his bkpcy., & the resolutions were not binding upon T. who had neither assented to the composition nor proved under the bkpcy., & the seizure by the sheriff of C.'s goods after the annulment of his bkpcy. was lawful. *Qu.:* whether the seizure after the annulment would have been lawful, if the composition had not been confined to "the debts proved & admitted in the bkpcy." & had extended to any debts "provable under the bkpcy."—CREW *v.* TERRY (1877), 2 C. P. D. 403; 46 L. J. Q. B. 787.

8947. Seizure before bankruptcy—On petition of execution creditor—Bankruptcy annulled by resolution of creditors.]—A trader was adjudicated bkpt. on the petition of a creditor, who was, under an execution, in possession of chattels belonging to the trader. Under orders of the ct., the bkpcy. was afterwards annulled, & the property of debtor was assigned by him to the same person who was trustee in the bkpcy., on trust to secure payment of a composition which the majority of the creditors had agreed to accept. The execution creditor then threatened to proceed with his execution:—*Held:* the chattels were vested in the trustee discharged from the execution, & the creditor ought to be restrained from proceeding with the execution.—*Re* CHIDLEY, *Re* LENNARD (1875), 1 Ch. D. 177; 45 L. J. Bcy. 49; 33 L. T. 553; 24 W. R. 182, C. A.

Annotation:—**Distd.** Crew *v.* Terry (1877), 2 C. P. D. 403.

8948. Garnishee order—Whether garnishee liable to trustee—After money paid to execution creditor—Without notice.]—Declaration, for a debt due from deft. to S., by pltfs. as trustees under a deed for the benefit of the creditors of S. under 1861 Act, all the requirements of which had been complied with so as to vest the debt in pltfs. Plea, that a judgment creditor of S. had obtained an order, attaching deft.'s debt & calling on him to show cause why he should not pay it to judgment creditor, that deft. having no notice of the trust deed had no cause to show, & an order was made upon him to pay the debt to the judgment creditor, that such order was, before deft. had any notice of the trust deed, served upon him, & deft., in compliance with the order, & to avoid & because he could not otherwise have avoided execution, paid the debt to the judgment creditor. Replication, that the trust deed was registered under 1861 Act, before payment by deft. to the judgment creditor:—*Held:* though the payment by deft. to the judgment creditor was made after the registration of the deed, the plea must be taken to mean, either that deft. paid without notice of the deed, or, if with notice, that it was in such circumstances that he was unable to get the order set aside before he was compelled to pay to save execution being actually levied, &, in either case, the payment was a protection to deft., the garnishee, as made under an order of a ct. of competent authority. *Semble:* if the garnishee has notice of a trust deed or bkpcy. before the time for showing cause, against the *ex p.* order had elapsed he would be bound to show cause, & if he were to pay to the judgment creditor, instead of showing cause, the assignees could recover the debt from him:—*Qu.:* whether, if the garnishee had notice of a trust deed or bkpcy., after the order for payment had been made & served, but before payment, he would be safe in paying without taking any other step, or whether he would be bound, if there were opportunity, to apply to get the order set aside, or

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any interest which can be the subject of attachment subsequently issued, until the trusts of the deed of assignment have been carried out.—BAMANJI MANIKJI *v.* NAORAJI PALANJI (1864), 1 Bom. 233.—**IND.**

s. *Attachment before assignment —Whether creditor has priority.*]—An assignment by insolvent for the general benefit of his creditors does not oust a prior attachment by a creditor of insolvent of a debt due to him.—*Re* THOMPSON (1895), 17 P. R. 109.—**CAN.**

t. —— ——.]—Goods attached before an assignment do not pass to the trustee thereunder.—LAITE *v.* REDMAN (1910), 9 Nfld. L. R. 449.—**NFLD.**

8948 i. *Garnishee order—Whether garnishee liable to trustee.*]—An assignment for the benefit of creditors by a primary debtor after a garnishing summons has been duly served upon him & the

Sect. 8.—Property available: Sub-sect. 3, B., C. & D.; sub-sect. 4.]

whether it would be sufficient to give the assignees notice that he should pay, unless they got the order set aside.—WOOD *v.* DUNN (1866), L. R. 2 Q. B. 73; 7 B. & S. 94; 36 L. J. Q. B. 27; 15 L. T. 411; 15 W. R. 180, Ex. Ch.

Annotations:—**Consd.** European Bank *v.* Fox, General Estates Co., Garnishees (1866), 15 L. T. 288; London Corpn. *v.* Cox (1867), L. R. 2 H. L. 239, H. L. **Folld.** Turnbull *v.* Robertson, Blackburn Garnishee (1878), 47 L. J. Q. B. 294. **Expld.** Martin *v.* Nadel, [1906] 2 K. B. 26, C. A. **Consd.** Ranson *v.* Platt, [1911] 2 K. B. 291, C. A. **Refd.** Barnfather *v.* Barrow, Barrow, Page & Draper (1877), 37 L. T. 231. **Mentd.** Cronmire *v.* MacColla (1893), 9 T. L. R. 549, C. A.; Ponsford, Baker *v.* Union of London & Smith's Bank, [1906] 2 Ch. 444, C. A.

8949. —— —— Money paid into court.]—Payment into ct. by a garnishee under a judge's order is a payment within C. L. P. Act, 1854 (c. 125), s. 65, & discharges the garnishee; & the subsequent execution of a composition deed by debtor will not prevent the creditor being entitled to the money so paid into ct.

A. having signed judgment against B., a solr. obtained a garnishee order against C., who owed B. a bill of costs. C. obtained further time for taxing the bill on payment into ct. of £25. B. subsequently, & before the taxation was complete, executed a composition deed, & gave notice to C. not to pay the amount of the bill to A. The bill when taxed was found to exceed £25. On an application by C. for repayment to him out of ct. of the £25:—*Held:* the payment into ct. was within C. L. P. Act, 1854, s. 65, & discharged C. as against B., &. A. was entitled to the £25.—CULVERHOUSE *v.* WICKENS (1868), L. R. 3 C. P. 295; 37 L. J. C. P. 107; 17 L. T. 478; 16 W. R. 402.

C. After-acquired Property.

See, generally, Part XX., Sect. 7, *ante.*

8950. Property acquired by debtor after execution of deed of inspectorship.]—Debtor executed an inspectorship deed, by which he covenanted that he would get in & realise all his estate & effects, under the direction of the inspectors, for the benefit of his creditors, to be administered as in bkpcy., &, whenever called upon to do so, assign to the inspectors all his estate & effects. As soon as all the estate should be fully administered or assigned to the inspectors, the deeds were to operate as a full discharge to debtor:—*Held:* the deed only affected property which belonged to debtor at the time of its execution, & after-acquired property did not pass under it.—*Re* PIERCY, *Ex p.* PIERCY (1873), 9 Ch. App. 33; 43 L. J. Bcy. 9; 29 L. T. 559; *sub nom.* PIERCY *v.* PIERCY, 22 W. R. 65, L. C. & L. J.

Annotation:—**Consd.** *Re* France, *Ex p.* Tinker (1874), 43 L. J. Bcy. 91.

8951. Property acquired by debtor after resolution granting discharge—No resolution closing liquidation has been passed.]—When the creditors of a liquidating debtor have passed a resolution granting him his discharge, his after-acquired property does not vest in the trustee, but belongs to debtor, although no resolution closing the liquidation has been passed.—EBBS *v.* BOULNOIS (1875), 10 Ch. App. 479; 44 L. J. Ch. 691; 32 L. T. 650; 23 W. R. 820, L. JJ.

Annotations:—**Folld.** *Re* Caughey, *Ex p.* Ford (1876), 1 Ch. D. 521. **Consd.** Meggy *v.* Imperial Discount Co. (1878), 3 Q. B. D. 711, C. A. **Apld.** *Re* Chatterton, *Ex p.* Hemming (1879), 13 Ch. D. 163, C. A. **Distd.** *Re* Wainwright, *Ex p.* Wainwright (1881), 19 Ch. D. 140, C. A. **Consd.** *Re* Smith, Green *v.* Smith (1883), 24 Ch. D. 672; *Re* Powell, Powell *v.* Powell (1904), 20 T. L. R. 374. **Mentd.** Cholmeley School Highgate *v.* Sewell, [1894] 2 Q. B. 906; Imray *v.* Oakshette, [1897] 2 Q. B. 218, C. A.

8952. *S. P. Re* BENNETT'S TRUSTS (1875), 10 Ch. App. 490; 32 L. T. 652; 23 W. R. 822, L. JJ.

Annotations:—**Consd.** Ebbs *v.* Boulnois (1875), 10 Ch. App. 479, L. JJ. **Distd.** *Re* Wainwright, *Ex p.* Wainwright (1881), 19 Ch. D. 140, C. A.

8953. Property acquired by debtor after resolution closing liquidation—No resolution granting discharge.]—Where in a liquidation a resolution has been passed closing the liquidation, but no resolution has been passed discharging debtor, the after-acquired property of debtor can be made available under 1869 Act, s. 54, for the payment of a debt owing before the liquidation.—*Re* POWELL, POWELL *v.* POWELL (1904), 20 T. L. R. 374; 11 Mans. 22.

8954. Property acquired by debtor after approval of scheme—Does not pass to trustee—In absence of express stipulation.]—A scheme of arrangement operates only to convey to the trustee property to which debtor is entitled up to the date of the approval of the scheme by the ct. It does not, unless there be an express stipulation to that effect, include property coming to debtor after that date.—*Re* CROOM, ENGLAND *v.* PROVINCIAL ASSETS CO., [1891] 1 Ch. 695; 60 L. J. Ch. 373; 64 L. T. 53; 39 W. R. 286; 7 T. L. R. 216.

8955. Property acquired by debtor before but not realised until after close of liquidation.]—Debtor was entitled under a will of testator, who died three years before the bkpcy., to property which was not realised, until several years after the close of the liquidation & the release of the trustee:—*Held:* the trustee was entitled to receive & give a discharge for such property, & it was his duty to distribute it under the order of the ct.—*Re* ARMSTRONG, *Ex p.* WITT (1879), 40 L. T. 836; 27 W. R. 888.

D. Property in Reputed Ownership of Debtor.

8956. Rule in bankruptcy not applicable to deeds of inspectorship.]—*Held:* the doctrine of "order & disposition" under 1849 Act did not apply to deeds of inspectorship under 1861 Act, s. 192.—*Re* SYMONS (1869), 17 W. R. 1040.

SUB-SECT. 4.—REALISATION OF PROPERTY.

8957. Recovery of advances—Proceeds of sale.]—S. deposited barilla with deft., as broker for sale, agreeing that it should go in liquidation of a claim of deft. against S. S. then assigned his property to trustees for his creditors, who paid deft. at his request the amount of the duties on the barilla, on his stating he had agreed to sell it for a sum which would more than pay the money advanced by them for the duties. The purchase

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garnishee, & judgment has been obtained thereon against debtor, does not take precedence of the attachment of the debt, & the creditor may enforce payment by the garnishee.—WOOD *v.* JOSELIN (1890), 18 A. R. 59.—CAN.

PART XXIII. SECT. 8, SUB-SECT. 3.—D.

a. *Rule in bankruptcy does not apply to deed of arrangement.*]—*Held:* goods in the order & disposition of an arranging debtor, with the consent of the true owner, did not pass by a deed made under 1867 Act.—GREER *v.* CASSIUS, Mac. 1015.—N.Z.

PART XXIII. SECT. 8, SUB-SECT. 4.

b. *Power of court—To punish debtor hindering realisation.*]—*Semble:* if a debtor who has made a deed of assignment were doing anything unfair to prevent the realisation of his assigned property, the Ct. of Insolvency could check or punish him.—HOWDEN *v.* COCK (1915), 20 C. L. R. 201.—AUS.

c. *Sale of property—Time for sale.*]—The ct. will consider that a year is the proper time within which the sale of the property assigned is to be made, where the assignment leaves the time & manner of such sale in the discretion of the assignee. If the sale be not made within a year the *onus* will be cast on the assignee of satisfying the ct. of his *bona fides* in seeking

of the barilla was never completed on account of it having deteriorated, & it was subsequently sold for less than the amount paid for duties. The trustees claimed to recover the amount advanced by them & also the proceeds of the sale of the barilla :—*Held :* though, if S. had advanced the money for duties, he could not have recovered it, the trustees for the creditors in general were in a different situation, & they were bound to facilitate the sale of the barilla if, as they were informed, it would be beneficial for the estate, & the trustees were entitled to recover.—LIVESEY *v.* WILLIS (1814), 5 Taunt. 446 ; 1 Marsh. 130 ; 128 E. R. 762.

8958. Power of sale with consent in writing of grantors—Sufficiency of consent.]—A. & B., father & son, executed deeds for the settlement of some of their family estates, & for payment of the debts of A. Certain estates were conveyed to trustees, with a power to sell, on the consent in writing of A. & B. or the survivor, & to apply the produce of the sale in payment of debts therein specified. A. was indebted to D., as trustee for an infirmary, & A. & B. had given joint & separate warrants of attorney to secure the debt. Separate judgments had been entered up against A. & against B. The amount of the sums thus due was stated in the deed. D. had some legal interest in the estates themselves. He was a party to the deed, & executed it. In the deed executed by A. & B., there was a conveyance to certain persons, with a power of sale, to be exercised with the consent, in writing, of A. & B., or the survivor of them. A. died without having concurred in any consent to a sale. B. afterwards borrowed money from an insurance co., the repayment of which was secured by mtge. of his estates, of which those which were the subject of the first deed formed part. In the mtge., to which the creditor under the first deed was a party, & which fully recited the deed, there was a power of sale given to the mtgee. :—*Held :* this was a consent, in writing, sufficient to satisfy the words of the first deed.—MONTEFIORE *v.* BROWNE (1858), 7 H. L. Cas. 241 ; 4 Jur. N. S. 1201 ; 11 E. R. 96, H. L.

Annotations :—**Refd.** Johns *v.* James (1878), 8 Ch. D. 744, C. A. ; Priestley *v.* Ellis, [1897] 1 Ch. 489. **Mentd.** English & Scottish Mercantile Investment Trust *v.* Brunton, [1892] 2 Q. B. 1.

8959. Book-debts & goodwill—Power of court to order sale by private contract.]—The ct. has jurisdiction, under 1861 Act, ss. 137, 197, upon the application of the trustees under a deed executed & registered in conformity with ss. 192 *et seq.*, to order the book-debts & goodwill of the business of debtor to be sold by private contract.—*Re* BALLAD & BOWMAN, *Ex p.* MANNOOCH (1863), 9 L. T. 521.

8960. Bank stock—Power of court to order entry in names of trustees—After death of debtor without transferring stock—Without necessity of taking out administration.]—Debtor assigned all his property to trustees for the benefit of his creditors, to be administered as in bkpcy. He was possessed of bank stock standing in his own name, but before he could transfer the stock to the trustees he died :—*Held :* the ct. had power to order the Bank of England to enter the stock in their books in the names of the trustees of the deed, without the necessity of taking out administration or the execution of a formal transfer by any one.—*Re* PRICE, *Ex p.* BANK OF ENGLAND (1867), 2 Ch. App. 662 ; 36 L. J. Bcy. 24 ; 16 L. T. 760 ; 15 W. R. 1066, L. JJ.

8961. Bill of exchange—Power of court—To restrain negotiation by inspectors.]—The ct. has no jurisdiction to order inspectors to deliver up a bill of exchange claimed by a creditor, or to restrain the negotiation of it.—*Re* SMITH, *Ex p.* CHARTERED BANK OF INDIA, AUSTRALIA & CHINA (1867), 16 W. R. 159.

8962. Rights of action by trustee—Right to sue in his own name.]—In an action by pltfs., suing in their own names as trustees of a deed of assignment for the benefit of creditors for a debt due from deft. to their debtors before the date of the deed :—*Held :* the trustees might sue in their own names.—DURANT *v.* ROBINSON (1876), 34 L. T. 617.

8963. —— Duty to prove assent to deed.]—Inspectors claiming as pltfs. under a deed of inspectorship registered under 1861 Act, must prove the assents to the deed of the creditors.—PHILLIPS *v.* FURBER (1870), 5 Ch. App. 746 ; 22 L. T. 707 ; 18 W. R. 985, L. C.

Annotations :—**Mentd.** Ellis *v.* Silber (1872), 8 Ch. App. 83, L. C. ; Graham *v.* Winterson (1873), L. R. 16 Eq. 243.

further delay.—ONTARIO BANK *v.* LAMONT (1883), 6 O. R. 147.—**CAN.**

d. —— *Advertisement of sale.*]—An advertisement of the sale of the arranging debtor's premises may be made, although it would result in the publication of his name.—*Re* J. N. (1873), 8 I. L. T. Jo. 64.—**IR.**

e. *Life interest—Power to sell—Received.*]—A person, entitled to a life estate in lands, conveyed his life estate to a trustee for creditors, upon trust, to pay to the creditors the amount due to them, with interest :—*Held :* the creditors were not entitled to a sale of debtor's life interest, but only to have a receiver appointed.—TAYLOR *v.* EMERSON (1843), 6 I. Eq. R. 224.—**IR.**

f. *Mortgaged property—Sale discharged from incumbrance.*]—An arranging debtor proposed to pay a composition on unsecured debts, & on secured debts not fully secured, which proposal was confirmed by the ct. He had previously mortgaged premises, which, subsequently, he demised. If the premises were sold, under order of ct., subject to the lease, they would not realise sufficient, after payment of prior incumbrances, to pay the amount due on foot of the mtge., which amount had not been realised, & no composition had been paid in respect of such deficiency :—*Held :* the ct. had jurisdiction to declare the lease invalid as against the mtgee., & to sell the premises discharged therefrom.—*Re* R., RUTTLE *v.* O'FLAHERTY (1877), 11 I. L. T. 133.—**IR.**

g. *Shares—Power to call on company for account.*]—An assignee for creditors under an assignment, which excepted shares in cos. not fully paid up, & which declared the assignor a trustee of such shares for the assignee, sought to have it declared that he was the owner of the shares & for an account :—*Held :* he was not entitled to call on the co. to account to him for the shares or any dealings therewith.—ARMSTRONG *v.* MERCHANTS' MANUFACTURING CO. (1901), 21 C. L. T. 123 ; 32 O. R. 387.—**CAN.**

h. *Rights of action by trustee—Ejectment.*]—A trustee under 1860 Act cannot be registered as a proprietor under Real Property Act, 1861, & cannot maintain ejectment against his insolvent, who is so registered.—KELLY *v.* DOODY (1871), 5 S. A. L. R. 132.—**AUS.**

k. —— *Money paid to creditor by debtor.*]—Debtor assigned for the benefit of his creditors, the trustee carrying on his business, under the deed, for the purpose of winding it up & employing debtor as his agent. Debtor paid money from the business so carried on to a creditor, who sought to appropriate it to an account due before the assignment ; the creditor knew that the money was paid out of the trust estate :—*Held :* the trustee could recover it in an action for money paid.—DICKIE *v.* NORTHRUP (1892), 24 N. S. R. 121.—**CAN.**

l. —— *Debt due to assignor.*]—M. had a contract to supply wood to a co., for which he was to be paid when accepted. While one hundred & fifty-two cords were lying in the co.'s yard for acceptance he assigned all his wood to pltf. for the benefit of his creditors. M. at the same time made over his interest in the contract to deft., who completed it, & the co. paid deft. for the one hundred & fifty-two cords as well as for what he had himself supplied :—*Held :* pltf. might recover such sum as money had & received.—SCOTT *v.* KELLY (1859), 17 U. C. R. 306.—**CAN.**

—— *To impeach conveyance by assignor.*]—*See* Part XX., Sects. 11, 12, *ante.*

8963 i. —— *Duty to prove assent to deed.*]—One of three partners assigned to trustees, for payment of the partnership debts, property which had originally belonged to the firm, the deed reciting that the other partners had conveyed to him :—*Held :* proof of the execution of the deed by the trustees was not necessary to enable them to recover the property assigned.—MACMILLAN *v.* RITCHIE (1851), 7 N. B. R. (2 All.) 242.—**CAN.**

Sect. 8.—*Property available: Sub-sect.* 4. *Sect.* 9: *Sub-sect.* 1, *A., B. & C.*]

8964. Application of Statute of Limitations.]—An application was made in the Bkpcy. Ct., by a trustee in a liquidation by arrangement, for an order that N. should pay over to him certain rents of the property of the liquidating debtor, which had been received by N. subsequent to the commencement of the liquidation. The notice of motion was served more than six years after the rents had been so received:—*Held:* Stat. Limitations was a bar to the motion by the trustee.—*Re* MANSELL, *Ex p.* NORTON (1892), 66 L. T. 245; 9 Morr. 198, C. A.

Effect of bankruptcy supervening—On assets already realised.]—*See* Nos. 9033 *et seq., post.*

SECT. 9.—POSITION OF TRUSTEE OR INSPECTORS.

NOTE.—*In considering the cases set out in this Section, regard must be had to the Notes at the beginning of the Part & of Sect.* 2, *ante.*

SUB-SECT. 1.—WHERE BANKRUPTCY DOES NOT SUPERVENE.

A. Appointment and Position generally.

8965. Jurisdiction of Court of Chancery—To appoint new trustees.]—New trustees of a creditors' deed may be appointed by the Ct. of Ch., notwithstanding 1861 Act, s. 197.—*Re* BACHE'S TRUST DEED (1868), 16 W. R. 1078.

8966. Appointment of two trustees—Death of one—Position of survivor.]—Where two persons are appointed joint trustees in a liquidation by arrangement under 1869 Act, s. 125, & one of them dies, the survivor continues to be trustee in the liquidation.—*Re* BARTON, TOMLINS *v.* LATIMER, [1909] 2 K. B. 841; 79 L. J. K. B. 29; 101 L. T. 407; 16 Mans. 269, C. A.

8967. Disqualification—Cannot sue out commission.]—A commission of bkpcy. cannot be taken out by a person who is appointed, & acts as a trustee under a deed of assignment for the benefit of creditors, although he does not actually execute the deed.—*Re* WHALLEY, *Ex p.* WHALLEY (1803), 1 Smith, K. B. 118, L. C.

8968. —— ——.]—By a composition deed, the insolvent assigned to four trustees all his goods, chattels, etc., upon trust to sell & to apply the proceeds rateably in discharge of his debts amongst his creditors, who should execute the deed, provided that the trustees & the creditors should, on or before a given day, make proof of the debts, if required, & execute that deed. The creditors, as a release of their respective debts, covenanted that they would not implead the insolvent or his goods. The deed was executed by two only of the trustees:—*Held:* the debt of a trustee who had executed it was extinguished by the deed, & he could not sue out a commission of bkpcy.—SMALL *v.* MARWOOD (1829), 9 B. & C. 300; 4 Man. & Ry. K. B. 181; 7 L. J. O. S. K. B. 197; 109 E. R. 112.

Annotations:—**Mentd.** Browell *v.* Reed (1842), 1 Hare, 434; Siggers *v.* Evans (1855), 5 E. & B. 367; Standing *v.* Bowring (1885), 31 Ch. D. 282, C. A.; London & County Banking Co. *v.* London & River Plate Bank (1888), 21 Q. B. D. 535, C. A.; Mallott *v.* Wilson, [1903] 2 Ch. 494.

8969. Subject to statutory incidents of office.]—A trustee under a deed of arrangement, by accepting the office of trustee, accepts it with the statutory incidents.—*Re* HERTAGE (1896), 3 Mans. 297.

See, now, 1914 (Deeds) Act, ss. 17, 18.

8970. Liable for security for costs.]—The trustee of a deed of assignment for creditors is not, if shown to be insolvent, exempt from liability to give security for the costs of an action brought to carry out the trusts of the deed.—GREENER *v.* KAHN & CO., [1906] 2 K. B. 374; 95 L. T. 481; 22 T. L. R. 694; *sub nom.* READER *v.* KAHN & CO., 75 L. J. K. B. 660, C. A.

Annotations:—**Consd.** White *v.* Butt, [1909] 1 K. B. 50, C. A.; Rainbow *v.* Kittoe, [1916] 1 Ch. 313.

See, also, cases in Part XXI., Sect. 3, *ante*, &, *generally*, PRACTICE & PROCEDURE.

PART XXIII. SECT. 9, SUB-SECT. 1. —A.

8965 i. *Jurisdiction of Courts of Equity —To remove trustees & make fresh appointment.*]—There is inherent jurisdiction in Cts. of Equity to remove trustees & appoint new ones in proper cases.—*Re* DICKINSON (1892), 2 B. C. R. 262.—**CAN.**

n. *Who may be appointed—Person ignorant of business.*]—The appointment as an assignee, of a person totally ignorant of business & incapable of properly performing the duties of winding it up, renders the deed void.—CULTON *v.* HARRIS (1897), 30 N. S. R. 112.—**CAN.**

o. —— *Company.*]—An incorporated co. cannot be an assignee for the benefit of creditors under Creditors' Trust Deeds Act.—COLONIAL DEVELOPMENT CO. *v.* BEACH (1913), 19 B. C. R. 247.—**CAN.**

p. —— *Sheriff—Effect of appointment of.*]—An assignment for the benefit of creditors made to a sheriff under R. S. O., 1887, c. 124, is made to him as a public functionary, & on his death the care & administration of the estate assigned devolves upon his deputy, & thereafter upon his successor in office. It is not competent to the sheriff to disclaim or decline to act as such assignee.—BROWN *v.* GROVE (1889), 18 O. R. 311.—**CAN.**

q. —— *Under Insolvent Act* 1865.]—The above Act does not authorise a voluntary assignment to an official assignee in any part of either Upper or Lower Canada, but means only that it may be made to any official assignee entitled to take it under Insolvent Act, 1864, without compliance with the formalities mentioned therein.—WHITE *v.* CUTHBERTSON (1867), 17 C. P. 377.—**CAN.**

r. —— *Residence of assignee.*]—A voluntary assignment to an official assignee must be to one resident in the county, within which insolvent has his place of business. *Semble:* the creditors may acquiesce in an assignment to a non-resident official assignee, & thus constitute him their assignee.—MCWHIRTER *v.* LEARMOUTH (1868), 18 C. P. 136.—**CAN.**

s. —— —— *Assent of majority of creditors.*]—The appointment as assignee, of a person other than an official assignee or some other resident person, must be assented to by the majority of creditors at the time of assignment, or the assignment will under Alberta Assignments Act be null & void.—FAIRCHILD *v.* MYRUM, *Ex p.* MADORE (1908), 1 Alta. L. R. 472; 9 W. L. R. 277.—**CAN.**

t. —— ——.]—Alberta Assignment Act, as amended by 1913 Act, does not require the assignment to be made to the official assignee for the district in which the assignor carries on business.—R. *v.* GRAHAM (1915), 31 W. L. R. 117; 8 W. W. R. 460; 21 D. L. R. 513.—**CAN.**

8969 i. *Subject to statutory incidents of office—Application of Insolvency Statutes.*]—Where debtor assigns & transfers to a third person as trustee for creditors all his estate, the trustee is within Insolvency Act, 1897, so far as its provisions can be applied.—*Re* COMYNS & WILLIAMS (1901), 27 V. L. R. 2.—**AUS.**

a. *Whether representative of general body of creditors.*]—Where a deed of assignment for the benefit of creditors appointed trustees, the ct., in an action by a scheduled creditor who had signed the deed against the trustees, the other creditors not being parties, to compel them to admit her claim, regarded the trustees, who by the deed were constituted the representatives of the creditors for the purpose of investigating claims so far as the deed allowed them to be investigated, as representing the general body of creditors.—JOHNSTON *v.* MATTHEWS (1893), 19 V. L. R. 638.—**AUS.**

b. *Trustee for debtor as well as creditors.*]—KING *v.* DOLL (1915), 32 W. L. R. 411; 9 W. W. R. 151; 25 D. L. R. 557.—**CAN.**

c. *Trustee also creditor—Whether executing as both.*]—Parties to a deed of assignment, in trust for payment of creditors generally, were described as trustees of the second & creditors of the third part. When the deed was executed one of the trustees was also a creditor of the assignor:—*Held:* such trustee must be considered to have executed the deed, both as creditor & trustee.—HAMMOND *v.*

B. Position in regard to Property of Debtor.

See Sect. 8, sub-sect. 1, *ante*.

C. Powers.

8971. To contest debt—After creditor allowed to execute deed for certain sum.]—Trustees of a creditors' deed were empowered to require creditors to prove their debts before executing it. The trustees having once allowed a creditor to execute the deed for a certain sum:—*Held:* they could not afterwards contest the debt, except on a bill filed for that purpose.—LANCASTER *v.* ELCE (1862), 31 Beav. 325; 31 L. J. Ch. 789; 7 L. T. 123; 8 Jur. N. S. 1167; 10 W. R. 824; 54 E. R. 1163.

Annotation:—**Distd.** *Re* Pilet, *Ex p.* Toursier & Berkeley, [1915] 3 K. B. 519, C. A.

8972. To reject proof peremptorily.]—The trustee under a composition has no right peremptorily to reject the proof of a creditor.—*Re* BOSTEL, *Ex p.* BOTTING (1874), L. R. 19 Eq. 261; 44 L. J. Bcy. 47; 31 L. T. 736; 23 W. R. 536.

Annotations:—**Consd.** Campbell *v.* Im Thurn (1876), 1 C. P. D. 267; *Re* Wright, *Ex p.* Willey (1883), 23 Ch. D. 118, C. A. **Refd.** *Re* Carew, *Ex p.* Carew (1875), 10 Ch. App. 308, L. JJ.; Tea Co. *v.* Jones (1880), 43 L. T. 255.

8973. To enforce contract of sale made by him.]—A trader made a conveyance of all his real & personal property to trustees to sell for the benefit of his creditors, under which the trustees contracted to sell lands to deft. The contract not being completed, they filed a bill against deft. for a specific performance, but, before answer, the trader became bkpt., & his assignees filed a supplemental bill to enforce the contract:—*Held:* although the conveyance to the trustees was an act of bkpcy., the assignees might compel the performance of the contract made under it.—GOODWIN *v.* LIGHTBODY (1818), Dan. 153; 159 E. R. 866.

8974. —— Creditors' assent might qualify purchaser's offer.]—A trustee in bkpcy. entered into a contract with defts. for the sale of the assets of bkpt. for such a sum as would pay the expenses of the bkpcy. & the preferential debts in full within fourteen days after the approval of the scheme by the ct., & a composition to the unsecured creditors, & that on approval of the scheme by the ct. the bkpcy. should be annulled. The creditors passed a resolution agreeing to the scheme, as proposed, but with the addition of a provision that a bond should be given by defts. for repayments of the money. The ct. afterwards approved the agreement, & annulled the bkpcy:—*Held:* the creditors not having accepted the scheme in the form agreed to by defts. there had been no approval of the scheme by the ct. & the contract could not be enforced.—LUCAS *v.* MARTIN (1888), 37 Ch. D. 597; 57 L. J. Ch. 261; 58 L. T. 862; 36 W. R. 627, C. A.

8975. To appeal against receiving order—Made within three months of deed.]—The trustee under a deed of arrangement has a *locus standi* to appeal against a receiving order made against debtor within three months of the execution of the deed.—*Re* BATTEN, *Ex p.* MILNE (1889), 22 Q. B. D. 685; 58 L. J. Q. B. 333; 37 W. R. 499; 5 T. L. R. 423; 6 Morr. 110, C. A.

Annotations:—**Refd.** *Re* Samson & Schreiber's Contract & Vendor & Purchaser Act, 1874 (1895), 39 Sol. Jo. 504; Maskelyne & Cooke *v.* Smith, [1903] 1 K. B. 671, C. A

8976. To redeem mortgage.]—The solr. to a trust misappropriated the trust funds, & subsequently, in part discharge of his liability, signed a declaration of trust appropriating to the trust property of his own which was in mtge. to a building society. The solr. having died insolvent, the trustees claimed to redeem the mtge.:—*Held:* they were entitled to do so.—RADCLIFFE *v.* ABBEY RD., & ST. JOHN'S WOOD PERMANENT BUILDING

BARKER (1848), 5 N. B. R. (3 Kerr) 634.—**CAN.**

d. *Removal of assignee—Notice of motion.*]—Where a summary motion is made under R. S. O. 1897, c. 147, to remove an assignee for the benefit of creditors, the notice of motion should state the grounds, or they should at least appear in the material filed in support of the application.—*Re* WILSON (1903), 6 O. L. R. 564.—**CAN.**

e. —— *Whether by summary motion.*]—The right of an assignee to his office is a proper subject for trial, rather than for summary disposition upon motion.—BROCK *v.* CLINE (1906), 8 O. W. R. 144–5.—**CAN.**

f. *Retirement of two trustees & remaining one unable to perform duties—Whether deed inoperative.*]—*Semble:* an assignment to trustees for benefit of creditors does not become inoperative by reason of the retirement of two out of three trustees & of the inability of the third to discharge his duties properly.—STEPHENSON *v.* BAUMGARTNER, BAUMGARTNER *v.* STEPHENSON (1868), 3 Agra, 104, 321.—**IND.**

g. *Liability for costs.*]—The assignee for the benefit of creditors, may be ordered to pay the costs of an action personally as any other unsuccessful litigant may be.—MACDONALD *v.* BALFOUR (1893), 20 A. R. 404.—**CAN.**

PART XXIII. SECT. 9, SUB-SECT. 1.—C.

h. *To have conflicting claims determined summarily.*]—An assignee for benefit of creditors under an assignment within R. S. O. 1914, c. 134, is not entitled, upon a summary application to the ct. under R. S. O. 1914, c. 121, to have conflicting claims of right to rank upon the estate determined.—*Re* FEARNLEY'S ASSIGNMENT (1915), 33 O. L. R. 492.—**CAN.**

k. *To bind creditors.*]—The inspectors of an insolvent estate have no power, unless specially authorised by the creditors, to bind the latter by anything they do in disposing of the estate. The disposal of it is in the hands of the creditors, &, in default of directions by them, in the hands of the judge of the county ct.—MORRISON *v.* WATTS (1892), 19 A. R. 622.—**CAN.**

l. *To add proviso to release of debtor.*]—Two partners, H. & F., by deed assigned their estate to trustees for the benefit of their creditors, & in consideration of the assignment the creditors released H. from all debts due from H. & F. It was provided by the deed that the release should not take effect unless & until the trustees should, by instrument in writing under their hands, signify their consent to such release taking effect, such consent to be given or withheld at the discretion of the trustees. By a subsequent deed, which recited the deed of assignment & the release therein contained, the trustees consented to the release taking effect, but provided that the release should in no way whatsoever act as a release of F. as a member of the firm H. & F. or in his individual capacity:—*Held:* the trustees had no power to add the proviso reserving rights against F., & H. & F. were released from the debts due by them.—*Re* FISHER, *Ex p.* PETERSEN (1899), 20 N. S. W. B. 42.—**AUS.**

m. *To assent to retention of security.*]—Under Assignments & Preferences Act, 1914 (c. 147), no formal action or resolution of the creditors is necessary to enable the assignee to assent to the retention of a security by a creditor.—TAYLOR *v.* DAVIES (1918), 41 D. L. R. 510; 13 O. W. N. 323; 41 O. L. R. 403.—**CAN.**

n. *To employ solicitor—To collect debts due.*]—A trustee under a deed for the benefit of creditors may employ an attorney to collect debts due to the estate.—THIBIDEAU *v.* LE BLANC (1907), 2 E. L. R. 422.—**CAN.**

o. —— *Propriety of appointment.*]—A solr. who had acted for insolvents & was largely indebted to the estate:—*Held:* not a proper person to act for the estate.—ORILLIA EXPORT LUMBER CO. *v.* BURSON (1903), 2 O. W. R. 1110.—**CAN.**

p. *To object to creditor's signature.*]—Trustees accepting a deed of assignment, for the benefit of creditors of the assignor, whose names are set out in the sched., are estopped from objecting to the signature of any alleged creditor therein appearing, unless the deed expressly provides for their doing so.—JOHNSTON *v.* MATTHEWS (1893), 19 V. L. R. 638.—**AUS.**

q. *To retain money to pay rent.*]—A trader assigned, to trustees for the benefit of his creditors, property consisting of stock-in-trade & of the unexpired lease of the business premises:—*Held:* the trustees were justified in retaining money out of the estate to pay rent as long as they were unable to assign the lease, or so long as it was reasonable to retain it for disposing of the property.—STEVENSON & SONS, LTD. *v.* BRIND (1895), 21 V. L. R. 109.—**AUS.**

r. *To renew chattel mortgage.*]—An assignee for the benefit of creditors may renew a chattel mtge. made in favour of his assignor, without a specific assignment thereof.—FLEMING *v.* RYAN (1894), 21 A. R. 39.—**CAN.**

s. *To select exempted articles.*]—When debtor makes an assignment of all his stock-in-trade & personal property, etc., liable to seizure under xecution, to a trustee for creditors, the

Sect. 9.—Position of trustee or inspectors: Sub-sect. 1, C. & D.]

SOCIETY (1918), 87 L. J. Ch. 557 ; 119 L. T. 512 ; 62 Sol. Jo. 667 ; [1918–9] B. & C. R. 84.

8977. Power vested in several trustees—Joint power—Passes to survivor.]—A power to determine a composition deed vested in several trustees of the deed is a joint power & passes to the survivor. —*Re* STOCK, *Ex p.* AMOS (1896), 66 L. J. Q. B. 146 ; 75 L. T. 422 ; 45 W. R. 480 ; 41 Sol. Jo. 113 ; 3 Mans. 324, D. C.

D. Duties.

8978. To execute deed—Whether execution by wife sufficient.]—A deed signed in the husband's name by a *feme covert* without the authority of her husband, who is therein named a trustee, is not a sufficient execution by the husband under 1861 Act, s. 192 (second condition) ; nor is the execution of a deed by the wife upon the authority of a letter from her husband, sufficient.—*Re* MILSTED, *Ex p.* JOREY (1868), 18 L. T. 158 ; 16 W. R. 582.

8979. To extend time for creditor signing deed.]—A deed excluded creditors not signing within a given time. A creditor resident abroad sent a power of attorney to an agent to sign for him, but power of attorney arrived after the expiry of the time for signing, the agent having previously expressed his desire to sign on behalf of his principal :—*Held :* it was the duty of the trustees in the circumstances to have extended the time as soon as they had notice of the creditor's claim.—RAWORTH *v.* PARKER (1855), 2 K. & J. 163 ; 25 L. J. Ch. 117 ; 27 L. T. O. S. 62 ; 4 W. R. 273 ; 69 E. R. 736.

Annotations :—**Refd.** Whitmore *v.* Turquand (1861), 30 L. J. Ch. 345. **Mentd.** Brandling *v.* Plummer (1857), 6 W. R. 117.

8980. To ascertain amount of debt.]—The trustee under a composition is entitled, where the amount of the debt is in dispute, to ascertain what is the amount actually due.—*Re* BOSTEL, *Ex p.* BOTTING (1874), L. R. 19 Eq. 261 ; 44 L. J Bcy. 47 ; 31 L. T. 736 ; 23 W. R. 536.

Annotations :—**Apprvd.** Campbell *v.* Im Thurn (1876), 1 C. P. D. 267. **Consd.** Tea Co. *v.* Jones (1880), 43 L. T. 255. It was no part of the trustee's duty to the creditors to settle the amounts due to the various creditors ; the case of *Re Bostel, Ex p. Botting*, cannot, in my opinion, be considered as an authority to the contrary (HAWKINS, J.) ; *Re* Wright, *Ex p.* Willey (1883), 23 Ch. D. 118, C. A. **Mentd.** *Re* Carew, *Ex p.* Carew (1875), 10 Ch. App. 308, L. JJ.

8981. ——.]—*Semble :* the trustee under a composition is entitled, before paying over the composition to a creditor, to investigate the validity of his claim.—CAMPBELL *v.* IM THURN (1876), 1 C. P. D. 267 ; 45 L. J. Q. B. 482 ; 35 L. T. 265 ; 40 J. P. 775 ; 24 W. R. 675.

Annotations :—**Mentd.** *Re* Lang, *Ex p.* Lang (1877), 5 Ch. D. 971, C.A. ; Wilson *v.* Breslauer (1877), 2 C. P. D. 314, C. A. ; Breslauer *v.* Brown (1878), 3 App. Cas. 672, H. L. ; Oppenheim *v.* Jackson (1879), 48 L. J. Q. B. 441 ; Lewis *v.* Leonard (1880), 5 Ex. D. 165, C. A.

8982. To sue surety—Power of court to compel trustee to do so.]—If the surety for payment of a composition fails to pay, it is the duty of the trustee to sue him at law on his covenant, & if the trustee neglects such duty, the Ct. of Bkpcy. has power to compel him to perform it.—*Re* DALE, *Ex p.* MIRABITA (1875), L. R. 20 Eq. 772 ; 44 L. J. Bcy. 119 ; 33 L. T. 60 ; 23 W. R. 689.

8983. —— ——.]—Under composition resolutions a trustee was appointed, & a surety for debtor covenanted with the trustee to pay two of the instalments of the composition. The instalments were not paid when they became due :—*Held :* upon the application of a creditor, the ct. had jurisdiction under 1869 Act, s. 126, to order the trustee to sue the surety upon his covenant.—*Re* DALE, *Ex p.* MONKHOUSE (1875), 1 Ch. D. 287 ; 45 L. J. Bcy. 71 ; 33 L. T. 614 ; 24 W. R. 300.

8984. To administer separate estate according to laws of bankrupt—Resolutions by joint creditors.]—Where proceedings for liquidation have been instituted by partners, & the joint creditors have passed a resolution for liquidation & appointed a trustee, the separate estate of each partner, as well as the joint estate, vests in the trustee so appointed, & if no resolution is passed by the separate creditors, the trustee must administer the separate estate according to the laws of bkpcy. —EBBS *v.* BOULNOIS (1875), 10 Ch. App. 479 ; 44 L. J. Ch. 691 ; 33 L. T. 342 ; 23 W. R. 820, L. JJ.

Annotations :—**Mentd.** *Re* Caughey, *Ex p.* Ford (1876), 1 Ch. D. 521, C. A. ; *Re* Pettit's Estate (1876), 1 Ch. D. 478 ; Meggy *v.* Imperial Discount Co. (1878), 3 Q. B. D. 711, C. A. ; *Re* Chatterton, *Ex p.* Hemming (1879), 13 Ch. D. 163, C. A. ; *Re* Wainwright, *Ex p.* Wainwright (1881), 19 Ch. D. 140, C. A. ; *Re* Smith, Green *v.* Smith (1883), 24 Ch. D. 672 ; Cholmeley School Highgate *v.* Sewell, [1894] 2 Q. B. 906 ; Imray *v.* Oakshette, [1897] 2 Q. B. 218, C. A. ; *Re* Powell, Powell *v.* Powell (1904), 20 T. L. R. 374.

8985. In regard to accounts—To give creditors full information—Liability for costs on failure.]—A trustee under a deed executed by debtor, pursuant to 1861 Act, s. 192, & duly registered, is bound, upon the reasonable application of creditors, to give them full information with respect to his receipts & payments under the deed, & if he refuse or neglect to do so, he is liable to be fixed personally with the costs incurred by the creditors in obtaining such information.—*Re* A TRUST DEED, *Ex p.* WHITE (1865), 13 L. T. 24.

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assignee has a right to select such articles as would be exempt under Executions Act, R. S. M. c. 53, s. 43, in the absence of a selection by debtor.—CLOUTIER *v.* GEORGESON, 20 C. L. T. Occ. N. 138 ; 13 Man. L. R. 1. —CAN.

t. *To transfer promissory note.*]—The holder of a note, indorsed in blank, assigned for benefit of his creditors all property, debts & effects, & delivered the note to his trustees :—*Held :* the trustees could transfer the note to a third person, who could sue the maker. —CAMPBELL *v.* GILBERT (1862), 5 All. 420.—CAN.

a. *To waive notice of dishonour of bill.*]—If the holder of a bill of exchange, the drawer of which has assigned his estate to a trustee for creditors, loses his right to resort to that estate, by not giving notice of dishonour, the trustee cannot, by waiver of the notice of dishonour, revive the liability as against other creditors.—*Re* LEVY'S TRUST ESTATE, *Ex p.* AARONS (1871), 2 V. R. 33.—AUS.

PART XXIII. SECT. 9, SUB-SECT. 1. —D.

b. *In general.*]—An assignee's duties are analogous to those of exors. & trustees administering estates.—ONTARIO BANK *v.* LAMONT (1884), 6 O. R. 147.—CAN.

c. —— *Discretion conferred by deed.*]—By an assignment on trust for creditors it was provided that no creditor should be entitled to receive a dividend upon any greater sum than the trustee should certify to be due, & that the trustee should act under the direction of a meeting of creditors :—*Held :* it was the duty of the trustee to exercise such a discretion as the deed reposed in him.—*Re* BARNETT'S TRUST ESTATE, *Ex p.* NATHAN (1854), 1 W. W. & A'B. 107.—AUS.

8985 i. *In regard to accounts.*]—A trustee is bound to use reasonable diligence to have the accounts ready, & to render them within a reasonable time after they are asked for.—RANDALL *v.* BURROWES (1865), 11 Gr. 364.—CAN.

d. —— *Where fraud or improper conduct not alleged.*]—Pltfs. assigned to deft., for the benefit of creditors, a list of whom was handed to him. Subsequently pltfs. furnished another sched., embracing several persons not mentioned in the original list. Deft. had paid several of those first named, had expended a sum greater than he had collected, & had become answerable for more than the estate would realise. He refused to recognise the claims of the additional parties : pltfs. filed a bill for an account of deft.'s dealings with the estate & for execution of the trusts of the deed : fraud or improper conduct were not alleged in the bill ; & if the whole estate were realised, deft. would still be a loser :—*Held :* the bill must be dismissed with costs.—LIDDELL *v.* DEACON (1873), 20 Gr. 70.—CAN.

8986. —— To file accounts—Every three months—Duty of inspector to enforce.]—*Held:* (1) it was the duty of the trustee to file accounts every three months; (2) it was the duty of the inspector to see that accounts were so filed by the trustee, & if the inspector did not call for an account, he could not be heard to complain that one had not been rendered.—*Re* BRIGHT, *Ex p.* OLD (1874), L. R. 17 Eq. 457; 43 L. J. Bcy. 47; 30 L. T. 72; 22 W. R. 365.

See, now, 1914 Deeds Act, s. 13.

8987. —— Jurisdiction of court to take account—Between debtor & trustee.]—The Ct. of Bkpcy. has jurisdiction to take an account between debtor & the trustees under a composition deed of a fund paid to the trustees for distribution among the creditors.—*Re* CAREW, *Ex p.* CAREW (1875), 10 Ch. App. 308; 44 L. J. Bcy. 67; 32 L. T. 318; 23 W. R. 459, L. JJ.

Annotations:—**Consd.** Breslauer *v.* Brown (1878), 3 App. Cas. 672, H. L. **Mentd.** Oppenheim *v.* Jackson & Till (1879), 41 L. T. 193; *Re* Lacey, *Ex p.* Lacey (1880), 16 Ch. D. 131, C. A.

8988. —— To pay personally stamp on accounts—Where no assets.]—Where no money on account of debtor's estate has come into the hands of a trustee under a scheme of arrangement, he must, at his own expense, provide the stamp for the affidavit of no receipts or payments, which is required to be forwarded to the Board of Trade.—*Re* ROWLANDS, *Ex p.* BOARD OF TRADE (1887), 35 W. R. 457; 4 Morr. 70.

8989. —— —— ——.]—The trustee must stamp an account called for by the Board of Trade under 1890 Act, s. 25, out of his own pocket, if he has no assets for the purpose.—*Re* HERTAGE (1896), 3 Mans. 297.

8990. —— Power of board of trade to demand account—After removal of trustee.]—Although a trustee under a scheme of arrangement has been removed from office, the Board of Trade has power to demand a statement of his receipts & payments as such trustee, & to apply to the ct. under 1883 Act, s. 102 (5), to enforce that order in case of neglect or refusal to comply with it.—*Re* ROGERS, *Ex p.* BOARD OF TRADE (1887), 35 W. R. 457; 4 Morr. 67.

8991. —— —— Committal on failure to comply.]—A trustee under a deed of arrangement failed to comply with an order of the ct. directing him to obey a previous order of the Board of Trade by which such trustee was required, under 1890 Act, s. 25, to furnish accounts. An application having been made by the Board of Trade for his committal:—*Held:* an order of committal must be made, but such order would not issue for a fortnight & not go out at all, if within that time the trustee complied with the terms of the order previously made against him.—*Re* GALLANT, *Ex p.* BOARD OF TRADE (1893), 10 Morr. 128.

8992. —— —— Liability for costs of application.]—When a trustee under a deed of arrangement, by neglecting to comply with an order of the Board of Trade under 1890 Act, s. 25, directing him to transmit accounts, obliges the Board of Trade to give notice of motion to compel compliance, the trustee must pay the costs so occasioned, though before the hearing he has complied with the order.—*Re* FREEMAN, *Ex p.* BOARD OF TRADE (1894), 1 Mans. 61.

8993. —— 1890 Act not retrospective.]—*Held:* 1890 Act, s. 25, either did not apply to deeds of arrangement registered before Jan. 1, 1891, or if it did apply to such deeds, applied only to accounts subsequent to Jan. 1, 1891.—*Re* NORMAN, *Ex p.* BOARD OF TRADE, [1893] 2 Q. B. 369; 63 L. J. Q. B. 34; 9 T. L. R. 656; 4 R. 584, C. A.

8994. —— Right of official assignee to demand audit—Liability for costs of application.]—Where debtors made an assignment for the benefit of creditors, & there had been no audit of the assignees' accounts & large sums had been received by them:—*Held:* (1) the official assignee acted properly in calling for an audit, although twenty-five years had elasped since any step had been taken & no creditor made any complaint; as the official assignee might with little difficulty & at a small expense have satisfied himself that the circumstances did not render it incumbent upon him to continue to prosecute a claim against the creditors' assignee, he was not held entitled to his full costs as against the latter, there being no estate.—*Re* ROBBINS & MUCHALL, *Ex p.* SHAW (1846), De G. 242.

8995. To pay money into Bank of England—Payment into bank in which trustee interested—Whether sufficiently prescribed by creditors.]—Creditors at a first meeting resolved on liquidation & appointed O. trustee. At the same meeting O. stated to the creditors that he should open an account in his own name, as trustee of debtor, at the P. Bank, of which he was manager, & should pay into that account all money received by him from debtor's estate. The creditors assented to such arrangement, but no formal resolution was passed confirming it:—*Held:* the estate being under liquidation, the creditors had sufficiently prescribed the bank into which the money was to be paid, & the trustee could not be charged with interest for not having paid it into the Bank of England.—*Re* BRIGHT, *Ex p.* OLD (1874), L. R. 17 Eq. 457; 43 L. J. Bcy. 47; 30 L. T. 72; 22 W. R. 365.

8996. To tender composition.]—*Semble:* the trustee under a composition is not bound to tender the composition.—*Re* TAYLOR, *Ex p.* WATERER (1874), 43 L. J. Bcy. 25, L. JJ.

Annotations:—**Mentd.** Campbell *v.* Im Thurn (1876), 1 C. P. D. 267; *Re* Watson, *Ex p.* Watson (1876), 24 W. R. 592, C. A.; Tea Co. *v.* Jones (1880), 43 L. T. 255.

8997. To pay composition—Before investigating claim.]—A. having deposited with B. £100 to distribute amongst A.'s creditors in proportion to their claims, no one of these can maintain an action against B. before the proportions of all claimants have been ascertained.

A.'s declaration in such case is evidence to show that C. is a creditor of his to a specific amount.—ROBSON *v.* ANDRADE (1816), 1 Stark. 372.

8998. —— —— Amended proof lodged—Trustee entitled to reasonable time after receiving it.]—

e. —— *Jurisdiction of court.*]—A trustee under a deed of trust for the benefit of creditors cannot, upon his own application, pass his accounts in the Ct. of Equity.—*Re* VAN WART, 21 C. L. T. 509; 2 N. B. Eq. Rep. 320.—**CAN.**

f. —— *Costs of assignee.*]—Where a creditor brought an action for an account against the assignee after demanding copies of the assignee's accounts, but without expressing any desire or making any attempt to inspect the accounts, & without waiting a reasonable time for preparation of copies, the assignee was allowed his costs as between solr. & client out of the balance of the estate in his hands, & in case of deficiency pltf. was ordered personally to pay it.—SANDFORD *v.* PORTER (1889), 16 A. R. 565.—**CAN.**

g. *To assign lease.*]—A trader assigned for the benefit of his creditors. The property consisted *(inter alia)* of the unexpired lease of the premises in which the business was carried on. The trustees took possession of the premises, & used them to dispose of the stock on them:—*Held:* the trustees were under an obligation to get rid of the lease at the first reasonable opportunity, & after disposing of the stock-in-trade they were justified, if unable to assign the lease to a substantial person, to assign to a man of straw.—STEVENSON & SONS, LTD. *v.* BRIND (1895), 21 V. L. R. 109.—**AUS.**

Sect. 9.—Position of trustee or inspectors: Sub-sect. 1, D. & E. (a) & (b).]

Where after a composition, payable by instalments at fixed dates, has been agreed upon a creditor sends in an amended proof for a larger sum, the trustee is entitled to a reasonable time from the sending in of such amended proof for payment of the amount due thereon.—BURGESS & COSENS *v.* GILLESPIE (1884), 1 Cab. & El. 321.

8999. Not to buy estate—Repurchase—After bonâ fide sale to stranger.]—Where a trustee for creditors under a deed of composition *bonâ fide* sold the property to a stranger, from whom he subsequently repurchased it at the same price, & the sale was confirmed by all the creditors who had executed the deed, & by two out of three of the assignees, a bill by the third assignor to set aside the sale was dismissed without costs.—DOVER *v.* BUCK (1865), 5 Giff. 57; 5 New Rep. 444; 12 L. T. 136; 11 Jur. N. S. 580; 66 E. R. 921.

9000. Not to buy debts—Purchase inconsistent with interests of trust.]—A trustee is bound not to do anything which can place him in a position inconsistent with the interests of the trust, or which can have a tendency to interfere with his duty in discharging it. Neither the trustee nor his representative can be allowed to retain an advantage acquired in violation of this rule.

A trust was created by debtor for the benefit of creditors, & the trustee had the power to bind debtor personally & heritably for the benefit of the trust. By the terms of the trust deed, the trustee was likewise required to do all in his power to keep the residue of the trust estate as large as possible for debtor. The trustee purchased an annuity granted by debtor, after the date of the trust deed. The trustee died. His representatives sought to enforce the annuity against the grantor: —*Held:* they could not do so.—HAMILTON *v.* WRIGHT (1842), 9 Cl. & Fin. 111; 8 E. R. 357, H. L.

Annotations:—**Refd.** Tennant *v.* Trenchard (1869), 4 Ch. App. 537, L. C.; Parker *v.* McKenna (1874), 10 Ch. App. 107, n.; Bennett *v.* Gaslight & Coke Co. (1882), 52 L. J. Ch. 98. **Mentd.** Irvine *v.* Kirkpatrick (1850), 16 L. T. O. S. 529, H. L.

9001. Not to sell to estate at profit.]—Under the provisions of a creditor's deed, a newspaper belonging to debtor was managed by him under the control of two inspectors. A firm, in which one of the inspectors was a partner, supplied paper manufactured by themselves, & were paid at the regular trade price:—*Held:* in the absence of any clause authorising the employment of the inspector's firm, such payments could not be allowed to the inspectors, except to the extent of the cost price of the paper.—CHAPLIN *v.* YOUNG (1864), 33 Beav. 414; 3 New Rep. 600; 55 E. R. 428.

E. Rights.

(a) Remuneration.

9002. How fixed—Invalid resolution of creditors.]—The creditors of bkpt. accepted a composition, & the sum required to pay the composition was provided by his father & distributed by the trustee. The creditors also passed a resolution that the remuneration of the trustee should be a commission of "5 per cent. on all amounts brought to credit & 5 per cent. on all amounts distributed to the creditors." The trustee claimed the commission on the sum provided by the father as being an "amount brought to credit" of the estate:—*Held:* (1) the resolution, not being in accordance with 1883 Act, s. 72, was *ultra vires;* (2) the words "the amount realised" in s. 72 meant "the amount realised by the trustee," & the sum provided by the father was not a sum "realised by the trustee," & the commission claimed was not payable. *Semble:* the words "distributed in dividend" in s. 72 meant "distributed in dividend out of assets realised by the trustee."—*Re* CHRISTIE, *Ex p.* CHRISTIE, [1900] 1 Q. B. 5; 69 L. J. Q. B. 31; 81 L. T. 528; 48 W. R. 94; 44 Sol. Jo. 12; 7 Mans. 1.

Annotation:—**Consd.** *Re* Rosslyn (1901), 18 T. L. R. 76.

h. *To take secured composition.*]—An assignee should not take a composition after bkpcy. unsecured.—*Re* GALLAGHER (1876), 10 I. L. T. Jo. 585. —**IR.**

8999 i. *Not to buy estate—Inspector of estate.*]—Pltfs. were creditors of the insolvent estate of J., who assigned under Assignments & Preferences Act. Deft. was an inspector of the estate. The assets were offered for sale by tender & purchased by insolvent's wife, who gave, as security for payment, notes indorsed by A. After the tender of the purchaser had been approved, A. induced the inspector to join him in the transaction. The estate paid a small dividend, & pltfs. brought an action for an account of any profit deft. might have made out of the sale: —*Held:* the inspector could not obtain an advantage as inspector for himself from his position, & the creditors were entitled to a reference to ascertain what profit, if any, he had derived from the transaction.—SEGSWORTH *v.* ANDERSON (1895), 24 S. C. R. 699.—**CAN.**

8999 ii. ——— ———.]—An inspector of an insolvent estate, appointed by the creditors under R. S. O. 1887, c. 124, who acts towards the assignee in an advisory capacity, cannot become a purchaser of the estate at a private sale thereof.—THOMPSON *v* CLARKSON (1891), 21 O. R. 421.—**CAN.**

8999 iii. *S. P.*—GASTONGUAY *v.* SAVOIE (1899), 29 S. C. R. 613.—**CAN.**

8999 iv. ——— *Resale at large profit.*]—A purchase by the assignee for the benefit of creditors of the assets of the estate, made by him at the request of the inspectors of the estate after futile efforts to sell at auction & by private tender, & after a circular letter had been sent by the inspectors to each creditor stating that the sale would be made unless objection were taken, was set aside, there being evidence that at the time of the purchase the assignee knew of & was negotiating with a possible purchaser, to whom he afterwards resold at a large profit, & had not disclosed that information to the inspectors.—MORRISON *v.* WATTS (1892), 19 A. R. 622.—**CAN.**

9001 i. *Not to sell estate—To inspector —Price below value.*]—A sale of debtor's land, made by the assignee for the benefit of creditors, to an inspector of the estate, at a price much below the true value at the time of the conveyance, was set aside.—TAYLOR *v.* DAVIES (1917), 39 O. L. R. 205; *revsd.* on other grounds (1918), 41 O. L. R. 403.—**CAN.**

9001 ii. ——— ——— *Resale to wife of insolvent—Whether assignee can recover purchase price.*]—J., a creditor of insolvents & also an inspector of their estate, bought, from the assignee for the benefit of creditors, insolvents' stock & sold it to the wives of the insolvents:—*Held:* the transaction was a fraud upon the estate, & the balance remaining due on notes given in part payment of the purchase price could not be recovered by the assignee.—WADE *v.* JAMES (1919), 15 O. W. N. 424; 45 O. L. R. 157.—**CAN.**

PART XXIII. SECT. 9, SUB-SECT. 1. —E. (a).

m. *Amount.*]—The trustee may be allowed a commission of 5 per cent. on receipts.—*Re* LEY (1900), 7 B. C. R. 94.—**CAN.**

n. *S. P.*—*Re* VAN WART, 21 C. L. T. 509; 2 N. B. Eq. Rep. 320.—**CAN.**

o. ——— *Additional remuneration—Extra work caused by debtor's conduct.*]—At a meeting of creditors, the trustees consented to act at a remuneration of 1 per cent. on the realised assets of the estate, on the assumption that assignor's business was properly managed. Owing to the condition of the books, accounts, etc., the labours of trustees were much greater than anticipated:—*Held:* the trustees were entitled to additional remuneration.—*Re* TESSIER, *Ex p.* GOODFELLOW & DONNELLY (1896), 7 Nfld. L. R. 886.—**NFLD.**

p. *Assignment to trustee in province—Work done by partner out of province.*]—Where an assignment for the benefit of creditors is made by a resident of Ontario to an assignee residing there, but all work is done by the assignee's partner residing out of the province, the assignee cannot recover as against the assignor or retain out of his estate any commission or expenses.—TENNANT *v.* MACEWAN (1896), 24 A. R. 132. **CAN.**

q. *Commission on amount realised—When allowed.*]—Where bkpt. compounds with his creditors, & the composition deed provides for the distribution of the estate by the official assignee, the ordinary percentage on the value of the estate realised is payable to that officer, but if debtor pays the amount of the composition directly to his creditors no commission can be charged. —*Re* JOHNSON, *Ex p.* OFFICIAL AS-

9003. —— Composition provided by stranger.]—Where a composition is provided by a stranger to the bkpcy., the creditors may by resolution grant the trustee a fixed sum to cover his remuneration & expenses.—*Re* ROSSLYN (EARL) (1901), 18 T. L. R. 76.

9004. Taxation—Jurisdiction of court.]—After the confirmation of a scheme the ct. has jurisdiction to tax the charges of a trustee in a liquidation by arrangement under 1869 Act, notwithstanding that they have been audited & approved by the committee of inspection subsequently to the confirmation of the composition arrangement. —*Re* RANBY, *Ex p.* RANBY (1880), 14 Ch. D. 467; 43 L. T. 11; 28 W. R. 804, C. A.

When bankruptcy supervenes.]—*See* cases in Subsect. 2, *post.*

(*b*) *Contribution and Indemnity.*

9005. Contribution—For what amount.]—J., a trader, executed a deed of inspectorship, & directed the inspectors to manage & get in his estate & divide same by instalments for the benefit of his creditors. It recited that J. owed W. & Co. on a bill of exchange £1,218, & that they had taken proceedings in bkpcy., but that same had been abandoned on the guarantee of some of the persons who were appointed inspectors to pay the amount found due on the bill by arbn. Among his creditors were W. & Co. for £3,336 for a trade debt. The deed provided that the inspectors might do all necessary acts for carrying into effect the arrangement respecting the £1,218 bill, & should pay W. & Co. whatever might be found due; there were also provisions for the indemnity of the inspectors & for contributions by the creditors for same. W. & Co. executed the deed for the debt of £3,336 only. Before the estate was wholly realised the first instalment became due, & an award was made in favour of W. & Co. for the amount claimed on the bill of exchange. The inspectors not having money in hand borrowed money on their own responsibility, & paid the whole £1,218 awarded. The estate turned out to be insufficient, & the inspectors filed a bill against the creditors, who had executed the deed, for contribution. A decree was made in pltfs.' favour, & an account was directed against defts. in respect of their several debts in the pleadings mentioned. W. & Co. having appealed:—*Held:* W. & Co. stood, in respect to the bill of exchange, as mere strangers to the deed, & they were liable to contribute in respect of the debt of £3,336 only. —CHEESEBOROUGH *v.* WRIGHT (1861), 4 De G. F. & J. 152; 31 L. J. Ch. 226; 5 L. T. 474; 10 W. R. 47; 45 E. R. 1142, L. JJ.

Annotation:—**Apld.** Kitchin *v.* Hawkins (1866), L. R. 2 C. P. 22.

9006. —— How enforced—Whether liability need be ascertained.]—By their covenant contained in a deed of inspectorship, the creditors executing the deed made themselves separately liable to indemnify the inspectors against any loss they might sustain as such inspectors, the amount of the liability of each creditor to be proportionate to his scheduled debt. An inspector finding that the assets of the business were insufficient to meet the liabilities, filed a bill against all the creditors who executed the inspectorship deed, praying contribution & accounts:—*Held:* (1) the inspectors were trustees for the creditors, & neither the separate liability, nor the separate nature of the defence of each creditor, some creditors having legal, & others equitable defences, precluded pltf. from commencing one suit against all the covenanting creditors, to obtain accounts & contribution; (2) the amount of pltf.'s liability need not be ascertained before he could file such a bill; (3) the circumstance that pltf. was a party to an existing suit in the same subject-matter instituted & conducted by a creditor, did not necessarily deprive pltf. of his right to institute his suit.—SINGLETON *v.* SELWYN (1863), 3 New Rep. 27; 9 L. T. 408; 9 Jur. N. S. 1149; 12 W. R. 98; *subsequent proceedings* (1865), 13 L. T. 434.

9007. Indemnity—From costs—Where ordered to sue surety.]—An order directing the trustee to sue the surety for payment of a composition under a composition deed should provide for the indemnity of the trustee against the costs of the action.—*Re* DALE, *Ex p.* MONKHOUSE (1875), 1 Ch. D. 287; 45 L. J. Bcy. 71; 33 L. T. 614; 24 W. R. 300.

9008. —— —— Priority over costs of other parties where estate deficient.]—If, in an action by *cestuis que trust* under a creditors' trust deed against their trustees for accounts, & to have the rights of the parties ascertained, the costs of all parties are ordered to be paid out of the trust fund, & it appears probable that the fund will not be sufficient for payment of all the costs in full, the trustees are entitled to a direction for payment of their costs, charges, & expenses in priority to the costs of all other parties.—DODDS *v.* TUKE (1884), 25 Ch. D. 617; 53 L. J. Ch. 598; 50 L. T. 320; 32 W. R. 424.

9009. Lien expressly given by deed—Whether destroyed by award in respect of property conveyed by deed.]—Bkpt. conveyed his real estate to two trustees upon certain trusts for the payment of his debts, & subsequently entered into an agreement with them as to the sale of the property. Afterwards he took forcible possession of part of it, & the trustees brought an action of ejectment against him, which with another action was referred

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SIGNEE (1890), 9 N. Z. L. R. 286. —**N.Z.**

r. *Enforcement of payment—Estate surrendered to assignor—No power to resume possession.*]—After a deed of composition had been agreed upon, but before it was executed, the assignee, at the request of the inspectors, surrendered the estate to insolvent, but never reconveyed it. Insolvent refused to pay the assignee's fees, whereupon he petitioned for an order on insolvent to pay, & in default for permission to resume possession of the estate:—*Held:* the assignee could not resume possession of the estate.—*Re* SILVER (1877), 2 A. R. 1.—**CAN.**

s. —— *Power to charge creditors personally.*]—An assignee for the benefit of creditors under Assignments Act cannot charge creditors personally with his remuneration for winding up the estate, unless upon a direct or implied promise of indemnity, but must look to the assets of the estate.—JOHNSTON *v.* DULMAGE (1898), 30 O. R. 233.—**CAN.**

9004 i. *Taxation—Jurisdiction of court.*]—Notwithstanding the trustee has been allowed a commission on his receipts, such commission may, on taxation, be disallowed.—HEAPE *v.* HAWTHORNE (1865), 2 W. W. & A'B. 76.—**AUS.**

PART XXIII. SECT. 9, SUB-SECT. 1. —E. (b).

9007 i. *Indemnity—From costs.*]—An assignee for the benefit of creditors, under Assignments Act, cannot charge creditors personally with the costs of an action brought by him on behalf of insolvent estate, unless upon a direct or implied promise of indemnity, but must look to the assets of the estate.—JOHNSTON *v.* DULMAGE (1898), 30 O. R. 233.—**CAN.**

9007 ii. —— —— *Action authorised by creditors.*]—An assignee for the benefit of creditors, on instructions of the inspectors, contested pltf.'s claim, who then brought an action, which was dismissed with costs, but, on appeal to the Div. Ct., that decision was reversed, with costs to be paid by the assignee. The creditors, after taking counsel's opinion, resolved to appeal to the Ct. of Appeal, but the appeal to that ct. was dismissed with costs. The assignee charged against the estate the total sum he had to pay in respect of the costs of these proceedings:—*Held:* that he was entitled so to do. —SMITH *v.* BEAL (1894), 25 O. R. 368.—**CAN.**

a. —— *Trustees carrying on business—Liability for losses.*]—An estate was assigned to pltf. & deft. as trustees for the benefit of creditors, with power to carry on the business or

Sect. 9.—Position of trustee or inspectors: Sub-sect. 1, E. (b) & F. (a) & (b).]

to the decision of an arbitrator. The award found that the creditors were entitled to recover in the action of ejectment, & directed that a sum of money which was due to the trustees for expenses incurred by them in the execution of the trusts should be paid by instalments, & in default of payment that the property should be sold & the proceeds applied in discharge of the debt due to the trustees:—*Held:* the award was no charge upon the land, but it did not destroy the lien thereon which the deed had expressly given to the trustees for the expenses incurred by them in the execution of the trusts.—*Re* THORNTON, *Ex p.* COPPARD & GATES (1833), 4 Deac. & Ch. 102, Ct. of R.

F. Liabilities.

(*a*) *For Negligence.*

9010. Degree of diligence required.]—The ct. will treat inspectors with reasonable indulgence, but at the same time will require of them reasonable diligence in performing the duties prescribed & undertaken.—COPPARD *v.* ALLEN (1864), 4 Giff. 497; 3 New Rep. 411; 33 L. J. Ch. 475; 9 L. T. 797; 10 Jur. N. S. 122; 66 E. R. 802. Varied on another point, 2 De G. J. & Sm. 173.

9011. —— By inspector carrying on business—For mortgagee in possession.]—A creditors' deed provided that, after certain mtges. had been paid, debtor should carry on his business under the control of inspectors, & it gave one of the mtgees. the option of either continuing in possession until the mtges. were paid, or "allowing the inspectors to manage the business on behalf of him & them": —*Held:* the inspectors, while they were allowed by the mtgee. to manage, were only responsible to the same extent as they would have been after the mtges. had been paid.—CHAPLIN *v.* YOUNG (1864), 33 Beav. 330; 3 New Rep. 449; 11 L. T. 10: 55 E. R. 395.

9012. —— Not liable for bonâ fide but erroneous decision on claim.]—A trustee under an assignment for creditors occupies a *quasi*-judicial position for the purpose of deciding on claims against the estate, & is not responsible for an error made in the *bonâ fide* exercise of his judgment.—*Re* PILLING, *Ex p.* OGLE, *Ex p.* SMITH (1873), 8 Ch. App. 711; 42 L. J. Bcy. 99; 21 W. R. 938, L. JJ.

9013. Failure to pay dividends—Defence that amount of debt not entered against creditor's name—Notice of claim sufficient to establish liability.]—In an action under a composition deed, between A., B., as trustee, & A.'s creditors, for the amount of a creditor's dividends, the deed reciting that A. was indebted to the several creditors whose debts were set opposite their names in the schedule annexed to the deed, & A. covenanting by the deed to pay a specific ratio of the debts, it is no defence to say that pltf. did not set the amount of his debt opposite to his name in the schedule. It is sufficient to render B. liable that he had notice of pltf.'s claim before action.—DANIEL *v.* SAUNDERS (1789), 2 Chit. 564.

9014. Neglect to carry out trusts of deed—Failure to get in estate.]—On a bill by a creditor against an inspector, who had neglected to act on the provisions of the deed as to getting in debtor's estate, an account was decreed against the trustee for wilful default, with annual rests & interest, & for the costs of the suit.—COPPARD *v.* ALLEN (1864), 4 Giff. 497; 3 New Rep. 411; 33 L. J. Ch. 475; 9 L. T. 797; 10 Jur. N. S. 122; 66 E. R. 802. Varied on another point, 2 De G. J. & Sm. 173.

9015. Failure to account—Liability for costs of action to enforce accounts.]—The assignee of A. under a deed of assignment & trust for the benefit of A.'s creditors was decreed, in the circumstances, to pay the costs of a suit for an account brought against him by the assignee of A. under Insolvent Debtors Act.—COLLINS *v.* REECE (1845), 1 Coll. 675: 63 E. R. 593.

Annotations:—**Refd.** Raworth *v.* Parker (1855), 2 K. & J. 163. **Mentd.** Watson *v.* Knight (1854), 19 Beav. 369; Whitmore *v.* Turquand (1860), 1 John & H. 444.

discontinue same. Pltf. & deft. carried on the business as such trustees, pltf.'s firm acting as their agents. The business eventuated in a heavy loss, & a large sum remained owing to pltf.'s firm as agents for the trustees. Pltf. brought an action against deft. claiming a declaration that deft. was liable to him for a moiety of the losses sustained:—*Held:* there was no implied liability on the part of the creditors to indemnify the trustees.—CARGILL *v.* HENDERSON, Mac. 850.—**N.Z.**

PART XXIII. SECT. 9, SUB-SECT. 1. —F. (a).

b. *Neglect to carry out trusts of deed—Refusal to pay dividend—Pleading.*]—The statement of claim in an action brought against B. as assignee in trust for creditors, alleged assent to the deed of assignment by pltfs., that B. had full notice of the assignor's indebtedness to pltfs., that B. realised upon the assets of the estate, & distributed the proceeds to certain creditors, but refused to pay pltfs. their proportionate share. It also alleged that B. possessed other money realised since what was stated to have been realised & distributed was realised. B. defended by admitting pltfs.' allegation as to assignment but he denied that pltfs. notified their claim in accordance with a judge's order that creditors should send in their claims verified by a statutory declaration, which order was published as directed in a newspaper. The defence further alleged that after execution of the assignment & while B. was in possession as assignee of the estate & effects of the debtor, pltfs. seized goods out of his possession as assignee & converted the same to their own use, & B. further set up that pltfs. by such seizure & conversion were estopped from making any claim under the assignment:—*Held:* the statement of defence was embarrassing but deft. might have leave to amend.—COCKSHUTT PLOW CO. *v.* WILKERSON (1906), 3 W. L. R. 175.—**CAN.**

c. —— *Refusal to register claims made after time.*]—The creditor of insolvent, who had assigned all his property for the benefit of his creditors generally, sued him for his debt, joining the trustees as defts. The trustees had refused to register pltf.'s claim on the ground that he had not applied for its registration within the time notified by them. The deed of trust empowered the trustees to distribute the assets of insolvent after a certain time among the creditors who had preferred their claims within that time, & declared that they should not be liable for such distribution to creditors who had not preferred their claims within that time, but it did not empower them to refuse to register claims made after that time, but before distribution of the assets:—*Held:* the refusal of the trustees to register pltf.'s claim gave him a cause of action against them, & as pltf. had applied for the registration of his claim before the distribution of the assets, the trustees had improperly refused to register it.—AJUDHIA NATH *v.* ANANT DAS (1881), I. L. R. 3 All. 799.—**IND.**

d. —— *Refusal to pay disputed claim—Payment over of surplus to assignor.*]—By trust disposition A. conveyed to B., as trustee, all her interest under a will for the purposes of realising same, & converting it into cash & paying all debts due by her at the date of the deed, & of thereafter paying over the balance to her. B. accepted the trust & by advertisement requested A.'s creditors to lodge their claims with him. C. lodged a claim, which A. had docqueted as correct. Subsequently A. informed B. that the docquet was a mistake & instructed B. not to pay C. B. paid over the balance of the estate to A., without having satisfied C.'s claim. In an action by C. against A. & B., in which it was established that C.'s claim was due by A.:—*Held:* B. was not entitled to pay over the balance of the trust funds to A. without satisfying C.'s claim, & he was personally liable to C.—CRUICKSHANK *v.* THOMAS (1893), 21 R. (Ct. of Sess.) 257.—**SCOT.**

e. *Failure to account — Creditor's remedy on assignee's bond.*]—Where an official assignee under Insolvent Act, 1875 has taken possession of an insolvent estate in that capacity, & subsequently the creditors have, by resolution continued him as assignee to the estate without exacting any further security, & while acting as such assignee he makes default to account for money of the estate, the creditors have recourse upon the bond given for the due performance of his duties as official assignee.—LETOURNEUX *v.* DANSEREAU (1886), 12 S. C. R. 307.—**CAN.**

9016. Overpayment of dividends.]—A creditor signed a creditors' deed for a debt due on bills for which debtor was liable. Before making formal proof of the debt, the creditor received dividends from the estates of other persons who were liable on some of the bills, but the trustee nevertheless paid him dividends on the full amount of the bills. The other creditors sought to surcharge the trustee with the dividend thus overpaid :—*Held :* the trustee ought not to be surcharged for the overpayment of the dividends.—*Re* PILLING, *Ex p.* OGLE, *Ex p.* SMITH (1873), 8 Ch. App. 711 ; 42 L. J. Bcy. 99 ; 21 W. R. 938, L. JJ.

9017. Allowing property to remain in debtor's possession—Allowing solicitor to retain bill of exchange.]—Among the assets of debtor, who executed a creditors' deed under 1861 Act, s. 192, was a bill of exchange which debtor had deposited with his solr. as a security for his professional charges. The bill was dishonoured at maturity, at which time the solr. had received from other sources sufficient to pay all his charges then due. The trustee, however, allowed the bill to remain in the solr.'s hands, who brought an action on it against the acceptor, but nothing was recovered in consequence of the acceptor's insolvency. The creditors sought to charge the trustee with the loss of the money, on account of his allowing the solr. to keep the bill & treat it as his own, instead of himself dealing with the acceptor & effecting a compromise :—*Held :* there was no ground for charging the trustee on such account.

The trustee allowed debtor to retain possession of wine & spirits to the amount of £130, which was eventually lost to the estate :—*Held :* the trustee must personally make good the loss with interest at 5 per cent.—*Re* PILLING, *Ex p.* OGLE, *Ex p.* SMITH (1873), 8 Ch. App. 711 ; 42 L. J. Bcy. 99 ; 21 W. R. 938, L. JJ.

9018. Negligence of employee—Receiver appointed by inspector.]—When a receiver is appointed under an ordinary inspectorship deed, the inspectors, though they appoint & may remove him, are not responsible for his default, as if he were their agent. —HOBSON *v.* JONES (1870), L. R. 9 Eq. 456 ; 39 L. J. Ch. 245 ; 22 L. T. 143 ; 18 W. R. 477.

Annotation :—**Refd.** Phillips *v.* Furber (1870), 22 L. T. 288.

9019. Fraud of employee—Servant.]—Deft., the paid trustee of a creditors' trust deed, employed L. to manage & deal with part of the trust property. The employment of L. was justifiable, & deft. was not guilty of any negligence in the matter, but certain chattels comprised in the trust estate having been stolen by L., & their value having thus been lost, it was sought to make deft. liable :—*Held :* no liability attached to deft.—JOBSON *v.* PALMER, [1893] 1 Ch. 71 ; 62 L. J. Ch. 180 ; 67 L. T. 797 ; 41 W. R. 264 ; 9 T. L. R. 106 ; 3 R. 173.

Annotation :—**Refd.** Shepherd *v.* Harris, [1905] 2 Ch. 310.

(b) To Strangers to the Trust.

9020. For payment of employees—Personal liability not expressly excluded.]—An inspector under a deed of arrangement will be liable personally to pay for services of persons he employs in & about the business of the arrangement, unless he expressly excludes such liability.—WARDELL *v.* JACKSON (1859), 1 F. & F. 452.

9021. For payment of attorney—Defending suit at order of debtor.]—A newspaper proprietor carried on business under the control of inspectors, who were empowered by the deed to pay costs, etc., & reimburse themselves out of money they might receive, there being nothing in the deed to import personal liability :—*Held :* they were not personally liable to an attorney, who had defended a suit relating to the business at the order of the trader, without any direction

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f. *Failure to advertise & register.*]—An action for penalties against the assignee for not advertising & registering an arrangement by way of composition, pursuant to R. S. O. 1887, c. 124, will not lie.—GUNDRY *v.* JOHNSTON (1896), 28 O. R. 147.—**CAN.**

g. *Failure to collect debts.*]—To make an assignee under Insolvent Debtors' Act liable for not collecting the assigned debts, there must be distinct proof of neglect, or of positive forbearance on his part toward debtors, without the concurrence of the assignor, & of consequent loss, & also, that the debts assigned were of real value.—COLLINS *v.* REID (1866), 2 Old. 252.—**CAN.**

h. —— *Book debts of small amounts.*]—An attorney employed by a trustee failed to collect certain book debts due the estate, for small amounts ; one of the reasons for making the assignment was the difficulty experienced by the assignor in collecting even good debts :—*Held :* the trustee should not be charged as for debts that he should have got in.—THIBIDEAU *v.* LE BLANC (1907), 2 E. L. R. 422.—**CAN.**

k. *Loss occasioned by sale of estate.*]—Partners made an assignment, & the assignee took possession of the partnership estate. Afterwards, M., a brother of one of insolvents, offered to purchase the partnership estate, & upon sufficient in number & value of the joint creditors signing a deed of composition & discharge, the assignee transferred the estate to him, without any authority from the creditors. At a subsequent meeting of the joint creditors, resolutions were passed approving of the deed, of the sale to M., & of the action of the assignee :—*Held :* the assignee was liable to account for any loss dissentient joint creditors might sustain in consequence of such sale.—*Re* MCLAREN & CHALMERS (1876), 1 A. R. 68.—**CAN.**

l. *Payment of invalid claim.*]—A trustee for behoof of creditors, who had in good faith, but against the protest of the truster, & so precipitately that the latter had no opportunity of interdicting him, paid a claim, afterwards held to be invalid :—*Held :* liable to make good the sum so paid away by him.—TAIT (BUTTERCASE & GEDDIE'S TRUSTEE) *v.* GEDDIE (1897), 24 R. (Ct. of Sess.) 1128.—**SCOT.**

m. *Re-assignment of property to assignor before payment of composition.*]—A trader assigned in trust for the benefit of his creditors generally, & they agreed to accept a composition, & discharge debtor. Before payment of the composition the trustees reassigned the property to debtor, on his undertaking to pay the several creditors the amount of their claims, which he did pay to the trustees, but failed to pay to the creditors :—*Held :* trustees were liable to make good the sum coming to the creditors.—NATIONAL BANK OF ALBANY *v.* MOORE (1874), 21 Gr. 269.—**CAN.**

n. *Surrender of property to preferred creditor.*]—Where a deed of assignment for the benefit of creditors, containing preferences, was fraudulent & void under the Statute of Elizabeth as against creditors, but before any lien was secured by creditors, the assignee, by direction of the assignor, surrendered property in his possession to a preferred creditor :—*Held :* assignee could not be made personally liable to creditors.—TAYLOR *v.* MCKINNON (1896), 29 N. S. R. 162.—**CAN.**

o. *Undertaking to release debtor from claims of non-assenting creditors—Breach.*]—Resps. executed a deed of assignment under which applts. became trustees & undertook to release resps. from claims of creditors who did not become parties to the deed. One such creditor thereafter sued upon his claim & obtained a provisional order of sequestration against resps. The order was subsequently discharged by arrangement :—*Held :* sequestration proceedings were the natural consequences of applts.' failure to carry out their undertaking, & they were liable to resps. for the damages thereby occasioned.—LAZARUS & JACOBSON *v.* HAYMAN & CO. (1907), T. S. 106.—**S. AF.**

p. *Inspector's liability for assignee's tort.*]—Inspectors are not, under 1869 Act, s. 34, liable for the wrongful act of the assignee, in the absence of evidence showing that they authorised the act complained of.—DURKEE *v.* COX (1877), 3 R. & C. 17.—**CAN.**

PART XXIII. SECT. 9, SUB-SECT. 1. —F. (b).

q. *For advances in respect of trust.*]—Three persons in whose favour a trust-disposition for behoof of creditors had been executed, granted to a bank an obligation, " as trustees & individually," to repay whatever sums might be advanced for trust-purposes to a specific extent :—*Held :* they were liable conjunctly & severally as individuals for the amount advanced.—COMMERCIAL BANK OF SCOTLAND *v.* SPROTT (1841), 3 Dunl. (Ct. of Sess.) 939.—**SCOT.**

Sect. 9.—Position of trustee or inspectors: Sub-sect. 1, F. (b).]

from them, unless there was anything in their previous communications with him to lead him to suppose they meant to make themselves personally liable for such claims.—STEELE *v.* LOW (1862), 2 F. & F. 772.

9022. For goods supplied on credit—For bills of exchange—Trustees continuing to carry on business.] —S. & S., trading in that name, becoming embarrassed, executed a deed, to which they were parties of the first part, certain of the creditors, as trustees, of the second part, & the general scheduled creditors, among whom the trustees were named, of the third part. The deed assigned the property of S. & S. to the trustees, & empowered the trustees to carry on the business under the name of the S. Co., to execute all contract & instruments necessary to carry it on, to divide the net income to be taken among the creditors in ratable proportions, such income to be deemed the property of S. & S., with power to the majority of the creditors, assembled at a meeting, to make rules for conducting the business, or to put an end to it altogether, & after the debts had been discharged, the property was to be retransferred by the trustees to S. & S. Two of the creditors, C. & W., were named among the trustees. C. never acted. W. acted for six weeks, & then resigned. Some time afterwards, the other trustees, who continued to carry on the business, became indebted to H., & gave him bills of exchange, accepted by themselves thus: "*Per pro.* the S. Co." :—*Held:* (1) there was no partnership created by the deed, & C. & W. could not be sued on the bills as partners in the co.; (2) they could not be sued for goods sold & delivered, there being no distinction upon the question of liability between the bills & the consideration for which they were given.—COX *v.* HICKMAN (1860), 8 H. L. Cas. 268; 30 L. J. C. P. 125; 3 L. T. 185; 7 Jur. N. S. 105; 8 W. R. 754; 11 E. R. 431; *sub nom.* WHEATCROFT & COX *v.* HICKMAN, 9 C. B. N. S. 47, H. L.

Annotations:—**Distd.** Easterbrook *v.* Barker (1870), L. R. 6 C. P. 1. **Consd.** Pooley *v.* Driver (1876), 5 Ch. D. 458; **Refd.** Singleton *v.* Selwyn (1865), 13 L. T. 534; Redpath *v.* Wigg (1866), L. R. 1 Exch. 335, Ex. Ch.; Wigfield *v.* Nicholson (1868), 9 B. & S. 261; *Re* Whiteley, *Ex p.* Smith (1892), 66 L. T. 291, D. C.; *Re* Hildesheim, *Ex p.* Hildesheim (1893), 42 W. R. 138, C. A.; Nicholls *v.* Knapman (1909), 101 L. T. 746. **Mentd.** Moore *v.* Rawlins (1859), 6 C. B. N. S. 289; Edmondson *v.* Thompson (1861), 10 W. R. 300; *Re* English & Irish Church & University Assce. Soc. (1863), 1 Hem. & M. 85; Kilshaw *v.* Jukes (1863), 3 B. & S. 847; Bullen *v.* Sharp (1865), L. R. 1 C. P. 86, Ex. Ch.; Greenberg *v.* Ward (1866), 12 Jur. N. S. 524; Sawyer *v.* Goodwin (1867), 36 L. J. Ch. 578; Holme *v.* Hammond (1872), L. R. 7 Exch. 218; Molliwo *v.* Court of Wards (1872), 9 Moo. P. C. C. N. S. 214, P. C.; Noakes *v.* Barlow (1872), 26 L. T. 136, Ex. Ch.; Gill *v.* M. S. & L. Ry. Co. (1873), L. R. 8 Q. B. 186; *Re* Royal Victoria Palace Theatre Syndicate (1873), 29 L. T. 668; Ross *v.* Parkyns (1875), L. R. 20 Eq. 331; *Re* Howard, *Ex p.* Tennant (1877), 6 Ch. D. 303, C. A.; Steel *v.* Lester (1877), 47 L. J. Q. B. 43; *Re* Megevand, *Ex p.* Delhasse (1878), 7 Ch. D. 511, C. A.; *Re* Albion Life Assce. Soc. (1880), 16 Ch. D. 83, C. A.; Smith *v.* Anderson (1880), 15 Ch. D. 247, C. A.; Murray *v.* Scott, Agnew *v.* Murray, Brimelow *v.* Murray (1884), 9 App. Cas. 519, H. L.; Frowde *v.* Williams (1886), 56 L. J. Q. B. 62, D. C.; White *v.* Churchyard (1887), 3 T. L. R. 428; Adam *v.* Newbigging (1888), 13 App. Cas. 308, H. L.; Badeley *v.* Consolidated Bank (1888), 38 Ch. D. 238, C. A.; Chitty *v.* Boorman (1890), 7 T. L. R. 43, D. C.; Davies *v.* André (1890), 24 Q. B. D. 598, D. C.; Davis *v.* Davis, [1894] 1 Ch. 393; King *v.* Whichelow (1895), 64 L. J. Q. B. 801, C. A.; Gaskell *v.* Gosling, [1896] 1 Q. B. 669, C. A.; *Re* Fort, *Ex p.* Schofield, [1897] 2 Q. B. 495, D. C.; Gosling *v.* Gaskell, [1897] A. C. 575, H. L.; Robinson Printing Co. *v.* Chic, [1905] 2 Ch. 123; Deyes *v.* Wood, [1911] 1 K. B. 806.

See, generally, BILLS OF EXCHANGE, PROMISSORY NOTES, & NEGOTIABLE INSTRUMENTS; PARTNERSHIP.

9023. ——.]—A trader, carrying on business as M. & Co., ordered goods of pltf., & before their delivery executed an inspectorship deed, of which defts. were inspectors. Pltfs. afterwards wrote a note, addressed to debtor, informing him that the goods were ready for delivery, & defts. replied, requesting him to send the goods, & signing "for M. & Co." Pltf. sent the goods, & default being made in payment, sued defts. for the price. The inspectorship deed gave debtor licence to carry on his business for six months under the control of the inspectors, who had power to put an end to the deed. The inspectors were to receive all the proceeds, pay current expenses (including salaries, rent, & plant & materials for the purposes of the business), & out of the surplus pay dividends to the creditors. They took no share of the profits, & had no power to take the management of the business to the exclusion of debtor:—*Held:* defts. having expressly signed the order "for M. & Co.," they could only be liable as the real principals for the time being, & as the deed did not constitute them as the masters or real principals of debtor in carrying on the business, there was no evidence to go to the jury of their liability, & pltf. could only look for payment to the firm of "M. & Co.," & to the trust in the deed for the payment of current expenses.—REDPATH *v.* WIGG (1866), L. R. 1 Exch. 335; 4 H. & C. 432; 35 L. J. Ex. 211; 14 L. T. 764; 12 Jur. N. S. 903; 14 W. R. 866, Ex. Ch.

Annotations:—**Expld. & Apld.** Easterbrook *v.* Barker (1870), L. R. 6 C. P. 1. **Refd.** Nicholls *v.* Knapman (1909), 101 L. T. 746.

9024. —— Debtor continuing to carry on business.]—By a deed of composition under 1861 Act, debtor assigned all his lands, goods, etc., to trustees, & covenanted that he would carry on or wind up his business under their superintendence & control, & that all money, etc., accruing in respect of the business should be deposited in a bank, & that he would act under the direction of the trustees in relation to the carrying on or winding up of the business. The trustees were empowered to employ any other person to effect the purposes of the deed, & to draw & accept bills, etc., for carrying on the business, & to make advances; & it was provided that all money received by the trustees should be applied in payment of the costs of the deed, next, in payment of debts incurred in carrying on the business & of their advances, & lastly, in payment to debtor of such sums as the trustees should think fit to allow him as a remuneration for his trouble, the surplus to be held in trust for debtor. Then came a proviso that the trustees were to be answerable each for his own acts or defaults only, & a declaration that if the instalments of the composition

9022 i. *For goods supplied on credit—Trustees continuing to carry on business.]* —Trustees, who continue to carry on the business of the assignor, render themselves personally liable, if they contract fresh liabilities.—BRAYTON *v.* DALRYMPLE, Mac. 395.—N.Z.

9022 ii. —— —— *Giving promissory notes when not authorised.]*—An assignee of a partnership, conducting the business under a trust deed for the benefit of the creditors, gave promissory notes to pltfs. for goods supplied to him in connection therewith, & signed them in the firm name, followed by his own, with the word "assignee" added. The deed gave him no authority to make notes or accept bills on behalf of the firm, & pltfs. had previously refused to draw on the latter, requiring his own acceptance:—*Held:* he was personally liable on the notes.—BOYD *v.* MORTIMER (1899), 30 O. R. 290.—CAN.

9024 i. —— *Debtor continuing to carry on business.]*—Pltf.'s claim was for goods sold to P., who shortly before the sale had made a transfer of his stock-in-trade & other property to deft. in trust for certain creditors. Deft. had

should be duly paid, all the real & personal estate, surplus money, etc., should be retransferred to debtor for his own absolute use & benefit, & a further proviso that, if any instalment should be unpaid, the trustees should hold & realise the estate upon trust to pay all expenses, etc., including the debts incurred in carrying on & winding up the business, & then pay the creditors rateably in full, & the deed concluded with a declaration that it was intended to operate as an inspectorship & composition deed under 1861 Act. After the execution of the deed, debtor continued to manage the business as before, paying all money received by him to a banking account kept by the trustees. The trustees met at the works weekly, inspected the books, & furnished debtor with money to meet all disbursements which would be required during the ensuing week for wages, materials, & petty-cash, but they gave him no authority to pledge their personal credit. In an action for goods supplied to the works upon orders given by debtor in his own name :—*Held :* the whole scope of the deed being, not to transfer the business to the trustees, but that it should remain the business of debtor, though carried on by him under the inspectorship & control of the trustees, the latter were not liable for goods supplied to debtor upon credit.—EASTERBROOK *v.* BARKER (1870), L. R. 6 C. P. 1 ; 40 L. J. C. P. 17 ; 23 L. T. 535 ; 19 W. R. 208.

Annotation :—**Refd.** Nicholls *v.* Knapman (1909), 101 L. T. 746.

9025. —— ——.]—By a deed entered into between G., a trader who had carried on business as G. & Co., & deft., therein described as trustee, G. for a nominal consideration assigned to deft. all his business, goodwill, stock-in-trade, & book debts, & deft. was to carry on & manage the business, &, after payment of the expenses thereby incurred & his own remuneration & paying for goods supplied by creditors, who were willing to supply goods for the business & to look for payment to the assets in the hands of the trustee, he was to pay & divide the residue ratably amongst the trade creditors whose names were scheduled to the deed, & then to pay the surplus, if any, to G. Six of the principal creditors of G. assented to the deed. No change was made in the name of the business, & it was carried on after the execution of the deed in the same way as before, & G. continued to manage it & to give the orders. Subsequently G. ordered goods from pltfs., who were not creditors of G. at the time the deed was executed. The goods were charged in pltfs.' books, & the accounts made out & delivered to G. & Co., & payments made by cheques signed by deft. in the name of G. & Co. In an action to recover the balance of the price of the goods, it was found as a fact that credit was given by pltfs. to G. & Co., & not to deft. :—*Held :* deft. was not personally liable as principal for the price of the goods.—NICHOLLS (G. B.) & Co., LTD. *v.* KNAPMAN (1910), 102 L. T. 306 ; 26 T. L. R. 356, C. A.

9026. For rent—Lease not expressly accepted.]—By a deed for the benefit of creditors, executed after the repeal of 1861 Act, debtor assigned to deft. all his personal estate, & deft. executed the deed, & acted under it. In the personal estate was included a lease, as to which deft. did no act specially accepting it. In an action by the landlord for rent :—*Held :* the lease had passed to deft., & he was liable.—WHITE *v.* HUNT (1870), L. R. 6 Exch. 32 ; 40 L. J. Ex. 23 ; 23 L. T. 559.

Annotations :—**Refd.** Debenham *v.* Digby (1873), 28 L. T. 170. **Mentd.** *Re* Beachey, Heaton *v.* Beachey, [1904] 1 Ch. 67, C. A.

9027. —— **After trustee discharged—Jurisdiction of court.**]—Debtor filed a liquidation petition on Sept. 14, & on Oct. 3 a trustee was appointed. On Nov. 26 the creditors resolved that the trustee should sell debtor's estate for a sum sufficient to pay the creditors 4*s.* in the pound, that debtor's discharge should be granted on the filing of the trustee's certificate that the provisions of the scheme of settlement had been complied with, & that the close of the liquidation & the release of the trustee should take place on & from Jan. 28. On Jan. 4 the resolutions were approved by the ct. Debtor was tenant of some business premises & some chattels for a term which expired on Dec. 25. The trustee took possession of the premises & the chattels, & remained in possession of them until the expiration of the term, but he did not pay the landlord the quarter's rent which fell due on Dec. 25. On Feb. 26 the landlord applied to the Ct. of Bkpcy. for an order directing the trustee to pay him that quarter's rent. There was evidence that several applications had been made to the trustee for the rent in the course of Jan., & that he had said that he had left money with debtor to pay it :—*Held :* (1) either the landlord's remedy was a personal one against the trustee, in which case the Ct. of Bkpcy. had no jurisdiction in the matter, or, if there was a remedy in the Ct. of Bkpcy., the trustee had done nothing more than commit a default in the administration of the assets, from liability for which he was protected by the release, there being nothing to show that there had been any fraud in obtaining it ; (2) 1869 Act, s. 53, applied to a release given by the creditors to the trustee under a liquidation by arrangement.—*Re* WARE, *Ex p.* CARTER (1878), 8 Ch. D. 731 ; 39 L. T. 185 ; 27 W. R. 106, C. A.

Annotation :—**Folld.** *Re* Gill, *Ex p.* Barnard (1882), 46 L. T. 824.

9028. —— ——.]—The lessee of a house & premises having filed a liquidation petition early in Aug., 1881, the trustee on Nov. 24 following disclaimed the lease. The lessor tendered a proof on Dec. 14 in respect of rent & dilapidations for £117 14*s.* 4*d.* which was admitted, & also claimed

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left P. in charge of the business & employed him to carry it on for him, & on his behalf, in accordance with instructions to be received. Pltf. was not aware of the transfer, but sold the goods as he had frequently done before the transfer. The goods purchased from pltf. were such as would be reasonably required in the business, & pltf. supposed that they had been ordered for it :—*Held :* deft. was liable to pltf. for the price of the goods. —HUTCHINGS *v.* ADAMS (1898), 12 Man. L. R. 118.—CAN.

9024 ii. —— ——.]—A. doing business as J. & Sons made a deed to H. in trust for the benefit of his creditors, containing a clause authorising the employment of the assignor, or some other person in carrying out the trusts & in carrying on the trade. H. made & executed a power of attorney to A., authorising him to collect money, prosecute suits, draw, make, & indorse cheques, bills, notes, etc., & generally to do & perform any acts or deeds in relation to the estate. Under the power A. went into possession & continued the business, & bought & sold goods. Certain goods were purchased from F., & were paid for by a note signed by A. as J. & Son & by H. per J. attorney :—*Held :* (1) A. did not carry on the business after the assignment at the instance of or as the agent of H., nor for the benefit of his estate ; (2) A. was not authorised to sign H.'s name to notes as he did ; (3) H. was not liable either as the person to whom credit was given or as an undisclosed principal ; (4) if H. was guilty of a breach of trust in allowing A. full control over the estate, that would not make him liable to F.—HECHLER *v.* FORSYTH (1894), 22 S. C. R. 489.—CAN.

t. For goods wrongfully seized & handed over by sheriff to trustee.]—The goods of A., having been seized by the sheriff under a *fi. fa.* against B., were handed over by the sheriff to an assignee, to whom B. had made an assignment :—*Held :* A. might maintain replevin against the assignee.—BURKE *v.* MCWHIRTER (1874), 35 U. C. R. 1.—CAN.

Sect. 9.—Position of trustee or inspectors: Sub-sect. 1, F. (b); sub-sect. 2.]

unliquidated damages sustained by reason of the disclaimer, but naming no amount. At a meeting of the creditors held on Jan. 6, 1882, a dividend of 1*s.* 6*d.* in the pound was declared payable on the 20th, & at the same meeting a resolution was passed to release the trustee as from that day. The lessor on Mar. 4 sent in a second proof for £309 7*s.* 6*d.* in respect of unliquidated damages, & claimed to be paid the dividend thereon :—*Held :* in the absence of fraud the remedy of the lessor was by an action at law outside the bkpcy., inasmuch as if any default had been made by the trustee, his liability for such default had been discharged by the release, & no fraud was alleged against him.—*Re* GILL, *Ex p.* BARNARD (1882), 46 L. T. 824.

9029. Where no cessio bonorum—Whether properly joined as party—In action on promissory note made by debtor & others.]—The members of the committee of a building society borrowed money from their bankers, & gave a promissory note for the amount borrowed. Soon after the transaction the society suspended business, & a bill was filed by one of the members of the committee who signed the note, against the bankers & the other members of the society to ascertain his liability. One of the parties liable on the note had, some time previous to the filing of the bill, executed a composition deed containing no *cessio bonorum*, & the trustee of the deed was made a deft. in the suit :—*Held :* as the composition deed contained no *cessio bonorum*, the trustee ought not to have been made a party to the suit, & that debtor himself should have been made a deft.—MOYE *v.* SPARROW (1870), 22 L. T. 154 ; 18 W. R. 400.

Annotations :—**Mentd.** *Re* Victoria Permanent Benefit Bldg. Investment & Freehold Land Soc., Hill's Case, Jones' Case (1870), L. R. 9 Eq. 605 ; *Re* Durham County Permanent Investment Land & Bldg. Soc., Davis' Case, Wilson's Case (1871), L. R. 12, Eq. 516 ; Portsea Island Bldg. Soc. *v.* Barclay (1894), 3 Ch. 86.

9030. For costs of receiver—Prior payment of costs of debtor's solicitor.]—The costs of the receiver under a liquidation petition ought to be paid out of the estate in priority to the costs of debtor's solr., the first charge on the assets being for the costs of realising them, & a trustee in a liquidation, who had paid the costs of debtor's solr. out of the assets, which were insufficient to pay both those costs & the costs of the receiver, was ordered to pay the receiver's costs personally.—*Re* JOHNSON, *Ex p.* ROYLE (1875), L. R. 20 Eq. 780 ; 33 L. T. 39 ; 23 W. R. 908.

SUB-SECT. 2.—WHERE BANKRUPTCY SUPERVENES.

9031. Bankruptcy on debtor's petition—No creditor entitled to petition.]—Where debtor executed an assignment for the benefit of his creditors, & shortly afterwards a fiat was issued upon his own petition, under 7 & 8 Vict. c. 96, s. 41, but at the time of issuing the fiat there was no creditor who could have issued one :—*Held :* the assignment was valid as against the assignees under the bkpcy.—*Re* MISKIN, *Ex p.* PHILPOTT (1846), De G. 346 ; 7 L. T. O. S. 387 ; 10 Jur. 717, Ct. of R.

Annotation :—**Follid.** *Re* Ferens, *Ex p.* Jackson (1848), De G. 609.

9032. Assets already realised must be administered in bankruptcy.]—In Nov., 1847, A., a trader, by deed, assigned all his effects to trustees for the benefit of his creditors. In Jan., 1848, A. filed a declaration of insolvency under 7 & 8 Vict. c. 96, upon which a fiat issued, but the fiat was not prosecuted by A. In Feb., on the application of B., a creditor of A., whose debt would have been sufficient for a petitioning creditor's debt, & was prior in date to the deed of Nov., the comr. made the adjudication in the bkpcy., & assignees were appointed :—*Held :* the money realised by the trustees under the trust deed ought to be administered in the bkpcy.—*Re* FERENS, *Ex p.* JACKSON (1848), De G. 609 ; 17 L. J. Bcy. 19 ; 11 L. T. O. S. 274 ; 12 Jur. 770.

9033. Accountable as trustee de son tort.]—A trustee acting under a deed of assignment, whilst it is still available as an act of bkpcy., is accountable, in the event of bkpcy. supervening, for his dealings with the estate as a trustee *de son tort* (VAUGHAN WILLIAMS, J.).—*Re* MARDON, [1896] 1 Q. B. 140 ; 65 L. J. Q. B. 111 ; 73 L. T. 480 ; 44 W. R. 111 ; 12 T. L. R. 53 ; 40 Sol. Jo. 70 ; 2 Mans. 511.

Annotation :—**Refd.** Davis *v.* Petrie, [1906] 2 K. B. 786, C. A.

9034. ———.]—If bkpcy. supervenes, the assignee under the deed becomes a trustee *de son tort* & the trustee in bkpcy. has a right to demand from him all the assets that have come into his hands. In these circumstances a payment made to the trustee under the deed is a payment made to a wrong person, & the trustee in bkpcy. is entitled to sue debtor to recover the debt. If the person so sued can show that the trustee in bkpcy. has been paid the debt sued for, either in whole or in part, by receipt from the trustee of the deed of the whole or a part of the money that has thus been paid to him, that will be, *pro tanto*, an answer to the claim. The *onus* of showing this rests on the person sued (FLETCHER MOULTON, L.J.).—DAVIS *v.* PETRIE, [1906] 2 K. B. 786 ; 75 L. J. K. B. 992 ; 95 L. T. 239 ; 22 T. L. R. 771 ; 13 Mans. 344, C. A.

9035. Treated as trespasser—Or as agent of official receiver.]—Where debtor executes a general assignment for the benefit of creditors, & the trustee carries on the business under the deed, receiving & making payments until a receiving order is made in bkpcy., on the petition of certain creditors who have not signed the deed, & whose petition is founded on the general assignment as an act of bkpcy., the official receiver is entitled to delivery up of the property in the possession of the trustee under the deed, & an account from him of the value of the property of debtor of which he took possession & which he has converted, *i.e.*, an account treating him as a trespasser, or he may adopt his actions & have an account treating the trustee as his agent.—*Re* RIDDEOUGH, *Ex p.* VAUGHAN (1884), 14 Q. B. D. 25 ; 33 W. R. 151 ; 1 Morr. 158, D. C.

Annotation :—**Refd.** Davis *v.* Petrie, [1906] 2 K. B. 786, C. A.

9036. What constitutes possession.]—Debtor executed a deed of assignment &, in order to avoid a threatened distress, handed the key of his business premises to the trustee of the deed. The trustee executed the deed of assignment, accepted the key, valued the stock-in-trade on the premises, & subsequently, on the authority of the creditors,

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PART XXIII. SECT. 9, SUB-SECT. 2.

a. *Liability for work executed.*]—A private trust for creditors was superseded by a sequestration. In an action against the voluntary trustees for the price of work executed on their order for behoof of the trust-estate :—*Held :* decree might competently go out against them *quâ* trustees, although the creditor had taken from the trustee in the sequestration his acceptance for the amount claimed.—ANDERSON *v.* M'DOWALL (1865), 37 Sc. Jur. 367 ; 3 Macph. (Ct. of Sess.) 727.—**SCOT.**

handed back the key to debtor, who disposed of the stock-in-trade & became bkpt. within three months :—*Held :* the trustee had taken possession of the property & was accountable for its value to the trustee in the bkpcy.—*Re* PRIGOSHEN, *Ex p.* OFFICIAL RECEIVER, [1912] 2 K. B. 494 ; 81 L. J. K. B. 1199 ; 106 L. T. 814 ; 56 Sol. Jo. 554 ; 19 Mans. 323.

9037. Right to costs & expenses.]—Trustees of a composition deed took upon themselves to act, & did act successfully, in the trusts of it, & got in some of debtor's assets. He was afterwards adjudicated bkpt., & the deed was declared invalid :—*Held :* the trustees were not entitled, as against the assignee in the bkpcy., to retain their costs of acting under the deed, out of the assets in their hands.—SMITH *v.* DRESSER (1866), L. R. 1 Eq. 651 ; 35 Beav. 378 ; 35 L. J. Ch. 385 ; 14 L. T. 120 ; 14 W. R. 469 ; 55 E. R. 942.

Annotation :—**Mentd.** *Re* Holden, *Ex p.* Official Receiver (1887), 20 Q. B. D. 43.

9038. —— Incurred in employing agent to recover property.]—Trustees under an assignment for the benefit of creditors employed an agent to proceed to America to recover part of the assigned property. Afterwards debtors became bkpt. & three of the trustees were appointed assignees :—*Held :* (1) they ought to be allowed in their accounts the expense of employing the agent ; (2) expenses to be allowable need not have actually benefited the estate, if there was a fair probability of their so doing.—*Re* ROBBINS & MUCHALL, *Ex p.* SHAW (1846), De G. 242.

9039. —— Incurred bonâ fide.]—Trustees of a deed of assignment for benefit of creditors were allowed out of the estate the costs they had *bonâ fide* incurred, although debtor was afterwards adjudicated bkpt.—*Re* BOYCE, *Ex p.* TOMLINSON (1861), 3 De G. F. & J. 745 ; 30 L. J. Bcy. 41 ; 5 L. T. 13 ; 7 Jur. N. S. 982, L. JJ.

Annotations :—**Consd.** *Re* Comber, *Ex p.* Strong (1864), 10 L. T. 387 ; Fitzpatrick *v.* Bourne (1868), L. R. 3 Q. B. 446, Ex. Ch. **Refd.** *Re* Tucker, *Ex p.* Cooke (1864), 10 L. T. 821. **Mentd.** *Re* Holden, *Ex p.* Official Receiver (1887), 20 Q. B. D. 43.

9040. —— Services beneficial.]—Debtor, prior to filing a liquidation petition, employed an accountant to post up his books. Upon the filing of the liquidation petition, the accountant was appointed receiver & manager, but the liquidation proceedings having been superseded by a bkpcy. the receiver paid over to the trustees in the bkpcy. the balance of debtor's property in his hands. The receiver subsequently applied to the trustee for payment of his bill of charges for services rendered by him prior to the liquidation :—*Held :* the services of the receiver having been beneficial to bkpt.'s estate, he was entitled to payment of his charges so incurred.—*Re* GEORGE, *Ex p.* GREENER (1880), 41 L. T. 739.

9041. —— —— Power of court to allow reasonable remuneration.]—If the ct. thinks that the estate of debtor has benefited by the action of the trustee under a deed of assignment, it will allow such trustee to retain such a reasonable sum as the ct. thinks fit as remuneration for his trouble, even though the official receiver in the exercise of his discretion has refused to do so.—*Re* FOSTER, *Ex p.* OFFICIAL RECEIVER (1895), 72 L. T. 364 ; 43 W. R. 428 ; 39 Sol. Jo. 349.

9042. —— Payment for goods supplied—Under express power—Bona fides.]—A creditor's deed by a builder empowered the trustee, a dealer in building materials, to provide materials necessary to complete some unfinished houses. Debtor became bkpt. & the deed was set aside :—*Held :* the trustee having acted *bonâ fide*, must be allowed the amounts he had paid & the value of the materials supplied under the deed.—WOODS *v.* AYTON, [1866] W. N. 207.

Annotation :—**Consd.** *Re* Richards, *Ex p.* Official Receiver (1884), 32 W. R. 1001.

9043. —— Of work & labour—Deed providing for costs of trust.]—Bkpts. had executed a deed of assignment to F. of the whole of their property for the benefit of creditors. The deed contained a provision for the payment, in the first instance, out of assets of the costs & expenses of F. The petition was founded on the deed as an act of bkpcy., & when the trustee in bkpcy. applied to F. for payment to him of assets in his hands, F. claimed to retain them against a larger sum due to him for expenses of work & labour done by him : —*Held :* the only right of F. was to prove for his claim, & he must pay to the trustee the assets in his hands.—*Re* RICHARDS, *Ex p.* OFFICIAL RECEIVER (1884), 32 W. R. 1001 ; 1 Morr. 242.

9044. —— Of collection of book debts—Of solicitor.]—In Aug., 1885, A. executed a deed of assignment, by which he vested his estate in B. as trustee for creditors, & part of the estate was realised. On Oct. 28, 1885, a petition was presented against A., the act of bkpcy. being the deed of assignment. On Oct. 20 B., the trustee under the deed, paid £20 7*s.* 8*d.* to his solrs., for costs incurred in connection with the deed & in the collection of book debts. On Jan. 20, 1886, a receiving order was made, & B. handed over to the official receiver what he had realised, less the sum paid in costs to his solrs. On a motion by the trustee in bkpcy. that B. might be ordered to pay over to him the £20 7*s.* 8*d.* paid to the solr. :—*Held :* B. was not entitled to retain the sum, but must hand it over to the trustee in bkpcy., after deducting the costs of collecting the book debts, which should, in the circumstances, be allowed.—*Re* FORSTER, *Ex p.* RAWLINGS (1887), 58 L. T. 114 ; 36 W. R. 144 ; 4 T. L. R. 89 ; 4 Morr. 292.

Annotation :—**Consd.** *Re* Pollitt, *Ex p.* Minor, [1893] 1 Q. B. 175.

9045. —— Sum paid to avoid distress—Approval of creditors—Costs of application by official receiver.]—In June, 1886, debtor executed an assignment for the benefit of his creditors, under which appct. was employed to prepare a statement of affairs, &, it appearing that the landlord was threatening a distress for rent, appct., upon the instructions of the creditors, paid the amount due. In July, 1886, a receiving order was made against debtor, & the official receiver declined to repay the money so advanced by appct. for the benefit of the creditors without an order of the ct. :—*Held :* (1) in the circumstances, & looking to the fact that a majority of the creditors in number & value were of opinion that the payment made by appct. was beneficial & should be refunded, repayment ought to be allowed ; (2) the official receiver was entitled to deduct his costs of the hearing from the amount.—*Re* AYSHFORD, *Ex p.* LOVERING (1887), 35 W. R. 652 ; 3 T. L. R. 604 ; 4 Morr. 164.

Annotation :—**Distd.** *Re* Craig, *Ex p.* Hinchcliffe, [1916] 2 K. B. 497.

9046. —— 1914 (Deeds) Act—What expenses allowed—Extent of lien.]—The expenses properly incurred by the trustee under a deed of arrangement in the performance of any of the duties imposed on him by the above Act, which, by s. 21, are to be allowed or paid to him by the trustee in bkpcy. in cases where the deed is avoided by the bkpcy. of debtor, are confined to expenses incurred in the performance of duties, which a trustee under a deed has for the first time to perform under the Act.

Sect. 9.—Position of trustee or inspectors: Sub-sect. 2. Sect. 10: Sub-sect. 1, A. (a).]

A trustee under a deed of arrangement has no lien on debtor's estate in respect of matters where he would not have had a lien before the Act.—*Re* GEEN, *Ex p.* PARKER, [1917] 1 K. B. 183; 86 L. J. K. B. 175; 115 L. T. 837; [1917] H. B. R. 20.

9047. Liability for rent—Lease disclaimed by trustee in bankruptcy.]—The lessee of premises, of which pltfs. were lessors, assigned the leases, together with other property, to deft. for the benefit of her creditors, by a deed, which was an act of bkpcy. After the assignment a quarter's rent accrued due under the leases, & the lessors obtained judgment against deft. for such rent. Before the bkpcy. of the lessee a second quarter's rent accrued due, in respect of which the lessors issued a writ against deft. Before the action came on trial the lessee was adjudicated bkpt., & the trustee in bkpcy. disclaimed the leases:—*Held:* deft. was liable for the rent, as the bkpcy. which followed on the act of bkpcy. had not the effect of releasing the liability for the rent as between the lessors & deft. existing at the time when the writ was issued.—STEIN *v.* POPE, [1902] 1 K. B. 595; 71 L. J. K. B. 322; 86 L. T. 283; 50 W. R. 374; 18 T. L. R. 337; 9 Mans. 125, C. A.

Annotation:—**Consd.** Davis *v.* Petrie (1905), 93 L. T. 511.

See, also, cases in Sect. 11, sub-sect. 3, C., *post.*

9048. Liability for negligence—Allowing debtor to take possession—On hearing of presentation of petition.]—A trustee under a deed of arrangement took possession of debtor's stock & sold part of it for £70. Upon hearing that a petition had been presented, the trustee went out of possession, leaving the remainder of the stock in the hands of debtor, who made away with it before the receiving order was made against him:—*Held:* the trustee under the deed must account to the trustee in bkpcy. for the whole of the stock which he had taken possession of, & not merely for what he had sold during the time he was in possession.—*Re* COOK, *Ex p.* PARSONS (1909), 53 Sol. Jo. 359, D. C.

See, also, cases in Part XX., Sect. 3, sub-sect. 2, *ante.*

SECT. 10.—POSITION OF CREDITORS.

NOTE.—*In considering the cases set out in this Section, regard must be had to the Notes at the beginning of the Part & of Sect. 2, ante.*

SUB-SECT. 1.—ALL CREDITORS GENERALLY.

A. Failure of Debtor to perform.

(a) Necessity for Performance or Tender—Pleading and Proof.

9049. Deed must be strictly complied with—Relief against penalty.]—There are some exceptions to the rule that equity will relieve against penalties. One is, where a voluntary composition is to be paid at a time certain, & in a certain manner. In that case, it is the voluntary bounty of the creditor to remit part of the debt, & the terms must be strictly complied with.—ROSE *v.* ROSE (1756), Amb. 331; 27 E. R. 222, L. C.

Annotations:—**Mentd.** Reynolds *v.* Pitt (1812), 19 Ves. 134, L. C.; Thompson *v.* Hudson (1867), 2 Ch. App. 255, L. C. & L. J.

9050. —— Execution restrained in particular circumstances.]—Though an agreement for a composition, generally, is not binding on the creditor, unless absolutely & strictly fulfilled, a bond-creditor, having concurred in a general resolution for a composition, to be secured by notes, was in the circumstances, with reference to the interest of the other creditors, restrained from taking execution in an action upon the bond, on non-payment of the notes, beyond the terms of the composition.—MACKENZIE *v.* MACKENZIE (1809), 16 Ves. 372; 33 E. R. 1025, L. C.

9051. Necessity for tender—Debt disputed.]—A creditor attended the first meeting by proxy & tendered a proof for £15 12*s.* debt & £1 16*s.* 6*d.* costs. The debt was admitted, but the costs were objected to. No actual tender was ever made to the creditor, but a circular letter was sent to the unpaid creditors, giving notice that the composition was payable at the office of debtor's solr., but that if refused, it would be forwarded by post office order:—*Held:* in the circumstances tender was impracticable, unless debtor chose to tender more than he admitted to be due, as the amount of the debt was disputed, & the creditor ought to have used the remedies given him by 1869 Act & to have proceeded in the Ct. of Bkpcy. to recover the composition, & he had no right to sue at common law for his debt.—*Ex p.* HEMINGWAY (1872), 7 Ch. App. 724, n.

Annotation:—**Refd.** *Re* Hatton (1872), 7 Ch. App. 723, L. JJ.

9052. —— —— Subsequent notice that debtor prepared to pay on sum claimed.]—Defts., as acceptors of a bill of exchange for £1,039, owed pltfs. a balance of £321. Defts. failed, & their creditors, amongst whom were pltfs., agreed to take a composition of 5*s.* in the pound on their debts, by notes at four & eight months. There was a dispute as to the balance due to pltfs., & they promised to adjust their account with one of defts., & said they would do as the other creditors did. Defts. insisted for some time that £250 9*s.* 7*d.* was the balance due, but defts.' attorney afterwards called on pltfs.' attorney & told him that defts. were ready to pay the composition on £321, the sum really due, but pltfs.' attorney refused, & said they must have the whole. No actual tender was made of the notes or of cash for the amount of the composition:—*Held:* a tender was not necessary in the circumstances, & pltfs. could only recover the amount of the composition on the balance.—REAY *v.* WHITE (1833), 1 Cr. & M. 748; 3 Tyr. 596; 2 L. J. Ex. 229; 149 E. R. 600.

Annotation:—**Refd.** Garrod *v.* Simpson (1864), 3 H. & C. 395.

9053. —— —— Tender must be unconditional.]—To be discharged from liability for debts included in his statement debtor must tender unconditionally to his creditors the composition payable on the admitted debt, giving the creditor the opportunity of accepting or rejecting it.—TEA CO. LTD. *v.* JONES (1880), 43 L. T. 255.

9054. —— Absence of creditor abroad.]—Where the contract, on which pltf. was suing, was made in Paris, & pltf. was residing in Paris at the time of the execution by deft. of a deed of composition under 1861 Act, & at the time of its registration:—*Held:* pltf.'s absence abroad afforded no excuse

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9049 i. *Deed must be strictly complied with.*]—It is of the essence of a composition of an existing debt, that every term of the agreement for composition should be strictly observed & performed.—HILL *v.* RUTHERFORD (1862), 9 Gr. 207.—CAN.

b. *How made—Payment in accordance with resolution essential.*]—A resolution passed & signed by creditors at a meeting called to consider debtor's position, that debtor "be allowed a settlement at 6, 9, & 12 months, at the rate of 25 cents in the dollar in equal payments without interest" does not, in itself, operate as satisfaction of their claims. Payment in accordance with its terms is essential.—WEESE *v.* BANFIELD (1895), 22 A. R. 489.—CAN.

for deft.'s not tendering him the money.—FESSARD *v.* MUGNIER (1865), 18 C. B. N. S. 286 ; 5 New Rep. 307 ; 34 L. J. C. P. 126 ; 11 L. T. 635 ; 11 Jur. N. S. 283 ; 13 W. R. 388 ; 144 E. R. 453.

Annotations :—**Apld.** The Eider, [1893] P. 119, C. A. **Refd.** Duval *v.* Gans (1904), 91 L. T. 308, C. A. **Mentd.** Lay *v.* Mottram (1865), 19 C. B. N. S. 479 ; Hart *v.* Smith (1868), 9 B. & S. 543 ; Hatch *v.* Hatch (1872), 28 L. T. 506 ; *Re* Bishop, *Ex p.* Paper Staining Co. (1873), 37 J. P. 660, L. C. & L. J.

9055. —— Of second instalment—Offer of first refused.]—Where a first tender is refused, there is no need to tender subsequent instalments.—*Re* SULLIVAN, *Ex p.* SULLIVAN (1866), 36 L. J. Bcy. 1 ; 15 L. T. 434 ; 15 W. R. 185, L. JJ.

Annotations :—**Mentd.** *Re* Prior, *Ex p.* Osenton (1869), 4 Ch. App. 690, L. JJ. ; *Re* Pullen, *Ex p.* Williams (1870), L. R. 10 Eq. 57.

See, also, No. 9593, *post.*

9056. Within what time—Proof disputed—On day order settling proof signed.]—In Feb., 1871, H. effected a composition with his creditors. The proof of one of the creditors, K., was disputed, & was only settled by the Judge on July 29, 1873. The composition on the amount as settled was not then paid at once, but the solrs. of both parties waited till the order was drawn up & signed by the registrar. On Aug. 22, 1873, debtor asked to be allowed to pay the composition partly in cash & partly in bills at two & four months. The request was refused, & K. then said that the composition not having been paid he should commence an action for the whole debt. On Aug. 27 the registrar signed the order, & on the same day debtor tendered payment of the composition in cash. That was refused, & an action for the original debt commenced on Aug. 29 :—*Held :* it would be inequitable to allow K. to proceed with the action.—*Re* HARPER, *Ex p.* KING (1873), L. R. 17 Eq. 332 ; 43 L. J. Bcy. 41.

Annotations :—**Expld.** *Re* Watson, *Ex p.* Watson (1876), 24 W. R. 592, C. A. **Mentd.** Melhado *v.* Watson (1877), 2 C. P. D. 281, C. A.

9057. To whom made—Creditor or authorised agent—Not workman or servant.]—Tender of composition must be made to the creditor, or to some one having authority to represent him. Tender to a mere workman or servant will not suffice.—HOADLEY *v.* JENKINS (1867), 16 L. T. 389, N. P.

9058. For what debt—Debt entered as partly secured—Security valued at "nil."]—Where in composition proceedings, under 1869 Act. s. 126, a creditor is placed in debtor's statement of affairs as a partly-secured creditor in respect of a certain debt, & debtor in the statement values the security at "*nil*," debtor must pay or tender the amount of the composition on that debt.—HAWES *v.* BAUMAN (1885), 34 W. R. 116 ; 2 T. L. R. 104, C. A.

9059. Pleading performance—Replication that instalments due to creditors other than plaintiff unpaid.]—To a declaration on a bill of exchange deft. pleaded a composition deed under 1861 Act, s. 192, containing a release by the creditors respectively, with a proviso that in case default should be made in payment of the composition to the creditors respectively, the release should be thenceforth at an end. The plea did not aver payment or tender of the composition, but contained a general averment that all things necessary in that behalf having happened & been done, pltfs. became & were bound by the deed as if they had been parties thereto & had executed same. Pltfs. replied that default was made by deft. in payment of the composition to divers of the creditors other than pltf. :—*Held :* the replication was bad.—HART *v.* SMITH (1868), L. R. 4 Q. B. 61 ; 9 B. & S. 543 ; 19 L. T. 419 ; 17 W. R. 158.

Annotations :—**Mentd.** *Re* Wilde (1868), 19 L. T. 752 ; *Re* Pullen, *Ex p.* Williams (1870), L. R. 10 Eq. 57 ; *Re* Harper, *Ex p.* Linsley (1873), 42 L. J. Bcy. 109.

9060. —— Waiver of creditor's rights—Plea omitting to state that debt sued for included in schedule.]—*Assumpsit* for work & labour, etc. Plea, that, after the accruing of the causes of action, by an indenture between deft., of the first part, S. & H. of the second part, & pltf. & others, creditors of deft., of the third part, S. & H. were appointed trustees for carrying the indenture into effect, for the benefit of such of deft.'s creditors as should execute it. The plea then stated an excuse for *profert*, & alleged that pltf., S. & H., & the other creditors of deft., did acquit, release, & discharge him from all debts, etc. The replication set out the indenture, not on oyer, but *in haec verba.* Pltf. contended the plea was bad, because, by incorporating the indenture in the replication with the plea, it did not appear by any averment in the plea that the debt was mentioned in the schedule, & because the release only applied to such debts : —*Held :* as the *profert* was excused & the replication stated the indenture as part of itself, the indenture was not to be taken to be part of the plea, & the plea was not bad for omitting to state that the debt sued for was mentioned in the schedule to the indenture.—HYDE *v.* WATTS (1843), 12 M. & W. 254 ; 1 Dow. & L. 479 ; 13 L. J. Ex. 41 ; 2 L. T. O. S. 151 ; 152 E. R. 1193.

Annotations :—**Mentd.** Ford *v.* Beech (1848), 11 Q. B. 852 ; Grey *v.* Friar (1854), 4 H. L. Cas, 565, H. L. ; R. *v.* Price (1854), 8 Moo. P. C. C. 203, P. C. ; Hughes *v.* Palmer (1865), 19 C. B. N. S. 393 ; *Re* Southam, *Ex p.* Lamb. (1881), 19 Ch. D. 169, C. A.

—— **Liability for default of trustee.**]—*See* Nos. 9595 *et seq.*, *post.*

9061. Pleading tender—Must show consideration for discharge.]—Deft. pleaded to an action of *assumpsit*, as to all except £20 9*s.*, *non assumpsit*, & as to that sum, that deft. being in embarrassed circumstances, pltf. & other creditors agreed to take 5*s.* in the pound, & that deft. was ready & willing to pay the amount of the composition, but pltf. refused to receive it, & discharged deft. from tendering or paying the composition :—*Held :* the plea was no answer as to the sum agreed to be taken for composition, as no consideration was stated for pltf.'s discharging deft. from the payment of it.—COOPER *v.* PHILLIPS (1834), 1 Cr. M. & R. 649 ; 5 Dowl. 196 ; 5 Tyr. 166 ; 149 E. R. 1241.

Annotations :—**Refd.** Garrod *v.* Simpson (1864), 3 H. & C. 395 ; Martin *v.* Gribble (1865), 34 L. J. Ex. 108.

9062. —— Must state offer to pay composition money—& tender of release for signature.]—In *assumpsit*, deft. pleaded that, after the causes of action accrued, deft. & M., who was jointly liable with him to pltf., became unable to pay their creditors in full, & thereupon it was agreed by deft., M., pltf., & the other creditors, that a composition of 4*s.* 6*d.* in the pound should be paid upon their debts, & that, upon receiving that sum, pltf. & the other creditors should execute to deft. & M. a general release, that a deed of release was prepared for execution, & that the creditors, except pltf., received the composition, & executed the release, that deft. had always been ready to pay pltf. the composition of 4*s.* 6*d.* in the pound upon his executing the release, of which pltf. had notice, & was requested by deft. to accept the composition & execute the release :—*Held :* bad, for not showing that deft. & M. offered to pay pltf. the composition money, or tendered the release to him for execution.—ROSLING *v.* MUGGERIDGE (1846), 16 M. & W. 181 ; 4 Dow. & L. 298 ; 16 L. J. Ex. 38 ; 8 L. T. O. S. 195 ; 153 E. R. 1152.

Annotation :—**Refd.** Garrod *v.* Simpson (1864), 3 H. & C. 395.

Sect. 10.—*Position of creditors: Sub-sect.* 1, *A.* (*a*) & (*b*) *i.*]

9063. —— Must state date of payments or tender.]—To counts by drawer against acceptor of two bills of exchange for £30 & £41 16*s.*, deft. pleaded as to £13 3*s.* 2*d.*, parcel of the £30 in the first count, & also, as to the second count, that deft. was in embarrassed circumstances, & indebted to pltf. in respect of the causes of action in the introductory part of the plea mentioned in the sum of £54 19*s.* 2*d.*, & to B. in another sum of money, & was unable to pay pltf. & B. their debts in full, & thereupon deft. agreed with pltf. & B. to pay them respectively, & pltf. & B. then mutually agreed with each other & deft. to accept of him 10*s.* in the pound as a composition upon & in full satisfaction & discharge of their respective debts. The plea then averred readiness & willingness to pay, with a tender of the amount of the composition, & concluded with payment of it into ct. Pltf. replied, traversing the agreement to accept the composition of 10*s.* in the pound in satisfaction & discharge, upon which issue was joined. At the trial the agreement proved was to accept a composition of 10*s.* in the pound, payable in certain sums on certain days. It also appeared that default had been made in payment of the instalments. The plea having been amended :—*Held :* the plea, as amended, was bad, even after verdict, for not stating that the payments were made at the precise times agreed on, or at least a tender made of them. *Semble :* if the pleas had been that a new mutual agreement between pltf., deft., & other creditors, binding on each at the time when it was made, was given as a substitution for, or in satisfaction of the debt due from deft. to pltf., such plea would have been good, & in that case it would have been for the jury to decide whether pltf. agreed to accept the agreement itself, not the performance of it, as a satisfaction for his debt.—EVANS *v.* POWIS (1847), 1 Exch. 601 ; 11 Jur. 1043 ; 154 E. R. 255.

Annotations :—**Refd.** Gabriel *v.* Dresser (1855), 3 C. L. R. 415 ; Hazard *v.* Mare (1861), 6 H. & N. 434. **Mentd.** Bury *v.* Blogg (1848), 12 Q. B. 877 ; Callander *v.* Howard (1850), 10 C. B. 290 ; Hall *v.* Flockton (1851), 16 Q. B. 1039, Ex. Ch. ; Dell *v.* King (1863), 2 H. & C. 84 ; Gurrin *v.* Kopera (1865), 3 H. & C. 694 ; Morris *v.* Barron, [1918] A. C. 1, H. L.

9064. —— Whether readiness to perform sufficient.]—A deed of composition provided that M. would on or before May 8 pay his creditors 5*s.* in the pound in full discharge, with a proviso that if M. should make default after fourteen days the release should be void. The deed was made in Paris, & F., a creditor, was residing in Paris when the fourteen days expired. F. sued M. on a bill accepted by him, to which M. pleaded the composition, & that he was ready & willing to perform it, but did not plead tender :—*Held :* the absence of the plea of tender was not cured by the plea of readiness to perform.—FESSARD *v.* MUGNIER (1865), 18 C. B. N. S. 286 ; 5 New Rep. 307 ; 34 L. J. C. P. 126 ; 11 L. T. 635 ; 11 Jur. N. S. 283 ; 13 W. R. 388 ; 144 E. R. 453.

Annotations :—**Mentd.** Lay *v.* Mottram (1865), 19 C. B. N. S. 479 ; Hart *v.* Smith (1868), 9 B. & S. 543 ; Hatch *v.* Hatch (1872), 28 L. T. 506 ; *Re* Bishop, *Ex p.* Paper Staining Co. (1873), 37 J. P. 660, L. C. & L. J. ; The Eider, [1893] P. 119, C. A. ; Duval *v.* Gans (1904), 91 L. T. 308, C. A.

9065. —— —— Plea that creditor refused & exonerated debtor from tender.]—To a declaration for goods sold & delivered, defts. pleaded a deed of composition under 1861 Act, by which defts. agreed to pay 10*s.* in the pound on all their debts, payable by instalments of 2*s.* 6*d.* at certain dates, & the creditors agreed to accept the composition in full satisfaction of their respective debts, & on payment of it to execute a release, & not to molest or sue defts. for any claim, unless default should be made by defts. in payment of the instalments ; & it was agreed that if any creditor should sue contrary to the clause, the deed might be pleaded in bar of the action. The plea then alleged that defts. were ready to pay the first instalment, but pltfs. refused to accept same, & exonerated defts. from paying or tendering it, & wholly refused to consent to or approve of, or become parties to, the deed :—*Held :* the plea was good without payment into ct.—BAMFORD *v.* CLEWES (1868), L. R. 3 Q. B. 729 ; 9 B. & S. 539.

9066. —— —— Amount in dispute.]—It is not enough for debtor to say to his creditor, "I am ready & willing to pay your composition upon the debt I admit, if you are content to receive it as a composition upon the amount due to you," or "when we agree upon the sum upon which the composition is to be calculated."—TEA CO., LTD. *v.* JONES (1880), 43 L. T. 255.

9067. —— That all things necessary had been done.]—To a declaration on a bill of exchange deft. pleaded a composition deed under 1861 Act, s. 192, containing a release by the creditors respectively, with a proviso that in case default should be made in payment of the composition to the creditors respectively, the release should be thenceforth at an end. The plea did not aver payment or tender of the composition, but contained a general averment that all things necessary in that behalf having happened & been done, pltfs. became & were bound by the deed as if they had been parties thereto & had executed same :—*Held :* the plea was good without alleging payment or tender.—HART *v.* SMITH (1868), L. R. 4 Q. B. 61 ; 9 B. & S. 543 ; 19 L. T. 419 ; 17 W. R. 158.

Annotations :—**Mentd** *Re* Wilde (1868), 19 L. J. 752 ; *Re* Pullen, *Ex p.* Williams (1870), L. R. 10 Eq. 57 ; *Re* Harper, *Ex p.* Linsley (1873), 42 L. J. Bcy. 109.

9068. Proof of tender—Necessity for.]—Where, at a meeting of creditors of A., it is agreed that a composition of 6*s.* in the pound shall be accepted, & that promissory notes for the amount "shall be given within fourteen days, the creditors assenting thereto within that time," & A. is sued for a debt due to one of the parties to the agreement, unless A. can show delivery or tender of the notes, he is liable for the whole debt.—OUGHTON *v.* TROTTER (1833), 2 Nev. & M. K. B. 71 ; 2 L. J. K. B. 185.

Annotation :—**Mentd.** Emmet *v.* Dewhurst (1851), 3 Mac. & G. 587, L. C.

9069. —— ——.]—In accordance with 1869 Act, s. 126, an extraordinary resolution was passed by the proper majority in number & value of the creditors of deft., that a composition should be accepted, payable by three instalments, & that the second & third instalments should be secured by the promissory notes of deft. & a third person. In an action by a creditor, who did not attend or vote on the resolution :—*Held :* such resolution, although duly passed & registered, did not constitute any defence, there being no proof that deft. had paid or tendered the two instalments which had become due before action, or that he had delivered the promissory notes.—GOLDNEY *v.* LORDING (1873), L. R. 8 Q. B. 182 ; 42 L. J. Q. B. 103 ; 21 W. R. 543.

Annotation :—**Refd.** Tea Co. *v.* Jones (1880), 43 L. T. 255.

9070. Effect of tender & payment into court—Action barred.]—Action on a bill of exchange. Equitable plea setting forth a composition deed under 1861 Act, s. 192, between debtor of the first part, two sureties of the second part, & the two

sureties of & other executing creditors of the third part, which, after reciting (*inter alia*) that there had been delivered to the creditors of the third part named in the schedule promissory notes, in payment of a composition of 3*s.* in the pound, contained a covenant by debtor & his sureties with the parties of the third part, to pay the promissory notes as they should become due, & to deliver & pay to all the other creditors like promissory notes, & was executed by debtor & the sureties only. The plea averred a tender of the composition upon pltf.'s debt, & payment thereof into ct. :—*Held :* the plea was an answer to the action.—SCOTT *v.* BERRY (1865), 3 H. & C. 966 ; 6 New Rep. 265 ; 34 L. J. Ex. 193 ; 13 L. T. 40 ; 11 Jur. N. S. 510 ; 13 W. R. 844 ; 159 E. R. 816.

Annotations :—**Refd.** Blumberg *v.* Rose (1866), 4 H. & C. 311. **Mentd.** Peel *v.* Webster (1867), 36 L. J. Ex. 188.

See, also, No. 9231, *post.*

(*b*) *Effect of Failure to Perform or Tender.*

i. *Where Bankruptcy does not Supervene.*

9071. Effect of failure to perform—Right to sue for original debt.]—Where, by a resolution under 1869 Act, s. 126, the creditors of debtor agree to accept a composition payable by instalments, & debtor makes default in payment of an instalment, a non-assenting creditor is entitled to maintain an action for the whole debt.—GOLDNEY *v.* LORDING (1873), L. R. 8 Q. B. 182 ; 42 L. J. Q. B. 103 ; 21 W. R. 543.

Annotation :—**Refd.** Tea Co. *v.* Jones (1880), 43 L. T. 255.

9072. —— ——.]—In composition proceedings, under 1869 Act, s. 126, debtor must pay or tender the amount of the composition on that debt, & in default thereof the original debt revives.—HAWES *v.* BAUMAN (1885), 34 W. R. 116 ; 2 T. L. R. 104, C. A.

See, also, Nos. 9222 *et seq.*, *post.*

9073. —— —— **Without any act or intimation of election.**]—Where a deed is void as against a creditor by reason of the failure of debtor to fulfil his covenant, no act or intimation of election on his part to avoid the deed is necessary before bringing action.—HYDE *v.* WATTS (1843), 12 M. & W. 254 ; 1 Dow. & L. 479 ; 13 L. J. Ex. 41 ; 152 E. R. 1193.

Annotations :—**Mentd.** Ford *v.* Beech (1848), 11 Q. B. 852 ; Grey *v.* Friar (1854), 4 H. L. Cas. 565, H. L. ; R. *v.* Price (1854), 8 Moo. P. C. 203, P. C. ; Hughes *v.* Palmer (1865), 19 C. B. N. S. 393 ; *Re* Southam, *Ex p.* Lamb (1881), 19 Ch. D. 169, C. A.

9074. —— —— **Failure of creditor to demand payment—Amount subsequently tendered.**]—Deft. being in embarrassed circumstances & indebted to pltf. on a promissory note, pltf. agreed to accept 5*s.* in the pound on the amount of the note & interest, & to take a bill of exchange drawn by deft. & accepted by A., payable to order, on condition that the original note should revive, if the bill should be dishonoured. The bill was dishonoured, but no demand was made on deft. on the day it became due, &, on the following day, deft. tendered the amount, which pltf. refused to accept, & sued on the original note :—*Held :* pltf. was not entitled to recover.—SOWARD *v.* PALMER (1818), 8 Taunt. 277 ; 2 Moore C. P. 274 ; 129 E. R. 390.

Annotations :—**Expld.** Lumley *v.* Musgrave (1837), 1 Jur. 799. **Mentd.** Susé *v.* Pompe (1860), 3 L. T. 17.

9075. —— —— **Provisions in deed for demanding payment.**]—To a declaration for goods sold & delivered deft. pleaded a deed, under 1861 Act, s. 192, dated June 25, 1867, whereby debtor & a surety covenanted to deliver to the creditors, on the day of the date of the deed, promissory notes signed by debtor & a surety for a composition upon their debts, & the creditors, in consideration of the premises, released debtor from all debts due to them. The release was followed by the following clause :—" Provided that if debtor & the surety shall not, within two calendar months from June 17, 1867, make & deliver the promissory notes unto the creditors, according to the true intent & meaning of these presents, then & in such case these presents shall thereupon become absolutely void, & of no effect, & the creditors respectively shall be restored to their original rights, as if these presents had not been made, provided the creditors shall personally or otherwise apply for their notes." Deft. did not deliver the notes, either on the day of the date of the deed, or within two months after June 17, 1867, but pltfs. never personally or otherwise applied for them :—*Held :* the release was not avoided either by the non-performance of the covenant to deliver the notes on the day of the date of the deed, being wholly independent of the performance thereof, or by non-delivery of the notes within the two months, as pltfs. had not applied for them.—SOLOMON *v.* LAVERICK (1868), 17 L. T. 545.

9076. —— —— **After receipt of part of composition—Other creditors induced to compound.**]—A creditor, who has agreed with his debtor, by parol, to take part as a composition for his whole demand, & has actually received money from debtor in part payment of the composition, is not bound thereby, but may still proceed for his whole demand, unless it can be shown that he has, by entering into such an agreement, & taking part of the composition, induced some other creditor also to compound with debtor, so that his subsequently proceeding for & recovering the whole amount of his own debt might be considered a fraud upon such other creditor.—GREENWOOD *v.* LIDBETTER (1823), 12 Price, 183 ; 147 E. R. 692.

9077. —— —— **After receipt of composition without objecting to default.**]—Although a sum. by way of composition, ought to be paid in full strictly on the appointed day, & although in

PART XXIII. SECT. 10, SUB-SECT. 1. —A. (b) i.

9071 i. *Effect of failure to perform —Right to sue for original debt.*]—If debtor, who has carried an arrangement under 1857 Act, fail to pay the instalments of the composition which his creditors have agreed to accept, the creditors are remitted to their original rights, & the Ct. of Bkpcy. will not restrain a creditor from proceeding to recover the entire amount of the debt for which he had agreed to take a composition.—*Re* J. L. (1874), 8 I. L. T. 106.—IR.

9071 ii. —— ——.]—Under a composition arrangement, payable in three instalments, each secured by the promissory note of the arranging debtor & his sureties, default was made in the payment of the second instalment, but the third was paid. The creditor thereupon sued for the original debt, less by the amount of the first & third instalments :—*Held :* the creditor was entitled to revert to his right to sue for the original debt, & the ct. refused to restrain him.—*Re* D. (1888), 21 L. R. Ir. 281.—IR.

9076 i. —— —— *After receipt of part of composition.*]—Under a composition, debtor was to pay by four instalments, each secured by the promissory note of himself & his sureties. Having made default in payment of the third instalment, the creditor sued upon the promissory note for that instalment, & was paid it ; the creditor then sued for the original debt, less by the amount of the three instalments paid, & seized debtor's goods in execution :—*Held :* the creditor, having elected to sue for the amount of the instalment, & been paid it, was not entitled to revert to his right to sue for the original debt, & he should be restrained from levying under the execution.—*Re* BUTLER (1878), 1 L. R. Ir. 225.—IR.

d. —— —— *Where creditor has compromised himself.*]—Upon a composition agreement, by which debtor agrees to pay the creditors a specific composition in a specified manner & at certain times, if he fails to pay or to provide for the composition according to the terms of the agreement, every creditor, who has not been paid

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default of such payment, the creditor may resort to his original claim for the whole debt, yet, if he afterwards accept the composition, without objecting to the default, he will be bound by it.—SHIPTON *v.* CASSON (1826), 5 B. & C. 378; 8 Dow. & Ry. K. B. 130; 4 L. J. O. S. K. B. 199; 108 E. R. 141.

9078. —— —— **Must show demand for payment —& refusal.**]—Where debtor has entered into an executory agreement with his creditors, by which they are to accept, as a composition for the debts due to them respectively, certain instalments secured by promissory notes, a creditor will not be allowed to sue at law for his original demand, even after the expiration of the time for the payment of the first instalment, unless it appears that he has demanded the promissory notes, & that debtor has refused to deliver them.—SALOMONSON *v.* BLYTH (1825), 3 L. J. O. S. Ch. 169.

9079. —— —— **Release not signed by all creditors—Nor tendered & refused by debtor.**]—By an agreement between defts. & their creditors, all defts.' stock-in-trade was placed in the hands of trustees for the benefit of the creditors, & defts. were to execute to the trustees a conveyance of all their estate, in which deed were to be inserted all other usual clauses. The trustees carried on defts.' business, & paid the creditors 10*s.* in the pound; they then tendered for execution by defts. a conveyance of all their estate, containing a clause of release, which defts. objected to as insufficient, & refused to execute the conveyance, & the instrument not having been executed by all the creditors, a meeting at which defts. were called on to execute was adjourned, that the signature of every creditor might be obtained:—*Held:* pltfs., who, as creditors, were parties to the above agreement, could not sue for their original debt, at least, till the conveyance, such as it was, had been executed by all the creditors, & refused by defts.—TATLOCK *v* SMITH (1829), 6 Bing. 339; 3 Moo. & P. 676; 8 L. J. O. S., C. P. 54; 130 E. R. 1311.

Annotation:—**Expld.** Garrard *v.* Woolner (1832), 1 Moo. & S. 327.

9080. —— —— **Acquiescence of creditor in breach.**] — A person in pecuniary difficulties entered into a composition deed, by which he covenanted to pay £1,500 to trustees, & to effect an insurance on his own life for that amount. He paid £500, & then effected an insurance for £1,000 only. One of the creditors who had signed the deed brought an action against debtor for his debt, insisting that the deed was void, in consequence of the breach of covenant to insure for £1,500:—*Held:* as the creditor was aware of the amount of the insurance soon after it was effected, & his conduct showed acquiescence in such breach of covenant, he was not entitled to take advantage of it, & must be restrained by perpetual injunction from bringing any action against debtor.—WATTS *v.* HYDE (1848), 17 L. J. Ch. 409; 12 L. T. O. S. 121, 141; 12 Jur. 661, L. C.

Annotation:—**Distd.** Bill *v.* Richards (1857), 26 L. J. Ex. 409.

9081. —— —— **Whether creditor estopped by failure to plead default in previous action.**]—To an action on a bill of exchange, deft. pleaded that pltf. sued him in a former action for the same cause, to which deft., on Nov. 3, 1868, pleaded to the further maintenance of the action a deed of composition under 1861 Act, dated Oct. 8, 1868, which was after action brought, whereby deft. covenanted to pay his creditors 1*s.* in the pound by two instalments of 6*d.* each on Apr. 6 & Aug. 6, 1869, in consideration of which the creditors released deft. from their several debts, with a proviso that, if default should be made by deft. in payment of the composition the deed should become void & the creditors should not be bound by the covenants therein contained, that, on Apr. 13, 1869, pltf. replied that deft. failed to pay the instalment due on Apr. 6, 1869, whereby the deed & the release therein contained became void, that deft. rejoined equitably that Apr. 6, 1869, was subsequent to the date of the plea, & that he had by mere mistake omitted to pay the instalment on that day, but before replication, *viz.* on Apr. 8, 1869, he tendered it to pltf., that, on May 25, 1869, pltf. confessed the plea, withdrew his replication, & taxed & received his costs, & so the first action was finally determined against pltf. except as aforesaid, & that pltf. was estopped from bringing a fresh action for the same cause. Replication, that pltf. ought to be admitted to implead deft., by reason of deft.'s failure in the due payment of the instalment of the composition on Apr. 6, 1869, whereby the release became null & void:—*Held:* the effect of the confession of the plea in the former action was to put an end to the litigation altogether as it stood at the time of the confession, & pltf. might have replied in the former action that the release, which was itself after the action, though operative when pleaded, became avoided by non-payment of the composition, &, having omitted to avail himself of the opportunity of doing so, pltf. was estopped from relying upon it in a second action.—NEWINGTON *v.* LEVY (1870), L. R. 6 C. P. 180; 40 L. J. C. P. 29; 23 L. T. 595; 19 W. R. 473, Ex. Ch.

Annotations:—**Consd.** Hall *v.* Levy (1875), L. R. 10 C. P. 154. **Refd.** Bennett *v.* Gamgee (1876), 2 Ex. D. 11; *Re* Pilling, *Ex p.* Board of Trade, [1903] 2 K. B. 50, C. A. **Mentd.** Davis *v.* Hedges (1871), 25 L. T. 155; Foster *v.* Gamgee (1876), 45 L. J. Q. B. 576; Midgley *v.* Midgley [1893] 3 Ch. 282, C. A.; Butler *v.* Butler, [1894] P. 25, C. A.; *Re* South American & Mexican Co., *Ex p.* Bank of England, [1895] 1 Ch. 37, C. A.

9082. —— —— —— **As regards default in payment of subsequent instalment.**]—To a declaration on a bill of exchange by pltf., as indorsee, deft., the acceptor, pleaded by way of estoppel, setting out the proceedings in a former action by pltf. upon the same bill of exchange, in which former action deft. had pleaded to the further maintenance a composition deed executed after action, by which deft.'s creditors, including pltf., agreed to release him from their debts in consideration of his agreement to pay a composition by two instalments, with a proviso that, on default in payment of the composition, the release was to become null & void. The plea then set forth that pltf. had replied to such plea in the first action the non-payment of the first instalment under the deed, & that deft. had rejoined, on equitable grounds, a mistake in non-payment on the proper day & a subsequent tender, that, thereupon, pltf. struck out the replication, confessed the plea, & taxed his costs, which were paid, & that such determination of the first action estopped pltf. from bringing the second action. Replication that after the proceedings in the first action, & before the second action, a second instalment under the deed became payable, that deft. had made default in payment of it, & that

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the composition & who has not compromised himself by his personal conduct, is remitted to his original rights & remedies.—*Re* FERGUSON (1877), 11 I. R. Eq. 260.—IR.

e. —— —— ——.]—Where by a resolution in arrangement the creditors agree to accept a composition payable by instalments, & debtor makes default in payment of an instalment, a creditor, who was a supporter of the resolution, will not be remitted to his original rights, if he has done anything to compromise himself by his personal conduct, or if his being so remitted would defeat the object of the resolution.—*Re* BARRINGTON (1878), 1 L. R. Ir. 130.—IR.

thereby the release in the deed became null & void :—*Held :* the replication was good.—HALL *v.* LEVY (1875), L. R. 10 C. P. 154 ; 44 L. J. C. P. 89 ; 31 L. T. 727 ; 23 W. R. 393.

9083. —— —— After resolution of creditors reducing amount of instalment payable.]—Where the assenting creditors by extraordinary resolution confirmed a previous resolution reducing the amount of the second instalment, & a dissentient creditor commenced an action at law for his whole debt, on the ground that the instalment originally agreed upon had not been paid, an injunction restraining the action at law was granted.—*Re* GLOVER, *Ex p.* RADCLIFFE INVESTMENT CO. (1873), L. R. 17 Eq. 121 ; 43 L. J. Bcy. 4 ; 29 L. T. 694 ; 22 W. R. 235.

9084. —— —— Giving promissory notes without payment not satisfaction.]—Deft. having filed a petition for liquidation under 1869 Act, s. 126, at a meeting duly convened, pltfs. being assenting creditors, resolutions were passed that a composition of 3*s.* in the pound should be accepted by the creditors in satisfaction of their debts, that such composition should be payable by instalments at three, six, & twelve months, & that the security of S. should be accepted for the whole of the composition ; & a trustee was appointed. Joint & several promissory notes of deft. & S. for the composition, payable at a bank, were given to pltfs. & the other creditors, & receipts signed by them, expressing it to be "in discharge of their debts." The first note was presented at the bank at maturity, & dishonoured, but no demand was made upon S. or the trustee :—*Held :* pltfs. were remitted to their right to sue for their original debt, the mere giving of the notes, without payment, not being satisfaction within the terms of the resolution or the receipt.—EDWARDS *v.* HANCHER (1875), 1 C. P. D. 111 ; 33 L. T. 575.

Annotations :—**Refd.** *Re* Bestwick, *Ex p.* Bestwick (1876), 2 Ch. D. 485, C. A. ; Tea Co. *v.* Jones (1880), 43 L. T. 255.

9085. —— —— Deed suspending creditors' right to sue—New agreement inferred.]—When a composition deed is entered into with creditors suspending their right to sue, the ct. will infer a new agreement by debtor to pay the original debt upon default by debtor in payment of the composition.—*Re* STOCK, *Ex p.* AMOS (1896), 66 L. J. Q. B. 146 ; 75 L. T. 422 ; 45 W. R. 480 ; 41 Sol. Jo. 113 ; 3 Mans. 324, D. C.

9086. —— Right to sue for balance of original debt unpaid—Proviso for cancellation of release on default.]—A debt being payable by instalments, with interest, debtor made default in payment of one of the instalments. By a deed, reciting that the creditor had agreed to give debtor time upon having the payment of the debt secured to him, with interest, "by the instalments & in manner thereinafter appearing," provision was made for payment of the debt, with interest, by instalments different from the former ones, with a proviso that upon default being made in payment of any instalment the whole unpaid portion of the debt, with interest, should become immediately payable. Debtor made default :—*Held :* the proviso was not in the nature of a penalty, & a ct. of equity ought not to restrain the creditor from enforcing immediate payment of the whole money remaining due.—STERNE *v.* BECK (1863), 1 De G. & J. Sm. 595 ; 2 New Rep. 346 ; 32 L. J. Ch. 682 ; 8 L. T. 588 ; 11 W. R. 791 ; 46 E. R. 236, L. JJ.

Annotation :—Protector Loan Co. *v.* Grice (1880), 5 Q. B. D. 592, C. A.

9087. —— —— Release expressly conditional on punctual payment.]—By a composition deed under 1861 Act, executed in Mar. 1867, deft., after assigning all his effects for the benefit of his creditors, contracted to pay them a composition of 7*s.* 6*d.* in the pound on their debts in three instalments of 2*s.* 6*d.* each, the first & second instalments to be secured by his own promissory notes at three & six months respectively, & the third instalment by the joint & several promissory note of himself & a surety. The deed contained a conditional release by the creditors of deft. from his debts, & a covenant by the creditors not to sue, & also a proviso that if the notes of either of them were not paid, when due, the conditional release & covenant should be absolutely void. The notes became due respectively on June 4, Sept. 4, & Dec. 4, 1867. After the second note had become due, on Sept. 17, pltfs., who were creditors of deft., & who had not executed the deed, assented to the deed, & took from deft. three promissory notes, under its provisions, for the amount of the composition on their debt. Two of such notes, *viz.*, those for the first & second instalments were then overdue, but were not paid to pltfs. until some three or four weeks after Sept. 17. In an action by pltfs. to recover the balance of their debt :—*Held :* as the release was expressly made conditional on the punctual payment of the promissory notes, & deft. had failed to pay the first & second of such notes, which were payable, *instanter*, on their delivery to pltfs., for some three or four weeks after delivery, according to the strict letter of the deed the release became inoperative, & could not be pleaded as an answer to the action, & pltfs. were entitled to maintain the verdict which had been entered for them at the trial.—MILLIGAN *v.* SALMON (1868), 18 L. T. 887.

9088. —— —— Whether court will restrain action.]—By resolutions under 1869 Act, the creditors agreed to accept a composition payable by instalments. Debtor made default in payment of an instalment to a creditor :—*Held :* the creditor could maintain an action against debtor for the balance of the whole debt remaining

9084 i. —— —— *Giving bills without payment not satisfaction.*]—After deft. had been adjudicated a bkpt., his creditors, amongst whom were pltfs., agreed to accept a composition, & bills of exchange were given to pltfs. for the amount. The bills having been dishonoured :—*Held :* the mere giving of the bills, without payment, was not a discharge of the original debt, & pltfs. were remitted to their right to sue for it.—ERSKINE *v.* MORELAND (1876), I. R. 10 C. L. 243.—IR.

f. —— —— *Statute of Limitations.*]—Creditors agreed to accept a composition secured by a deed, which provided that in default of payment by debtor the deed should become void. Default was made under the deed on Sept. 30, 1908. An action was commenced by a creditor on Feb. 16, 1915, for the original debt :—*Held :* the creditor's cause of action was statute-barred.—NATTRASS *v.* SIMPER (1915), 17 W. A. L. R. 135.—AUS.

g. —— —— *Election — Waiver.*]—Where a creditor has a right to treat a deed of composition as null & void in the event of debtor's default in making payment on the due date, the creditor must elect timeously whether he will claim the forfeiture or not, & if, debtor having made default, the creditor continues to receive or to demand payment under the deed he will be held to have elected to waive his claim to forfeiture.—MULLER & CO. *v.* BASS & CO. (1915), W. L. D. 46.—S. AF.

9086 i. —— *Right to sue for balance of original debt unpaid.*]—Upon default in carrying out the terms of a deed of composition & discharge a new arrangement was made respecting the realisation of debtor's assets & their distribution, to which all the executing creditors appeared to have assented : —*Held :* a creditor who had benefited by the realisation of the assets & by his action given the body of the creditors reason to believe that he had adopted the new arrangement, could not repudiate the transaction upon the ground that the new arrangement was not fully understood, without at least a surrender of the advantage he had received through it. Debtor's assent to such repudiation & the grant of better terms to the one creditor would be a fraud upon the other creditors, & as such inoperative & of no effect.—HOWLAND *v.* GRANT (1895), 2 Terr. L. R. 158 ; 26 S. C. R. 372. —CAN.

Sect. 10.—*Position of creditors: Sub-sect.* 1, *A.* (*b*) *i.*]

unpaid, & would not be restrained by the Ct. of Bkpcy.—*Re* HATTON (1872), 7 Ch. App. 723; 42 L. J. Bcy. 12; 27 L. T. 396; 20 W. R. 978, L. JJ.

Annotations:—**Folld.** *Re* Bishop, *Ex p.* Paper Staining Co. (1873), 37 J. P. 660. **Apld.** *Re* Duffield, *Ex p.* Peacock (1873), 8 Ch. App. 682, L. JJ. **Folld.** Goldney *v.* Lording (1873), L. R. 8 Q. B. 182. **Expld.** *Re* Harper, *Ex p.* King (1873), L. R. 17 Eq. 336, n. **Consd.** Slater *v.* Jones, Capes *v.* Ball (1873), L. R. 8 Exch. 186; *Re* Thorpe, *Ex p.* Härtel (1873), 42 L. J. Bcy. 34. **Refd.** Newell *v.* Van Praagh (1874), L. R. 9 C. P. 96; Edwards *v.* Hancher (1875), 1 C. P. D. 111; Campbell *v.* Im Thurn (1876), 45 L. J. Q. B. 482; Tea Co. *v.* Jones (1880), 43 L. T. 255; *Re* Stock, *Ex p.* Amos (1896), 3 Mans. 324, D. C.

See, also, Nos. 9100, 9101, *post.*

9089. —— —— After deducting payments received from debtor or surety.]—Where creditors agree to accept a composition payable in instalments, some of which are guaranteed by a surety, if default is made in the payment of any one instalment, the creditors have a right to sue debtor, or to prove in his bkpcy., for the balance of their original debts, after deducting what they have received, either from debtor or the surety, in respect of the composition, & not merely for the amount of the unpaid instalments of the composition; & the surety has no right to put the creditors to an election whether they will carry out the composition arrangement *in toto* or reject it *in toto*.

A composition agreement is made between debtor & each of his creditors that if debtor will, at three specified times, pay three specified sums of money to each of his creditors, & the other creditors will agree to accept those payments, the original debt shall, if the conditions be fulfilled, be released. If there is nothing more than this, the agreement does not amount to an accord & satisfaction by the creditor, &, if debtor fails to pay any instalment of the composition, the right of the creditor revives to sue for his original debt, less what he has received in respect of it (BRETT, L. J.).—*Re* BEDELL, *Ex p.* GILBEY (1878), 8 Ch. D. 248; 47 L. J. Bcy. 49; 38 L. T. 728; 26 W. R. 768, C. A.

Annotations:—**Mentd.** *Re* Barnes, *Ex p.* Quilter (1882), 30 W. R. 739, C. A.; Hood *v.* Newby (1882), 21 Ch. D. 605, C. A.

9090. —— Failure to pay amount of award—Right to sue thereon.]—The creditors of debtors, who had filed a liquidation petition, resolved to accept a composition, & appointed a trustee to receive & distribute it. In debtors' statement it was mentioned that two persons claimed to be creditors for a large sum, but that their claim was the subject of an action, which had been referred to an arbitrator, the reference being still pending. The two persons attended the meetings of the creditors, of which notice had been sent to them, & tendered a proof, but their proof was objected to, & they were not allowed to vote. Several months afterwards the arbitrator made his award, finding a large sum due to them. The composition not having been paid, they commenced an action against debtors for the amount of the award:—*Held:* the action ought not to be restrained.—*Re* WATSON, *Ex p.* WATSON (1876), 2 Ch. D. 63; 34 L. T. 778; 24 W. R. 592, C. A.

See, now, Jud. Act, 1873 (c. 66), s. 2 (5); 1914 Act, ss. 7, 16, 21; 1915 Rules, rr. 215, 220.

9091. —— Revival of original debt.]—Upon a composition, the original debt revives upon failure of debtor in performing his undertaking.—*Re* KIDDER, *Ex p.* CROSBIE (1835), 2 Mont. & A. 393; 5 L. J. Bcy. 7, Ct. of R.

9092. —— Right to levy execution.]—A deed of composition under 1861 Act, s. 192, had been executed by deft., by which the creditors covenanted to accept a composition payable by instalments therein mentioned, & that, unless & until the instalments of the composition, or some or one of them, should become payable, & should not be paid within three days after demand, they would not arrest nor proceed against deft. It was further provided that the deed should have no effect & be void *ab initio*, in case the instalments should not be duly paid. A month after the first instalment became payable, pltf. being a non-assenting creditor, & having received no payment, without notice to deft. caused an execution to be levied upon deft.'s goods for the amount of a judgment obtained by him:—*Held:* the deed being by force of the last proviso absolutely void, the certificate of registration was no bar to pltf.'s execution.—BAKER *v.* PAINTER (1867), L. R. 2 C. P. 492; 17 L. T. 53.

See, also, No. 9102, *post.*

9093. —— Revival of original remedies—Right to commit debtor.]—A judgment having been recovered against deft. for a sum of money & remaining unsatisfied, pltf. applied to a judge at chambers to commit deft. to prison under Debtors Act, 1869 (c. 71), s. 5. The judge made an order for the payment of the debt by monthly instalments. After three of such instalments had been paid, proceedings were taken by deft. for the purpose of making a composition with his creditors under 1869 Act, s. 126, & a resolution of the creditors was duly passed accepting a composition upon deft.'s debts, payable by two instalments. Default was made in the payment of the first instalment of the composition to pltf., & instalments under the judge's order having by that time become due & not having been paid, pltf. applied again at chambers for the committal of deft. to prison for non-compliance with the judge's order:—*Held:* the effect of the default in payment of the composition was to remit pltf. to the position he occupied before the proceedings in respect of the composition took place, & the order might be made for deft.'s committal to prison for non-compliance with the judge's order.—NEWELL *v.* VAN PRAAGH (1874), L. R. 9 C. P. 96; 43 L. J. C. P. 94: 29 L. T. 891; 22 W. R. 377.

Annotations:—**Consd.** Edwards *v.* Hancher (1875), 1 C. P. D. 111. **Refd.** Tea Co. *v.* Jones (1880), 43 L. T. 255.

9094. —— Right to attach funds in hands of trustee—Whether trust created.]—L., being pressed by his creditors, suggested an arrangement by which he should set aside his official salary of £1,500 *per annum*, together with a further sum of £100 *per annum*, which sum should be paid quarterly by him to defts., one of whom, S., was to act as trustee for the creditors. The terms were embodied in a deed, a lithographed copy of which was sent by S. to the creditors & was assented to by them. The deed was executed by L., but he declined to allow it to be registered, as he would thereby probably lose his official appointment. The proposal came to an end, but L. intimated to S. that he would carry out his part of the arrangement just the same, & pay the quarterly instalments as if the deed were binding. S. again communicated with the creditors, & advised them to accept the offer, as the only alternative was making L. bkpt., which would result in his losing his appointment. The first instalment of £400 was paid to S., the second one promised, but no other payment was afterwards made:—*Held:* the £400 in S.'s hands was not a debt due by defts. to L., as a trust had been

created, & could not be attached by a judgment creditor.—RUNTZ *v.* LONGBOURNE (1892), 8 T. L. R. 568.

9095. —— Right to serve bankruptcy notice & present petition on debt—Provision in deed for notice by trustees that deed void—No notice given.]—A deed of arrangement, by which debtor agreed to pay his creditors their debts in full by certain quarterly instalments, contained a clause that if default were made for the space of twenty-one days in paying any one instalment, then, & in such case, it should be lawful for the trustee under the deed by notice in writing to declare such deed void, & in such event the creditors should be entitled to enforce their claims as if the deed had never been made or executed :—*Held :* the trustee not having given such notice, a creditor under the deed was not entitled to serve a bkpcy. notice & present a petition on account of the debt due to him.—*Re* CLEMENT, *Ex p.* GOAS (1886), 3 Morr. 153, C. A.

9096. —— On debtor's right to discharge.]—By composition resolutions it was agreed to accept 2*s.* in the pound, payable within three months, & secured to the satisfaction of the trustee, debtor to be allowed his discharge on the trustee certifying that he was satisfied with the security, & the liquidation to be closed on payment of the composition. The trustee certified that he was satisfied with the sureties, but debtor did not apply for his discharge. The first instalment was paid with the aid of the sureties, & the last, three months after the time fixed by the resolutions, out of after-acquired property. Debtor subsequently applied for, but had been refused his discharge, & the liquidation had not been closed :—*Held :* the bargain between debtor & his creditors contained in the resolutions must be carried out in its entirety, & debtor, having failed to pay the composition, was not entitled to his discharge, & the after-acquired property vested in the trustee.—*Re* HINTZ, *Ex p.* HINTZ (1883), 53 L. J. Ch. 398.

See 1914 Act, s. 16 (10).

See, also, Nos. 9600, 9601, *post.*

9097. Effect of failure to tender—Right to sue for original debt.]—Pltf., the drawer of a bill of exchange accepted by deft., agreed with him & the rest of his creditors to take a composition of 8*s.* in the pound to be secured by promissory notes to be given by deft. payable on days certain, & that deft. should assign to the creditors certain debts, upon which they should execute a general release the assignment was executed, & all the creditors except pltf. received their composition & executed the release. Pltf. might have received his promissory notes if he had applied for them, but it did not appear that deft. had ever tendered them to pltf., or that he had ever applied for them. Pltf. afterwards, & after the days of payment of the promissory notes had expired, sued deft. on the bill of exchange :—*Held :* he was not precluded by the agreement from recovering.—CRANLEY *v.* HILLARY (1813), 2 M. & S. 120 ; 105 E. R. 327.

Annotations :—**Distd.** Soward *v.* Palmer (1818), 2 Moore C. P. 274 ; Salomonson *v.* Blyth (1825), 3 L. J. O. S. Ch. 169 ; Shipton *v.* Casson (1826), 4 L. J. O. S. K. B. 199. **Consd.** Garrard *v.* Woolner (1832), 8 Bing. 258. **Reld.** Oughton *v.* Trotter (1833), 2 Nev. & M. K. B. 71. **Mentd.** Emmet *v.* Dewhurst (1851), 3 Mac. & G. 587.

9098. —— ——.]—At a meeting of creditors in a liquidation under 1869 Act, ss. 125, 126, a statement of assets & debts was produced by debtor, deft., in which pltfs. were inserted as creditors for £150, & it was resolved that a stated composition payable in four instalments, at stated intervals from date of registration of the resolutions, should be accepted & be secured by the joint & several promissory notes of deft. & a named surety, & that R. be appointed a trustee to receive & distribute the composition notes, & such resolutions were duly registered. Pltfs. did not attend the meeting, but had notice of the resolutions, nor did they assent to the amount alleged in deft.'s statement to be due to them, but claimed & sent in a proof for a larger sum. After registration of the resolutions deft. delivered to the trustee the joint & several promissory notes of himself & the surety for the composition instalments, payable at the stated periods, filled up with the correct amounts in all cases where the creditors were satisfied with deft.'s statement of such amounts, which notes were distributed to such creditors & were duly honoured. Pltfs., however, claiming a larger sum than the debt admitted to be due, the notes intended for them were delivered in blank to the trustee, who had authority from deft. & the surety to fill them up with the correct amount of the composition instalments when the amount of the debt was settled, & to hand them so filled up to pltfs. After receiving the notes the trustee by letter requested from pltfs. particulars of their claim, in order to complete the composition notes, in reply to which pltfs. referred him to their solrs. for information, to whom, however, no application was ever made, nor were any other steps taken to adjust the debt, nor were the notes ever filled up or tendered to pltfs., nor was any tender or offer to pay the composition upon the admitted debt of £150 ever made. In an action by pltfs. for the amount claimed by them to be due from deft., the trial judge found as facts, (1) the instalments of the composition were due to those bound by it before action brought ; (2) the trustee was willing to fill up & deliver the notes to pltfs. for the composition on £150, but not on any larger amount unless agreed on, which it never was ; (3) pltfs. did nothing to prevent deft. or the trustee from filling up & tendering to pltfs. the notes as a composition upon £150, & never waived the performance of anything it was incumbent upon deft. or the trustee to do, unless the facts before-mentioned amounted in law to such waiver, which they did not :—*Held :* owing to deft.'s omission to tender to pltfs., or to deliver to the trustee, the composition to which he admitted pltfs. were entitled, pltfs. were in a position to maintain the action for the full amount of their admitted original debt.—TEA CO., LTD. *v.* JONES (1880), 43 L. T. 255.

9099. —— —— Creditor not restricted to summary remedy.]—It is competent to a non-assenting creditor, notwithstanding a resolution for a composition under 1869 Act, s. 126, duly registered under s. 127, to sue for his original debt, where debtor has failed to pay or tender the composition within the time agreed on, or within a reasonable time. The creditor is not restricted to the summary remedy, by application to the Ct. of Bkpcy., provided by that sect. *Qu.:* as to the power of the Ct. of Bkpcy., under s. 13 or under r. 260, to restrain such an action.—EDWARDS *v.* COOMBE

9097 i. *Effect of failure to tender—Right to sue for original debt.*]—The creditors of insolvent debtor, by deed, absolutely & unconditionally released their claim against him, but such release was intended to be in consideration of debtor delivering to them certain indorsed notes, which he stated he was unable to procure, & in fact they were not delivered as had been agreed upon : —*Held :* the creditors were entitled to enforce payment of their original claim, notwithstanding debtor offered to pay the sum for which it was stipulated by the deed of composition that the notes should be given, or to give the notes agreed upon.—HILL *v.* RUTHERFORD (1862), 9 Gr. 207.—**CAN.**

Sect. 10.—*Position of creditors: Sub-sect.* 1, *A.* (*b*), *i. & ii.*]

(1872), L. R. 7 C. P. 519; 41 L. J. C. P. 202; 27 L. T. 315; 21 W. R. 107.

Annotations:—**Apld.** *Re* Hatton (1872), 7 Ch. App. 723, L. JJ.; *Re* Duffield, *Ex p.* Peacock (1873), 8 Ch. App. 682, L. JJ.; Goldney *v.* Lording (1873), L. R. 8 Q. B. 182. **Expld.** *Re* Harper, *Ex p.* King (1873), L. R. 17 Eq. 336, n. **Consd.** Slater *v.* Jones, Capes *v.* Ball (1873), L. R. 8 Exch. 186; Newell *v.* Van Praagh (1874), L. R. 9 C. P. 96; Edwards *v.* Hancher (1875), 1 C. P. D. 111. **Expld.** *Re* Bestwick, *Ex p.* Hodgkinson (1876), 34 L. T. 73. **Refd.** *Re* Glover, *Ex p.* Radcliffe Investment Co. (1873), 43 L. J. Bcy. 4; *Re* Dale, *Ex p.* Mirabita (1875), L. R. 20 Eq. 772; Campbell *v.* Im Thurn (1876), 1 C. P. D. 267; Tea Co. *v.* Jones (1880), 43 L. T. 255; *Re* Stock, *Ex p.* Amos (1896), 3 Mans. 324, D. C.

9100. —— —— Whether court will restrain action.]—A creditor refused to be bound by a resolution for a composition registered under 1869 Act, s. 125, on the ground that the composition had not been tendered to him within the prescribed time:—*Held:* he ought not to be restrained from suing debtor at law.—*Re* BISHOP, *Ex p.* PAPER STAINING CO. (1873), 8 Ch. App. 595; 37 J. P. 660, L. C. & L. J.

Annotations:—**Apld.** *Re* Harper, *Ex p.* King (1873), L. R. 17 Eq. 336, n. **Folld.** *Re* Watson, *Ex p.* Watson (1876), 2 Ch. D. 63, C. A.

9101. —— —— ——.]—Debtor filed a liquidation petition, & in his statement of affairs entered the name of a creditor, who had brought an action against him in which a reference was pending, & the amount of his claim. The creditor tendered a proof for part of such amount, but the proof was objected to, & he was not allowed to vote at either of the meetings of creditors. The rest of the creditors duly resolved to accept a composition of 5*s.* in the pound. Pltf. in the action received notice to appear before the registrar & prove his debt, but he did not do so, & the registrar ordered the objections to the proof to stand over till the arbitrator had made his award. The arbitrator awarded a portion of the amount claimed, & no tender of the composition having been made to him, pltf. commenced an action against debtor on the award. On an application by the trustees under the composition to the Ct. of Bkpcy. to restrain the action:—*Held:* there was no ground for restraining pltf. from suing debtor at law.—*Re* WATSON, *Ex p.* WATSON (1876), 2 Ch. D. 63; 34 L. T. 778; 24 W. R. 592, C. A.

See, also, No. 9088, *ante.*

9102. —— Right to levy execution—Debt being amount of untaxed costs.]—Debtor, who made a composition with his creditors under 1869 Act, s. 126, was liable to a creditor for payment of untaxed costs in an action at law, & debtor inserted them in his statement at an estimated amount. The costs were not taxed at the time appointed for payment of the composition, & debtor did not tender the composition to the creditor. The creditor then signed judgment, & had the costs taxed, & levied execution against the goods of debtor, for the whole amount. Debtor applied for an injunction to restrain the creditor:—*Held:* debtor ought to have tendered the composition on the estimated amount of the debt, & the creditor was entitled to proceed with his execution, notwithstanding the composition.—*Re* DUFFIELD, *Ex p.* PEACOCK (1873), 8 Ch. App. 682; 42 L. J. Bcy. 78; 28 L. T. 830; 21 W. R. 755, L. JJ.

Annotations:—**Expld.** *Re* Harper, *Ex p.* King (1873), L. R. 17 Eq. 336, n.; *Re* Bestwick, *Ex p.* Hodgkinson (1876), 34 L. T. 73. **Distd.** Campbell *v.* Im Thurn (1876), 1 C. P. D. 267. **Expld.** *Re* Newman, *Ex p.* Brooke (1876), 3 Ch. D. 494, C. A. **Consd.** Breslauer *v.* Brown (1878), 3 App. Cas. 672, H. L. **Expld.** Vint *v.* Hudspith (1885), 33 W. R. 738, C. A. **Consd.** *Re* Bluck, *Ex p.* Bluck (1887), 4 Morr. 273. **Refd.** Melhado *v.* Watson (1877), 2 C. P. D. 281, C. A.; Tea Co. *v.* Jones (1880), 43 L. T. 255; *Re* British Gold Fields of West Africa, [1899] 2 Ch. 7, C. A.; *Re* A Debtor (No. 68 of 1911), [1911] 2 K. B. 652, C. A.

See, also, No. 9092, *ante.*

ii. *Where Bankruptcy Supervenes.*

9103. Right to claim dividend—& prove for residue—No fund separated before bankruptcy.]—A creditor, who has not received dividends under a composition, if a bkpcy. takes place, & there is no fund separated for his use, cannot have those dividends out of the bkpt. estate, & prove the residue of his debt, but must come in as the other creditors at the date of the bkpcy.—*Ex p.* D'OLIVIERA, *Ex p.* VON HALLE (1803), 8 Ves. 84; 32 E. R. 284, L. C.

9104. —— Promissory notes for same tendered & refused.]—W. entered into a composition deed, by which it was agreed that the creditors should accept a composition of 10*s.* in the pound, secured by the joint & several promissory notes of deft. & W., the notes to be delivered seven days after registration of the deed, the whole of W.'s estate to belong to deft., & to be realised for his benefit. Pltf. agreed to assent to the deed & afterwards refused to be bound by it, on the ground that his assent had been obtained by fraud. The deed was duly registered according to 1861 Act, & the promissory notes were tendered to pltf., but he refused to accept them. Pltf. then brought an action for his debt against W., who pleaded the composition deed, which was a valid deed on the face of it, & pltf. replied that the assents were obtained by fraud. The action was referred, & deft. being unable to prove the sufficiency of the assenting creditors, so as to satisfy the Act, consented that an award should be made by which the verdict should be entered in pltf.'s favour. W. was afterwards adjudged bkpt. Deft. had realised W.'s estate. Pltf. then brought an action against deft. for the promissory notes given by deft. for the composition due to pltf. under the deed:—*Held:* the action was not maintainable, & pltf.'s proper remedy was by application to the Ct. of Bkpcy., which had power to do complete justice between the parties.—LATTER *v.* WHITE (1872), L. R. 5 H. L. 578; 41 L. J. Q. B. 342, H. L.

9105. Right to prove for balance of original debt—After application of assigned property—Subject to rebate.]—Under an assignment in trust to pay the creditors, who should execute the deed, with a covenant by debtor that if the creditors should not out of that fund be paid in full within two years, to pay the deficiency within a month afterwards, the creditors under the deed in the event of a bkpcy. before the end of two years are entitled to prove for the deficiency after application of the trust fund, subject to a rebate.—*Ex p.* RICHARDSON (1807), 14 Ves. 184; 33 E. R. 491, L. C.

9106. —— On condition of bringing into estate money already received.]—A creditor, for goods sold & delivered, & also for money lent, is not entitled to regard them as two separate debts, or

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9100 i. —— —— *Whether court will restrain action—Creditor making tender impossible.*]—Where the composition was payable by instalments, & a creditor, alleging he had not been paid one of the instalments, brought an action on his original debt, & debtor applied to restrain the action, on the ground that the creditor had kept out of the way of payment for the purpose of bringing his action, the ct. directed the question of fact raised to be tried before itself, as preliminary to restraining the action.—*Re* L. (1889), 23 L. R. Ir. 528.—IR.

k. *Whether creditors' rights under arrangement released.*]—An arranging debtor carried a composition of 20*s.* in the pound payable by instalments.

to insist upon being paid his cash advances as a condition for his coming in with the other creditors under a composition in respect of his trading account; & where this has been done, & the composition has fallen through & debtor become bkpt., the creditor is not entitled to prove for the balance of his trading account, unless he bring in to the estate what he has so received in respect of his cash advances.—*Re* WESTROP, *Ex p.* UNDERWOOD (1859), 32 L. T. O. S. 395.

9107. —— After deducting instalment of composition received.]—A., by a deed of composition of Jan. 1, 1812, between him & his creditors, agreed to pay them 10*s.* in the pound on their respective debts by instalments, to be secured by promissory notes. The creditors covenanted that "when & as soon as such promissory notes should be paid & discharged" they would acquit & release A. The deed contained a proviso that in case of default in such payment, or if any commission of bkpcy. should issue against A. before the whole of the composition should be paid, then the covenants on the part of the creditors, whose debts should be unsatisfied, should be null & void. The first instalment was paid. The second was not. A commission issued against A. on Jan. 31, 1812, at the instance of a person who had become a creditor since the deed. The deed did not assign A.'s effects:—*Held:* the creditors were entitled to retain the first payment, & to prove under the commission for the residue of the original debt.—*Re* PALMER, *Ex p.* VERE (1812), 1 Rose, 281, L. C.

Annotation:—**Apld.** *Re* Chitty, *Ex p.* Ellis (1835), 4 Deac. & Ch. 736, Ct. of R.

9108. —— ——.]—By a deed of composition entered into by bkpt. with his creditors, dated Sept. 5, 1831, he agreed to pay them 10*s.* in the pound by two instalments of 5*s.* each, in consideration of which the creditors covenanted to release him from his debts as soon as both instalments were paid. The deed was executed only by the major part of the creditors. After the payment of the first instalment, on Oct. 31, 1831, a commission issued on an act of bkpcy. committed in June, 1831:—*Held:* the creditors, who had received the first instalment, were entitled to prove for the residue of their debts without refunding the amount of the instalment.—*Re* WOOD, *Ex p.* WOOD (1832), 2 Deac. & Ch. 508, Ct. of R.

9109. —— ——.]—An assenting creditor to a deed of composition, made in accordance with 1861 Act, s. 192, who has received a portion of the composition, is entitled to prove against the estate of debtor on his being adjudicated bkpt., giving credit for the portion of the composition received by him.—*Re* WRIGHT (1868), 19 L. T. 149.

9110. —— After deducting security—If electing to retain same.]—On an agreement for a composition, A., a creditor, received as a further security the assignment of several debts due to B., debtor. Default was made in payment of the instalments of the composition, & B. became bkpt.:—*Held:* A. might prove for the amount of his original debt, but he could not also retain the benefit of the assignment of the debts, & the value of the latter must be ascertained, & liberty should be given for A. to prove for the difference, if he elected to retain them.—*Re* CHITTY, *Ex p.* ELLIS (1835), 4 Deac. & Ch. 736; 2 Mont. & A. 370; 4 L. J. Bcy. 77, Ct. of R.

Annotation:—**Refd.** *Re* Westrop, *Ex p.* Underwood (1859), 32 L. T. O. S. 395.

9111. —— Though part of balance tendered—Creditor refusing to give receipt in terms asked.]—Debtor, in 1831, agreed with his creditor to pay him a composition of 5*s.* in the pound upon the amount of his debt, by instalments. The first instalment was paid, when the creditor agreed to give debtor a release in full, on his paying the balance of the composition. Debtor made default in payment of the balance, but in Feb., 1839, being pressed for the payment "of the demand" of the creditor, he made a payment of £100 in part of the balance of the composition, & required a receipt, as "for a composition of 5*s.* in the pound, upon the balance of account owing by him." The creditor acknowledged the payment of the £100, but declined signing a receipt in such form. In Sept., 1839, debtor became bkpt.:—*Held:* the agreement for the composition did not preclude the creditor from proving for the balance of the original debt, & it was not barred by Stat. Limitations.—*Re* WOTHERSPOON, *Ex p.* BATESON (1840). 1 Mont. D. & De G. 289; 4 Jur. 994, Ct. of R.

9112. —— Creditor surety for composition—Conduct inducing other creditors to compound—Deduction of security.]—Although a creditor is not paid the amount of a composition entered into with his compounding debtor, he will not be remitted to his original debt, in case of the bkpcy. of his debtor, if he himself was security for payment of the composition to the other creditors, & if by his conduct in the transaction it may be fairly inferred that he induced the other creditors to enter into the composition; in such case his proof will be confined to the balance of the original debt, after deducting the amount of the composition. If he holds a security, he will be allowed to place a value on it, & deduct it from the sum for which he is entitled to prove; & if he hold back any part of his debt at the time of the composition, which he is subsequently paid, it will be deducted from his proof.—*Re* KEARNEY, *Ex p.* KEARNEY (1851), 17 L. T. O. S. 18.

9113. —— Notwithstanding terms of discharge.]—Debtor executed an assignment of his property to a trustee for the benefit of his creditors. The deed provided for the distribution of the assets by the trustee ratably among all the creditors, & contained a covenant by which "in consideration of the premises," the creditors, parties to the deed, agreed to "release debtor from all claims & demands" against him. Debtor was adjudicated bkpt. upon the petition of a non-executing creditor, the act of bkpcy. proceeded upon being the execution of the deed:—*Held:* the deed sufficiently showed that the release was not intended to bind the executing creditors in the event of bkpcy., & they were entitled to prove.—*Re* STEPHENSON, *Ex p.* OFFICIAL RECEIVER (1888), 20 Q. B. D. 540; 57 L. J. Q. B. 451; 58 L. T. 589; 36 W. R. 624; 4 T. L. R. 258; 5 Morr. 44, D. C.

Annotations:—**Consd.** *Re* Clark, *Ex p.* Beardmore, [1894] 2 Q. B. 393, D. C. **Mentd.** *Re* O'Sullivan, *Ex p.* Ferd. Baller (1892), 61 L. J. Q. B. 228, D. C.

9114. Right to prove for balance of composition—No instalment in arrear at date of bankruptcy.]—A composition agreement between debtor & his creditors provided for the payment of a composition of 9*s.* in the pound by four instalments, with a proviso that in case the composition should

After payment of some of the instalments, debtor made default in payment. He was afterwards adjudicated a bkpt., & he carried a composition after bkpcy. of 2*s.* 6*d.* in the pound, which composition was paid to all his creditors, including those under the arrangement matter, & amongst others to A. & B. Neither A. nor B. attended or voted at the meeting at which the composition in the bkpcy. matter was carried, but A. proved, & A. & B. received the 2*s.* 6*d.* in the pound:—*Held:* neither A. nor B. had thereby waived or released their rights under the arrangement.—*Re* GUILFOYLE (1885), 15 L. R. Ir. 238.—IR.

Sect. 10.—Position of creditors: Sub-sect. 1, A. (b) ii. & B. & C.]

not be duly paid, the release should be null & void. Debtor paid three instalments, & became bkpt. before the time for payment of the fourth :—*Held :* the creditors were not remitted to their original debt, but were entitled to a proof only for the amount of the remaining instalment.—*Re* DODGSON, *Ex p.* PEELE (1813), 1 Rose, 435, L. C.

B. Consideration given to other Creditors to procure Assent.

9115. Whether creditors bound.]—If there is a fraudulent bargain for the benefit of some of the creditors the ct. will hold the deed not to be binding on a non-assenting creditor.—*Re* COWEN, *Ex p.* COWEN (1867), 2 Ch. App. 563 ; 16 L. T. 469 ; 15 W. R. 859, L. JJ.

Annotations :—**Apld.** *Re* Deacon, *Ex p.* Deacon (1868), 4 Ch. App. 87, L. JJ. **Folld.** Hart *v.* Smith (1868), L. R. 4 Q. B. 61 ; *Re* Pullen, *Ex p.* Williams (1870), L. R. 10 Eq. 57. **Apld.** *Re* Sedley, *Ex p.* Cobb (1873), 8 Ch. App. 727, L. JJ. **Folld.** *Re* Wedgwood Coal & Iron Co. (1877), 6 Ch. D. 627. **Mentd.** *Re* Burrs, *Ex p.* Fore St. Warehouse Co. (1874), 30 L. T. 624, L. J.

See, also, Sub-sect. 2, D., *post.*

9116. —— Requisite majority obtained by secret payments to some creditors—Payments made by third party—Unknown to debtor.]—A statutory majority of the creditors, obtained by including creditors who, unknown to debtor, have received from a third person additional payments on account of their debts in order to induce them to assent, is not such a majority as will bind a dissentient minority under 1861 Act, s. 192, & the execution of a deed of arrangement, in such circumstances, raises no defence to an action for his debt brought by a dissentient creditor.—HEMMING *v.* PUGH (1863), 1 New Rep. 239.

9117. —— Payment made before registration.]—At a meeting of A.'s creditors, a composition of 5*s.* in the pound was offered & refused, & A. subsequently executed a deed of assignment to a trustee for the benefit of his creditors. The estate, as appeared by the account of the trustee, showed 2*s.* 2*d.* only in the pound, but, previously to the registration of the deed four creditors actually received 5*s.* in the pound from or through the clerk to the attorneys acting for both A. & the trustee. Upon application being made by a dissenting creditor for leave to render process available, notwithstanding the registration, it was contended that the payment of 5*s.* in the pound to certain of the creditors was an unfair inducement to execute the deed, rendering same void as against creditors :—*Held :* it was the duty of the ct. to insist upon the most perfect good faith being kept, & that no undue advantage was offered to any creditor to assent, & the application must be granted.—*Re* ELLIS, *Ex p.* NELSON (1865), 13 W. R. 760.

9118. —— Executing deed.]—Declaration on the money counts. Pleas, that by a deed of arrangement made between deft. of the first part, certain trustees of the second part, & the creditors of defts. named in a schedule to the deed of the third part, deft. assigned all his estate to the trustees in trust for distribution equally among all his creditors, & that by the deed the parties of the first & second parts did, if & when the deed should have been executed by four-fifths in number & value of the creditors, release deft. from all demands, etc., that the deed was executed by such majority & amongst others by D., one of pltfs., & that deft. was released from all causes of action. The replication, on equitable grounds, averred that deft. agreed with certain of his creditors, being other than pltfs. to pay or secure to such creditors, in consideration of their executing the deed, certain pecuniary & valuable benefits & preference over the others, & thereby induced such preferred creditors to execute the deed, & that such agreement was made, & such execution by the preferred creditors procured, without the knowledge or consent of pltfs. or of the creditors of deft. other than the preferred creditors, & that deft. procured the deed to be executed by such majority by the fraudulent agreement :—*Held :* the deed was void against pltfs. on the ground that, in order to make such a deed binding upon the creditors, there must be perfect good faith between all the creditors, & debtor, & no creditor be induced to sign the deed in consequence of receiving some benefit beyond the rest of the creditors.—DAUGLISH *v.* TENNENT (1866), L. R. 2 Q. B. 49 ; 8 B. & S. 1 ; 36 L. J. Q. B. 10 ; 15 W. R. 196.

Annotations :—**Apld.** *Re* Milner, *Ex p.* Milner (1885), 15 Q. B. D. 605, C. A. **Refd.** Hart *v.* Smith (1868), 9 B. & S. 543.

See, also, Part XX., Sect. 12, *ante.*

9119. —— ——.]—The essence of a composition arrangement between debtor & his creditors is equality between the creditors, & a creditor who has executed a composition deed is entitled to repudiate it, if he afterwards discovers that other creditors have been induced to execute the deed by means of a secret bargain for a payment to them in excess of the composition, even if the bargain was made after his own execution of the deed. This principle applies, even if the additional payment is to be made at the expense of a third party, provided that the bargain is made with debtor's knowledge, & it applies whether the composition arrangement is made under the provisions of an Act or not.—*Re* MILNER, *Ex p.* MILNER (1885), 15 Q. B. D. 605 ; 54 L. J. Q. B. 425 ; 53 L. T. 652 ; 33 W. R. 867 ; 1 T. L. R. 553 ; 2 Morr. 190, C. A.

Annotations :—**Refd.** *Re* E. A. B. (1901), 85 L. T. 773, C. A. ; Sier *v.* Bullen (1915), 84 L. J. K. B. 1288, D. C.

9120. Agreement signed on understanding that no preference given—Payment made under pressure—Not in pursuance of previous agreement.]—At the time of entering into an agreement it was known that debtor was being sued in a county ct. by P., as exor. of a creditor, for a small sum which was afterwards paid in full the day before the cause was ripe for trial. The agreement contained a provision that it was signed by the creditors on the understanding that no concealment of fraud had been practised by debtor, the whole of the creditors receiving not exceeding the amount of the composition on discharge of their debts :—*Held :* the payment to P. being made under pressure, & not in pursuance of a prior agreement to give him a preference, did not render the transaction void.—CAREY *v.* BARRETT (1879), 4 C. P. D. 379, D. C.

PART XXIII. SECT. 10, SUB-SECT. 1.—B.

9115 i. *Whether creditors bound.*]—An agreement with one creditor to pay him in full, on condition of his procuring other creditors to sign a composition deed, & a subsequent payment accordingly, do not avoid the deed as to any other of the creditors.—HUGHES *v.* GILLESPIE (1842), Arm. M. & O. 379.—IR.

9116 i. —— *Requisite majority obtained by note to cover law costs incurred by some creditors—Note given by trustee—Unauthorised by debtor.*]—Where creditors signed a deed of composition & discharge, upon the assignee giving them his note to cover certain costs which they had incurred in endeavouring to recover the claim, & there was not a sufficient number in value of creditors signing without them :—*Held :* the deed was invalid, even though the act of the assignee was unauthorised by the insolvent.—*Re* MCRAE (1877), 1 A. R. 387.—CAN.

C. Secured Creditors.

See, generally, Part IX., *ante*.

9121. Right to retain security—Deed containing no stipulation for surrender of same.] — The creditors of an insolvent agreed, by an instrument not under seal, that they would accept in full satisfaction of their debts 12*s.* in the pound, payable by instalments, & would release him from all demands. One of the creditors, who signed for the whole amount of his debt, held at the time, as a security for part, a bill of exchange drawn by debtor & accepted by a third person. The money due on such bill having afterwards been paid by the acceptor:—*Held:* the creditor might retain it, the agreement of composition not containing any stipulation for giving up securities, & the effect of it not being to extinguish the original debt.—THOMAS *v.* COURTNAY (1817), 1 B. & Ald. 1; 106 E. R. 1.

Annotations:—**Consd.** Nichols *v.* Norris (1831), 3 B. & Ad. 41; Pfleger *v.* Browne (1860), 28 Beav. 391. **Refd.** Constable *v.* Andrew (1833), 3 L. J. Ex. 55. **Mentd.** Cowper *v.* Green (1841), 7 M. & W. 633.

9122. —— Deed signed without prejudice to securities held.]—D., a partner in a mercantile firm, having applied to O., who was already a creditor, for further advances of money for the use of the firm, which O. had refused to make without security, mtges. were executed to him of two of the concerns of the firm to secure £15,000, & of an estate, the several property of D., for £10,000. The estate was already under mtge., but the equity of redemption was conveyed by D. to O. to secure the advances & liabilities of O. on account of the firm to the amount of £10,000. After the execution of the deeds, O. made advances on account of the firm to the extent of £20,000. The deeds were executed in 1814. After that time various accounts were settled between O. & the firm, in which a balance was found due from them to O. amounting to £7,830 beyond the £25,000 secured by the three mtges. In 1816 the firm became insolvent, & in 1817 a docket was struck against them, but the creditors being desirous of preventing a bkpcy., entered into an agreement for a composition, which was carried into execution by a deed dated in Sept., 1817, by which the creditors bound themselves to accept 7*s.* in the pound upon their respective debts, for which J., one of the partners, alone became liable, D. retiring from the firm, & being released from the debts of the firm. On Nov. 6, 1817, the equities of redemption of the premises belonging to the firm, which O. held under two deeds of mtge., were conveyed to him in discharge of the sums of £10,000 & £5,000 respectively, the sums secured upon them. On the same day another deed was executed between D. & O., by which O. upon certain conditions, bound himself to take £8,000 instead of £10,000, the sum secured upon the estate of D., & to permit him to redeem on payment of that sum. The deed of composition was signed by O., the first of the creditors, & to his signature he added the words "without prejudice to the securities which I hold." The other creditors parties to the deed wrote their signatures under that of O. Upon a bill filed by O. to raise the debt of £8,000 by sale of the mortgaged premises, & a cross bill by D. stating that the partnership premises were given up to O. at a rate far below their value, insisting that the composition was taken by O. for his whole debt, that an account ought to be taken of the value of all the partnership property originally held by O. in security for his debt, & that his separate estate should not be applied to the payment of the debt of the firm until after the partnership securities & funds had been exhausted:—*Held:* the signature of the composition deed by O. was not, in the circumstances, a waiver of the security, & the equity of D., if any, to an account & application of the partnership securities was lost by acquiescence, & precluded by want of interest.—DUFFY *v.* ORR (1831), 5 Bli. N. S. 620; 1 Cl. & Fin. 253; 5 E. R. 449, H. L.

9123. —— ——.]—C., having an interest in £10,000, subject to a mtge. made by himself to D., & having also other property subject to mtges., assigned the £10,000, subject to the mtge. to D., & also the other property, subject to the mtges. affecting it, to trustees, upon trust to pay the mtges. affecting both, & to divide the surplus among the other creditors of C., &, by the same deed, C.'s creditors released him from all demands in respect of their debts. D. being applied to by C. to execute the deed, refused to do so unless his mtge. security upon the £10,000 was preserved, & C.'s solrs., one of whom, T., was a trustee under the trust deed, prepared a memorandum, which was indorsed on the deed, & declared that D., by executing the deed, should not affect his mtge. security upon the £10,000. D. then executed the

PART XXIII. SECT. 10, SUB-SECT. 1. —C.

m. *Position generally.*]—Under the arrangement clauses of Irish 1857 Act, a creditor holding a mtge. is in the same position as in proceedings in bkpcy.—*Re* FERRALL (1867), 1 I. R. Eq. 81.—**IR.**

n. —— *Whether bound to inform other creditors of security.*]—Where a deed of composition stated that it should not "affect any mtge., hypothec, lien, or collateral security held by any creditor as security for any debts":—*Held:* a creditor, whose claim was fully secured by a mtge. on real estate & other collaterals, was not bound to communicate that fact to the other creditors at the time of, or before, executing the deed.—HENDERSON *v.* MACDONALD (1873), 20 Gr. 334.—**CAN.**

o. —— *Whether trustee of estate.*]—A secured creditor of a person who has made an assignment for the benefit of creditors is not, by virtue of Assignments & Preferences Act, 1914 (c. 147) an express trustee, but at most a constructive trustee of the estate, notwithstanding that by the resolution of the creditors he was appointed one of the inspectors of the estate with power in conjunction with the assignee to realise upon the assets of the estate to the best advantage.—TAYLOR *v.* DAVIES (1918), 41 D. L. R. 510; 41 O. L. R. 403; 13 O. W. N. 323.—**CAN.**

p. —— *Creditor not assenting.*]—A secured creditor does not assent to a deed of assignment when he applies for & receives payment out of the assigned funds in reduction of his principal debt as if no such deed had been made, & for interest accrued after the date of the deed.—*Re* GRANT, HARRIS *v.* FINKER (1896), 15 N. Z. L. R. 557.—**N.Z.**

9122 i. *Right to retain security—Deed reserving rights.*]—A deed was executed by which insolvent covenanted to pay a composition & give each creditor indorsed notes therefor, & the creditors released him from all their respective claims, "saving & reserving the rights which any of them may have against any other person, or in respect of any security held by them, or any of them." A. & Co. had a claim amounting to $2,758, for $800 of which they held collateral security. The composition on their claim having been placed in the assignee's hands for them:—*Held:* A. & Co. were entitled to retain their securities, & not bound to value them. —*Re* STERN (1875), 37 U. C. R. 296.—**CAN.**

9122 ii. —— —— *Notice of lien.*]—M. made an assignment for the benefit of creditors to deft., who was preferred for the sum of $4,000. There was a proviso that nothing in the deed contained should "prevent the creditors or any of them from enforcing or otherwise obtaining the full benefit of any charge or lien, which they then had upon any estate or effects whatever." Prior to the assignment, M. received $600 in cash from deft., as security for which he assigned a legacy which he expected to receive from R. The other creditors who executed the deed of assignment had no notice of such indebtedness, or of the security held for it:—*Held:* if the assignment of the legacy constituted a "charge or lien," there was notice to creditors under the deed that rights of that kind were to be preserved unaffected.—BANKS *v.* MACKINTOSH (1895), 27 N. S. R. 478.—**CAN.**

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deed, & at the same time signed the indorsement, which was also signed by T. There was no reason to suppose that the indorsement was, or was intended to be, concealed from any of the other creditors who executed the trust deed:—*Held:* D. did not waive his rights or remedies as mtgee. of the £10,000.—LEE *v.* LOCKHART (1837), 3 My. & Cr. 302; 1 Jur. 769; 40 E. R. 941, L. C.

Annotation:—**Refd.** *Re* Blakely, *Ex p.* Harvey (1854), 4 De G. M. & G. 881, L. JJ.

9124. —— Whether separate security—Creditor acting in common with joint creditors.]—Where a joint creditor of a firm has a private security for his debt on a separate estate, belonging to one of the partners of the firm, he will not be allowed to take advantage of a general composition deed, & also retain his private security, unless he either holds himself entirely aloof from the other joint creditors, or distinctly communicates with them on the subject, if he acts in common with them at all, & the circumstances of his having postponed his execution of the composition deed till after he has realised his private security, & debtor being the complaining party, do not prevent the application of the rule.—CULLINGWORTH *v.* LOYD (1840), 2 Beav. 385; 9 L. J. Ch. 218; 4 Jur. 284; 48 E. R. 1230.

Annotations:—**Apld.** Bush *v.* Shipman (1844), 14 Sim. 239; Société Générale de Paris *v.* Geen (1883), 8 App. Cas. 606, H. L. **Mentd.** Pfleger *v.* Browne (1860), 28 Beav. 391.

9125. —— —— Deducted in error in proving on joint estate.]—B. & Co. were creditors of a partnership for £2,400, for which they held a security comprising joint property of the firm & also separate property of one of the partners. The firm being in difficulties, the joint creditors agreed to accept a composition, & B. & Co. valued their security at £800, & proved & received the composition upon the balance. Subsequently they received from their security more than £800 & interest from the date of valuation. Four years after the close of the composition debtors brought an action to redeem their security. B. & Co. claimed to retain the security on the separate property until they had received payment in full of their claim, on the ground that they need not have deducted the separate property:—*Held:* B. & Co. could not retain the separate security, on the ground that although B. & Co. need not have deducted the value of the separate security, yet, as the composition had been fixed, & the whole proceeding in the composition had been taken & completed upon the footing of the valuation of the compound security at £800, it was too late to upset the transaction.—COULDERY *v.* BARTRUM (1881), 19 Ch. D. 394; 51 L. J. Ch. 265; 45 L. T. 689; 30 W. R. 141, C. A.

Annotations:—**Apprvd.** Société Générale de Paris *v.* Geen (1883), 8 App. Cas. 606, H. L. **Mentd.** *Re* Button, *Ex p.* Voss (1905), 74 L. J. K. B. 403, C. A.

9126. —— Deed releasing debt.]—By the release of a debt by a composition deed, the creditor loses also the right to retain a written instrument deposited with him by debtor as a security for the debt.—COWPER *v.* GREEN (1841), 7 M. & W. 633; 10 L. J. Ex. 346; 151 E. R. 920.

Annotations:—**Consd.** Bateson *v.* Gosling (1871), 41 L. J. C. P. 33. **Refd.** Cragoe *v.* Jones (1873), L. R. 8 Exch. 81. **Mentd.** Shadwell *v.* Shadwell (1860), 7 Jur. N. S. 311.

9127. —— Secured bills of exchange proved for full amount by holder.]—Pltf. gave credit to defts. for goods sold & made advances to them; goods were deposited by defts. with pltf. as security, & bills were drawn by pltf. & accepted by defts. for the amounts of the goods sold & advances made. Pltf. indorsed away such bills for value. During the currency thereof defts. filed a petition for liquidation under 1869 Act, & their creditors duly resolved to accept a composition. The holders of the bills, by arrangement between themselves & pltf., claimed & were paid the composition on the total amounts of the bills, pltf. paying them the balance thereof. Pltf. did not send in any proof or claim any dividend, but he realised his security by sale of the goods deposited & claimed to hold the proceeds against the balance so paid by him upon the bills:—*Held:* pltf. had no right to do so, as by such arrangement the holders of the bills had in effect received the composition for the benefit of pltf., so that, according to the bkpcy. law, he was bound to account to defts. for the amount by which the composition paid on the bills exceeded that which would have been paid if the value of the security had been previously deducted.—BAINES *v.* WRIGHT (1885), 16 Q. B. D. 330; 55 L. J. Q. B. 99; 54 L. T. 724; 34 W. R. 211; 2 T. L. R. 194, C. A.

9128. Right to set up security—After composition accepted—Debt proved without deducting security.] — A secured creditor, who proves his debt without deducting the value of his security, cannot, after a composition has been accepted, be allowed to set up his security.—*Re* BALBIRNIE, *Ex p.* JAMESON (1876), 3 Ch. D. 488; 45 L. J. Bcy. 156; 35 L. T. 533, C. A.

Annotation:—**Distd.** *Re* McColla, *Ex p.* McLaren (1881), 16 Ch. D. 534, C. A.

9129. Realisation—Jurisdiction of court—To order sale at instance of equitable mortgagee.]—In a case of a composition the Ct. of Bkpcy. has no jurisdiction to make an order for sale at the instance of an equitable mtgee.—*Re* LITTLER, *Ex p.* MANCHESTER & LIVERPOOL DISTRICT BANKING CO. (1874), L. R. 18 Eq. 249; 43 L. J. Bcy. 73; 30 L. T. 339; 22 W. R. 567.

Annotations:—**Folld.** Simpson *v.* Henning (1875), L. R. 10 Q. B. 406. **Mentd.** *Re* Balbirnie, *Ex p.* Jameson (1876), 3 Ch. D. 488.

9130. —— —— To hear application after property revested in debtor.]—The Ct. of Bkpcy. has no jurisdiction to entertain an application by a mtgee., after the approval of a scheme, if the property has been revested in debtor.—*Re* HOLMES, *Ex p.* WOODS (1880), 43 L. T. 447; 29 W. R. 124.

9131. —— Bill for foreclosure against debtor—Whether trustees must be made parties.]—A depositor, by way of mtge. of a lease, made a

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9126 i. —— *Deed releasing debtor.*]—A. made an assignment for the benefit of his creditors, & thereby provided for the preferential payment of all sums which other persons were liable for as sureties or indorsers for him:—*Held:* the creditors to whom those secured sums were due were entitled to the benefit of the provision, & would not lose it by executing the deed of assignment, though it contained a clause releasing debtor.—SQUIRE *v.* WATT (1869), 29 U. C. R. 328.—CAN.

9126 ii. *S. P.*—THORNE *v.* TORRANCE (1866), 16 C. P. 445; (1868), 18 C. P. 29.—CAN.

r. —— *Where trustee does not take over security.*]—The effect of an assignee determining not to take over a security is that the secured creditor retains the property, upon which the security is held, discharged of the equity of redemption of the assignee or of any other person who would otherwise be entitled to redeem.—TAYLOR *v.* DAVIES (1918), 41 D. L. R. 510; 41 O. L. R. 403; 13 O. W. N. 323.—CAN.

s. *Abandonment—Receipt of dividend.*]—An arranging debtor returned B., a creditor holding a judgment mtge., as an unsecured creditor. B. informed the solr. for the arranging trader that he held a mtge., & would rely upon it. The arrangement was effected, & the assignees sent to B. a dividend warrant for the full amount of the composition, which B. received, & placed to the credit of the mtge. debt. The trader subsequently became bkpt.:—*Held:* the creditor did not elect to abandon his mtge. security.—*Re* FERRALL (1867), 1 I. R. Eq. 81.—IR.

registered assignment, under 1861 Act, of all his estates & effects to trustees, in favour of his creditors. The trustees had not done any act to signify their acceptance of the lease. The mtgee. filed a bill for foreclosure or sale against the mtgor., not making the trustees parties. A plea of the assignment was allowed, with leave to amend.—METROPOLITAN BANK *v.* OFFORD (1870), L. R. 10 Eq. 398 ; 39 L. J. Ch. 820 ; 22 L. T. 699.

9132. —— Right to realise & prove for difference—No election to take security in full satisfaction.]—Debtor, in his statement of affairs, entered A. as a creditor, fully secured. The creditors accepted a composition of 10*s.* in the pound. A. did not attend or take any part at either of the meetings, nor prove any debt under the petition. Debtor paid the composition to all the creditors except A. Two years afterwards debtor filed a second petition, whereupon A. realised his security, & claimed to prove under the first petition for the balance remaining due :—*Held :* A. was not bound by debtor's statement of his affairs, & he was entitled to prove for the balance found due to him, & he paid the composition payable upon such balance. *Semble :* if A. had clearly elected to take his security in full satisfaction of what was due to him, he would not have been entitled to anything.—*Re* BESTWICK, *Ex p.* BESTWICK (1876), 2 Ch. D. 485 ; 45 L. J. Bcy. 148 ; 34 L. T. 784 ; 24 W. R. 938, C. A.

Annotation :—**Distd.** Couldery *v.* Bartrum (1881), 30 W. R. 141, C. A.

—— Security realising more than valuation.]—*See* Nos. 9134, 9135, *post.*

9133. Valuation—Whether bound by debtor's valuation in statement of affairs.]—Where in composition proceedings under 1869 Act, s. 126, a creditor is placed in debtor's statement of affairs as a partly secured creditor in respect of a certain debt, & debtor in the statement values the security at *nil*, the creditor need not take any step to signify his assent to such valuation.—HAWES *v.* BAUMAN (1885), 34 W. R. 116 ; 2 T. L. R. 104, C. A.

9134. —— Security realising more than valuation—Right to surplus.]—By a composition deed, debtor, in consideration of a covenant on the part of himself & a surety to pay a composition of 10*s.* in the pound, obtained a release from his scheduled debts by a statutory majority of his creditors. The deed contained a proviso that every secured creditor should have the full benefit & advantage of his security, & should be entitled to the composition after allowing for the value of such security. Amongst the secured creditors was one for £229 8*s.* 5*d.*, whose security was a policy of assurance on the life of debtor. The creditor valued the policy at £16 ; & for the difference, *viz.*, £213 8*s.* 5*d.*, he received the composition of 10*s.* in the pound. The policy having fallen in after some premiums had been paid by the creditor :—*Held :* the creditor, upon execution of the deed, remained a creditor for £16 only, &, the composition having been duly paid, the proceeds of the policy, after payment of £16 & interest, belonged to debtor's estate, subject to repayment with interest to the creditor of premiums which he had paid.—BOLTON *v.* FERRO (1880), 14 Ch. D. 171 ; 49 L. J. Ch. 569 ; 42 L. T. 529 ; 28 W. R. 578.

Annotation :—**Apprvd.** Société Générale de Paris *v.* Geen (1883), 8 App. Cas. 606, H. L.

9135. —— —— ——.]—*Held :* the effect of General Rules, 1870, r. 272, read together with 1869 Act, s. 126, was that in composition proceedings under s. 126 a secured creditor, who proved for the balance of his debt after deducting the assessed value of his security, & afterwards realised the security, must pay to debtor any surplus realised above the assessed value, after allowing interest upon the assessed value from the assessment until the realisation.—SOCIÉTÉ GÉNÉRALE DE PARIS *v.* GEEN (1883), 8 App. Cas. 606 ; 53 L. J. Ch. 153 ; 49 L. T. 750 ; 32 W. R. 97, H. L.

Annotation :—**Refd.** Pearce *v.* Bullard, King, [1908] 1 Ch. 780.

9136. —— —— —— Creditor accepting security as part payment.]—One of the trustees of a composition deed consented that one of the other creditors, a banker, should retain a policy of assurance which he held as a security for his debt, in part discharge of such debt. This was not communicated to the other creditors, but the trustee subsequently bought up the interests of all the creditors & paid them a composition :—*Held :* the banker was entitled to the money recovered on the policy for his absolute use.—OSBORN *v.* MILFORD (1853), 1 W. R. 137.

9137. —— Security overvalued—Promissory notes given for composition—Whether further rights.]—Debtor's estate was vested in trustees under a scheme of arrangement approved by the ct. under 1890 Act, s. 3. The net proceeds were

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9132 i. *Realisation—Right to realise & prove for difference.*]—A deed for the benefit of creditors excluded all preference & priority as to payment of the debts :—*Held :* a secured creditor for anything beyond what his security would bring could claim only the same as other creditors.—GORE BANK *v.* SUTHERLAND (1865), 1 C. L. J. N. S. 159.—**CAN.**

9132 ii. —— ——.]—Where a deed provides that debts are to be proved & paid according to bkpcy. law, a secured creditor cannot claim under the deed more than a dividend on the amount of the difference between his principal debt & the value of his security, together with interest up to the date of the deed.—*Re* GRANT, HARRIS *v.* FINKER (1896), 15 N. Z. L. R. 557.—**N.Z.**

a. —— *Right to sue for deficiency.*]—The creditors of bkpt. passed resolutions accepting a composition of 10*s.* in the pound to unsecured creditors. The composition was paid to all creditors who held no security, & the bkpcy. was annulled. A secured creditor, whose securities had on realisation proved deficient, & who had not proved against the estate, sued debtor for the balance of the original debt due to him :—*Held :* (1) the words " unsecured creditors " in the resolution were either surplusage or included a person having a claim for an unsecured balance ; (2) a creditor holding a security was within the composition as being an unsecured creditor in respect of his unsecured balance ; (3) such creditor could not sue for the balance due.—LEVIN *v.* DEATH (1889), 8 N. Z. L. R. 150.—**N.Z.**

b. —— *Security realised by trustee—Right to sue trustee.*]—Pltfs. lent F. bank stock, to secure which he assigned & delivered to them notes & acceptances made by T. F. obtained the notes from pltfs. to collect for them, & subsequently assigned to deft. for the benefit of creditors, & included the notes in the sched. attached to the assignment, but stated in the deed that pltfs. held the notes as security for their loan. All the money received from T. came into deft.'s hands :—*Held :* pltfs. might recover from defts. as money had & received to their use, the amount of their loan out of the money received on the notes.—LEE *v.* WOODSIDE (1862), 22 U. C. R. 15.—**CAN.**

c. *Valuation—What property to be valued.*]—The security upon which the creditor is to put a specific value under Assignments & Preferences Act, 1914 (c. 147), s. 20 (4), is the property upon which the debt is secured.—TAYLOR *v.* DAVIES (1918), 41 D. L. R. 510 ; 41 O. L. R. 403 ; 13 O. W. N. 323.—**CAN.**

d. —— *Whether valuation must be on oath—Or in claim filed.*]—It is sufficient under the above sub-sect. if the creditor deliver to the assignee, a simple & separate statement that he puts a stated value on his security ; such creditor need not put in a specified value on oath, nor is it incumbent on him to insert the specified value in the claim filed with the assignee.—TAYLOR *v.* DAVIES (1918), 41 D. L. R. 510 ; 41 O. L. R. 403 ; 13 O. W. N. 323.—**CAN.**

e. *Double ranking — Application of rule.*]—The rule forbidding double ranking of securities for the same debt on a bkpt. estate applies only where the debtor has been properly divested of his estate in favour of a trustee for behoof of creditors, & not to cases in which he has merely made an extra-judicial settlement.—MACKINNON *v.* MONKHOUSE (1881), 19 Sc. L. R. 324.—**SCOT.**

Sect. 10.—*Position of creditors: Sub-sect.* 1, *C. & D.; sub-sect.* 2, *A.*]

to be applied in payment of (1) the expenses, (2) the preferential debts, (3) a composition of 7*s.* 6*d.* in the pound on the unsecured debts in three instalments. The payment in full of the instalments at their respective dates was further secured by the joint & several promissory notes of the trustees. Appct., a creditor, had made no claim for a year, & then had overvalued his security:—*Held:* the trustees having entered into no contract apart from the promissory notes, he was not entitled to payment in full of the composition.—*Re* MORTER, *Ex p.* NICHOLLS (1897), 45 W. R. 593; 41 Sol. Jo. 624, C. A.

See 1914 Act, s. 16 (10).

D. Other Cases.

Rights of creditors not party to deed to whom deed not communicated.]—*See* Nos. 9315, 9533 *et seq.*, *post.*

Whether entitled to interest.]—*See* No. 9313, *post.*

Right to add costs of action.]—*See* No. 9314, *post.*

SUB-SECT. 2.—ASSENTING CREDITORS.

A. Right to assent.

9138. Who may take benefit—Only creditors to whom trustees should give debentures—After investigation of claims.]—A. being greatly in debt, he & his father, in pursuance of an arrangement between themselves, conveyed estates of which they were seised for life & in remainder respectively to trustees in trust to sell for payment of A.'s debts, but no creditor was to be entitled to the benefit of the trust unless the trustees, after having investigated & allowed his debt, should give him a debenture for it. The trustees gave debentures to three of the creditors, after which one of the trustees instituted a suit against his co-trustees, etc., & on the hearing the master was directed to take an account of all A.'s debts due at the date of the conveyance & to advertise for his creditors to prove their debts by a day to be named or be excluded from the benefit of the decree. Pltf. & several other creditors of A. having proved their debts under the decree:—*Held:* none of them except pltf. & the debenture creditors were entitled to the benefit of the trust.—DREVER *v.* MAWDESLEY (1849), 16 Sim. 511; 18 L. J. Ch. 273; 13 Jur. 330; 60 E. R. 973.

9139. —— Creditor refusing to verify claim—Unfounded allegation of settled account—Previous dividends not disturbed.]—A creditors' deed was executed in 1849. Pltf., a creditor who had executed the deed, insisted on an alleged settled account, & refused to verify his claim, as required by the deed. A dividend was paid the other creditors in 1854, & in 1856 pltf. instituted a suit for the performance of the trusts of the creditors' deed. There being no valid settled account:—*Held:* pltf. was entitled to the benefit of the deed, but only on the terms of not disturbing any dividend already made.—FIELD *v.* COOK (1857), 23 Beav. 600; 53 E. R. 236.

9140. —— Only creditors having provable debts at execution of deed.]—Throughout 1861 Act, the word "creditor" is used in the sense of a person having a claim which can be proved under the bkpcy., whether upon a debt or not, & in s. 192, the word "creditors" means all persons who at the time of the execution of the deed had claims which would have been provable against the estate, if debtor had then become bkpt.—WOOD *v.* DE MATTOS (1865), L. R. 1 Exch. 91; 3 H. & C. 987; 35 L. J. Ex. 64; 15 L. T. 142; 12 Jur. N. S. 78; 14 W. R. 226; 159 E. R. 824, Ex. Ch.

Annotations:—**Distd.** Hoggarth *v.* Taylor (1867), L. R. 2 Exch. 105. **Consd.** *Re* Thompson, *Ex p.* Wilmot (1867), 2 Ch. App. 795, L. C. & L. JJ.; Sharland *v.* Spence (1867), L. R. 2 C. P. 456; Solomon *v.* Isaacs (1872), 27 L. T. 624, Ex. Ch. **Refd.** Robertson *v.* Goss (1867), L. R. 2 Exch. 396; Bailey *v.* Bowen (1868), L. R. 3 Q. B. 133; Hooper *v.* Marshall (1869), L. R. 5 C. P. 4. **Mentd.** Coles *v.* Turner (1866), L. R. 1 C. P. 373, Ex. Ch.

9141. —— —— Party having claim for unliquidated damages.]—A person who has a claim against debtor for unliquidated damages is not a creditor within 1861 Act, ss. 192, 197.

Where a trust deed under s. 192 does not in terms extend to creditors in respect of unliquidated damages, they cannot come in under the deed by virtue of s. 153. It is otherwise as to a deed in the form of Sched. D under s. 200.—*Re* THOMPSON, *Ex p.* WILMOT (1867), 2 Ch. App. 795; 36 L. J. Bcy. 17; 16 L. T. 650; 15 W. R. 969, L. C. & L. JJ.

Annotations:—**Expld.** *Re* Davies, *Ex p.* Cleland (1867), 2 Ch. App. 808, L. J.; Financial Corpn. *v.* Lawrence (1869), 38 L. J. C. P. 305. **Consd.** Solomon *v.* Isaacs (1872), 27 L. T. 624, Ex. Ch. **Refd.** Holmes *v.* Symons (1871), L. R. 13 Eq. 66.

9142. —— Party having contingent claim.]—Debtor executed an inspectorship deed which provided that, in the case of debts due from him on negotiable instruments, either the original holder, or the present or ultimate holder, or any intermediate indorsers, might execute or assent to the deed, but that the ultimate holder should be deemed the creditor & party to the deed. Debtor was liable on acceptances on bills drawn by S., who was returned as an assenting creditor in respect of them, but, in fact, S. was, at the time of the registration, the holder of only a small part of those bills, the rest being in the hands of his bankers, who had discounted them. After the registration all the bills came into the hands of S.:—*Held:* the bankers were the proper parties to have been returned as creditors in respect of the bills in their hands, & S. had no right to assent in respect of his contingent liability as drawer.—*Re* PETRIE, *Ex p.* PETRIE (1868), 3 Ch. App. 232; 37 L. J. Bcy. 13; 18 L. T. 169; 16 W. R. 467, L. JJ.

Annotations:—**Consd.** Hooper *v.* Marshall (1869), L. R. 5 C. P. 4. **Refd.** *Re* Broadridge, *Ex p.* Cyrus (1869), 5 Ch. App. 176, L. J. **Mentd.** Beddall *v.* King (1869), L. R. 4 C. P. 549.

See, also, cases in Sect. 10, sub-sect. 3, *A.*, *post.*

9143. —— —— Creditor whose debt was provable under previous composition—Promissory note taken after first composition for old debt.]—A receiving order was made against debtor, & the creditors, who had proved their debts under it, were paid a composition under 1890 Act, s. 3, & the order was rescinded. Applts. were creditors who did not prove their debts & received no composition, & after the rescission debtor gave them a promissory note for the amount of their debt. Subsequently debtor, being again in difficulties, executed a deed for the benefit of his creditors, the other parties to the deed including applts. as creditors. The deed recited that he had requested the creditors to give him time for payment & that they had agreed to do so, & in consideration thereof debtor assigned to a trustee certain property upon trust to realise it & pay the creditors, including applts. Ultimately the trustee had certain money in his hands for distribution, & he applied for a declaration that applts. were not entitled to the benefit of the deed:—*Held:* as applts.' debt was a provable debt under the composition & had

been discharged & no new consideration had been given for it, & there was no estoppel, applts. were not creditors at all, & were not entitled to the benefit of the deed.—*Re* PILET, *Ex p.* TOURSIER & Co. & BERKELEY, [1915] 3 K. B. 519 ; 84 L. J. K. B. 2133 ; 113 L. T. 926 ; 31 T. L. R. 558, D. C.

9144. —— Creditors who had voted against arrangement & defeated same—Subsequent desire to withdraw vote & assent so as to give requisite majority.]—At a meeting of creditors, whose proofs amounted to £50,075 3*s.* 1*d.* fifty-two creditors out of fifty-nine voted for a resolution for liquidation by arrangement, but their proofs fell short of three-fourths of the £50,075 3*s.* 1*d.*, by £4882, & the resolution was lost. Among those who had voted for bkpcy., as opposed to liquidation by arrangement, were two creditors whose debts amounted to £8,388. Both had voted by proxy, & were desirous of withdrawing their vote, & voting for liquidation by arrangement, in which case the requisite three-fourths in value would be attained :—*Held :* in the peculiar circumstances of the case, they might be deemed assenting creditors to the liquidation by arrangement.

Every case of the kind must be dealt with according to its own circumstances.—*Re* WEHNER (1871), 20 W. R. 199.

Annotation : **Refd.** *Re* Butlin, *Ex p.* Thorne (1873), 8 Ch. App. 723, n.

9145. —— Creditor not scheduled to deed—Bringing action against debtor.]—A creditor, whose name & the amount of whose debt are not entered in the statement of a compounding debtor, & who is not bound by the composition, may nevertheless take advantage of the composition & prove his debt, & claim a share in the fund in hands of the trustees.

A resolution having been passed at a meeting of creditors to accept a composition from debtor, debtor paid a sum of money to the trustee which was more than sufficient to pay the composition of all the creditors whose names & debts were entered in his statement. Other creditors, who were not bound by the composition, had previously filed a bill in Ch. against debtor & certain persons, charging them with a breach of trust. They did not come in & prove such debt in the composition, but simply gave notice to the trustee of their claim. After all the creditors who were bound by the composition had been paid, debtor applied to the ct. to order the trustee to pay back the surplus of the fund to him :—*Held :* pltfs. in the Ch. suit had a right to take advantage of the composition, although they were not bound by it, & the ct. would not make an order as to the disposal of the surplus until a decree had been made in the Ch. suit.—*Re* CAREW, *Ex p.* CAREW (1875), 10 Ch. App. 308 ; 44 L. J. Bcy. 67 ; 32 L. T. 318 ; 23 W. R. 459, L. JJ.

Annotations : **Apprvd.** Breslauer *v.* Brown (1878), 3 App. Cas. 672, H. L. **Distd.** Oppenheim *v.* Jackson & Till (1879), 41 L. T. 193. **Expld. & Distd.** *Re* Lacey, *Ex p.* Lacey (1880), 16 Ch. D. 131, C. A.

9146. —— —— After attempt to defeat deed.]—Certain creditors had contested a trust deed, under which property was assigned for the benefit of creditors :—*Held :* if they had not contested the deed, they might have been permitted to come in, notwithstanding lapse of time, & notwithstanding that some of them were not scheduled to the deed, but they could not be permitted to come in after having endeavoured to defeat the deed by setting up a prior claim which was rejected.—*Re* MEREDITH, MEREDITH *v.* FACEY (1885), 29 Ch. D. 745 ; 54 L. J. Ch. 1106 ; 33 W. R. 778.

9147. —— —— Deed for benefit of all creditors generally.]—Where a deed of assignment for the benefit of creditors is expressed to be for the benefit of those creditors whose names are set forth in the schedule thereto, that does not exclude other creditors who are not so named from coming in under the deed, nor prevent it from being a deed for the benefit of creditors generally.—*Re* ALLIX, *Ex p.* TRUSTEE, [1914] 2 K. B. 77 ; 83 L. J. K. B. 665 ; 110 L. T. 592 ; 58 Sol. Jo. 250 ; 21 Mans. 1.

9148. —— Creditor bringing action against debtor—In breach of covenant not to sue debtor—Action alleged to be only for purpose of ascertaining damages.]—A deed of assignment for the benefit of creditors, dated in April, 1895, contained a covenant by the creditors not to sue debtor for their debts, & provided that the deed might be pleaded as a defence to any action brought in breach of the covenant. Debtor's leaseholds were excepted from the assignment. In July, pltf. made a claim of £85 for damages for breaches of covenants in a lease to debtor committed previous to the execution of the deed, but deft., the trustee of the deed, refused to admit liability on the part of debtor's estate. In Aug. pltf.'s solrs. issued a writ against debtor claiming damages for breach of covenant, to which debtor appeared, & in their letter to deft.'s solrs. to inform them of the writ said, "our clients claim to rank as creditors in the administration of the assets." The proceedings were discontinued, & another writ was issued against debtor claiming possession, mesne profits, & damages for breach of covenant. Judgment was signed against debtor by default, & the usual inquiry as to damages was directed, to which the undersheriff duly made his return. Pltf. contended that the proceedings were taken to ascertain the amount of the claim for damages which the trustee wrongfully refused to assess, & were not inconsistent with assent to the deed of assignment :—*Held :* the deed was not finally acceded to by pltf., & he was not entitled to come in as a creditor under the deed. —*Re* LEE, PATTESON *v.* MILES (1896), 41 Sol. Jo. 12.

9149. Within what time—After debtor unable to have benefit of deed.]—Debtor conveyed all his property to trustees for his creditors, in consideration of a licence & release granted to him by the deed, & afterwards died. Seven years after his death a creditor, who had notice of the deed shortly after its execution, but did not execute it, filed a bill to be allowed to execute it, & to have the benefit of it :—*Held :* the bill should be dismissed, as debtor could not have the benefit of the

PART XXIII. SECT. 10, SUB-SECT. 2. —A.

9145 i. *Who may take benefit—Creditor not scheduled to deed.*]—An alleged creditor seeking to rank on the assigned estate of a debtor can bring an action against the trustees of an ordinary deed of assignment, asking a declaration that he is entitled to share ratably with the other creditors, although he has not signed the deed.—WEBSTER *v.* RAE (1893), 19 V. L. R. 717.—**AUS.**

f. —— *Creditor who has not proved.*]—It is not necessary for creditors to prove their debts to enable them legally to execute the deed of composition & discharge.—*Re* LANGS (1868), 4 C. L. J. N. S. 283.—**CAN.**

g. —— *Creditor acquiescing in deed.*] —PYPER *v.* MCDONALD, 5 C. L. J. N. S. 162.—**CAN.**

h. —— *Holder of debtor's contingent liabilities—Bills indorsed by debtor.*] —Holders of contingent liabilities of debtor, *e.g.* holders of bills indorsed by debtor, cannot be included in the number of creditors entitled to sign an assignment of all debtor's property for the benefit of his creditors under 5 Vict. No. 9, ss. 33, 34.—*Re* COXEN (1844), 1 Legge 223.—**AUS.**

k. —— *Mortgagee.*]—A mtgee., in the absence of statutory provisions to the contrary, may be included in the number of creditors entitled to sign, if his debt be due.—*Re* COXEN (1844), 1 Legge 223.—**AUS.**

Sect. 10.—*Position of creditors: Sub-sect.* 2, *A.*]

consideration.—LANE *v.* HUSBAND (1845), 14 Sim. 656; 9 Jur. 1001; 60 E. R. 513.

Annotation:—**Consd.** *Re* Baber's Trusts (1870), L. R. 10 Eq. 554.

9150. —— ——.]—If the time has arrived when it is too late for debtor to have the benefit of a composition deed, it is too late for a creditor to accede to it.—WHITMORE *v.* TURQUAND (1861), 3 De G. F. & J. 107; 30 L. J. Ch. 345; 4 L. T. 38; 7 Jur. N. S. 377; 9 W. R. 488; 45 E. R. 819, L. C.; *subsequent proceedings*, 4 L. T. 702.

Annotations:—**Consd.** Durant *v.* Robinson (1876), 34 L. T. 617. **Refd.** *Re* A Composition Deed, *Ex p.* Shettle (1862), 7 L. T. 366. **Mentd.** *Re* A Disputed Adjudication (1860), 3 L. T. 634; Jones *v.* Morris (1865), 6 B. & S. 198; *Re* Foster, *Ex p.* Foster (1883), 52 L. J. Ch. 577, C. A.; *Re* Cutler, Shoolbred *v.* Leslie (1892), 8 T. L. R. 584; Ratcliff & Dealtry *v.* Mendelssohn, [1902] 2 K. B. 653, C. A.; *Re* Mendelssohn, *Ex p.* Mendelssohn, [1903] 1 K. B. 216, C. A.; Mendelssohn *v.* Ratcliff (1904), 91 L. T. 204, H. L.

9151. —— **After insolvency of debtor.**]—Creditors who assent to a composition deed will be allowed to sign & take the benefit of the deed after the insolvency of debtor.—BIRON *v.* MOUNT (1857), 24 Beav. 642; 27 L. J. Ch. 191; 30 L. T. O. S. 344; 4 Jur. N. S. 43; 53 E. R. 506.

9152. —— **After registration of simple composition resolutions.**]—After the registration of simple composition resolutions, by which no trustee is appointed for the receipt & distribution of the composition & no security is given for its payment, the proceedings are at an end, & the Ct. of Bkpcy. has no jurisdiction to entertain an application by a creditor, who was omitted from debtor's statement of affairs, & who has taken no part in the proceedings, for the admission of a proof of his debt.—*Re* LACEY, *Ex p.* LACEY (1880), 16 Ch. D. 131; 50 L. J. Ch. 207; 43 L. T. 579; 29 W. R. 299, C. A.

9153. Time limit fixed by deed—Whether creditor may take benefit after expiry of period.]—Under a deed of trust for payment of such creditors as come in within a year, a creditor will not be excluded, though he does not come in, until after the year.—DUNCH *v.* KENT (1684), 1 Vern. 260; 23 E. R. 455; *subsequent proceedings* (1685), 1 Vern. 319.

Annotations:—**Consd.** Raworth *v.* Parker (1855), 2 K. & J. 163; Durant *v.* Robinson (1876), 34 L. T. 617. **Refd.** Watson *v.* Knight (1854), 19 Beav. 369; Whitmore *v.* Turquand (1861), 3 De G. F. & J. 107, L. C. **Mentd.** Brandling *v.* Plummer (1857), 6 W. R. 117.

9154. —— ——.]—A. executed a deed of assignment of his effects to a trustee for the benefit of all his creditors who should sign or assent to the deed within three months after the date of it:—*Qu.:* whether, in the view of a Ct. of Equity, a creditor who did not sign or assent to the deed until after the expiration of the three months could take any benefit under it.—COLLINS *v.* REECE (1845), 1 Coll. 675; 63 E. R. 593.

Annotations:—**Consd.** Raworth *v.* Parker (1855), 2 K. & J. 163. **Refd.** Watson *v.* Knight (1854), 19 Beav. 369; Whitmore *v.* Turquand (1860), 1 J. & H. 444.

9155. —— **Creditor partly satisfying debt for goods sold—By exercising lien.**] — Pltfs., hop-merchants, sold a quantity of hops. The purchaser, before he had paid for them, entered into a deed of composition with his creditors, who were to execute the deed within three months. Pltfs., who retained a lien on the hops, according to the custom of the trade, sold them for much less than the original purchase-money, & then claimed to share in the dividend, under the deed, for the balance due to them:—*Held:* pltfs., not having executed the deed, & having paid themselves in part by the sale of the hops, could not claim a share in the dividend under the deed.—BUSH *v.* SHIPMAN (1844), 14 Sim. 239; 13 L. J. Ch. 391; 8 Jur. 657; 60 E. R. 350; *affd. sub nom.* BUCK *v.* SHIPPAM (1846), 1 Ph. 694.

Annotations:—**Refd.** Watson *v.* Knight (1854), 19 Beav. 369. **Mentd.** Pfleger *v.* Browne (1860), 28 Beav. 391.

9156. —— **Creditor actively refusing to come in within period—Such refusal not retracted within period.**]—Whatever may be the general rule, if there be any, as to extending indulgence to a creditor under a composition deed, who does not claim the benefit of the deed within the time specified therein, that rule does not apply to a creditor who actively refuses to come in under, or assent to the deed within the time limited, & who does not retract such refusal within that time.—JOHNSON *v.* KERSHAW (1847), 1 De G. & Sm. 260; 9 L. T. O. S. 216; 11 Jur. 553, 795; 63 E. R. 1059.

Annotation:—**Apld.** Watson *v.* Knight (1854), 19 Beav. 369.

9157. —— **Creditor delaying to claim—Setting up title adverse to deed.**]—Though a creditor, who is prevented by accident from signing a composition deed within the period specially appointed for that purpose, may obtain equitable relief, yet it will not be extended to one who has delayed making his claim, & has set up a title adverse to the deed.—WATSON *v.* KNIGHT (1854), 19 Beav. 369; 52 E. R. 393.

Annotation:—**Folld.** *Re* Meredith, Meredith *v.* Facey (1885), 29 Ch. D. 745.

9158. —— **Creditor acquiescing & forbearing to sue.**]—A creditor assigned property by deed to trustees upon trust to sell, & apply the clear proceeds in payment of the debts owing by him to such of his creditors as should, before a certain day execute the deed, & the surplus, if any, to the assignor, & the deed contained a release by the creditors. The assignor & the trustees, who were also creditors, executed the deed at once. No other creditor executed before the stipulated day, but notice of the deed was given to them all, & they forbore to sue, & fifteen years afterwards some were permitted to execute, the trustees meanwhile having taken possession of & sold part of the property:—*Held:* the deed was binding on the assignor, & the creditors were entitled to have the trusts of it carried into effect.—NICHOLSON

9153 i. *Time limit fixed by deed—Whether creditor may take benefit after expiry of period.*]—Certain creditors executed a deed of assignment for the benefit of creditors after the expiration of the time provided in the deed, but before any dividend was paid. Some of them had not learned of the assignment until after the time had elapsed; others had sent instructions & power of attorney to execute within the time, but the execution did not take place until after the time had elapsed. The assignment contained no release:—*Held:* the above creditors were entitled to participate *pari passu* with the creditors who executed within the period.—CAPSTICK *v.* HENDRY, 22 C. L. T. Occ. N. 35.—CAN.

9153 ii. —— —— *Estate not distributed.*]—Debtor made a deed of assignment in favour of all his creditors who should execute same within three months. Notice thereof was published to the effect that all creditors wishing to participate in the assets of the estate should execute the deed within three months. Creditors, who resided in England, had no notice of the assignment until the three months had nearly expired, & as soon as possible thereafter they authorised an agent to come into the assignment & execute the deed, but the assignees & the other creditors refused to allow him to do so. The three months had then expired, but there had been no distribution of the proceeds of the estate:—*Held:* there having been no negligence on the part of such creditors, & no dividend having been paid, such creditors were not precluded from coming in & sharing with the other creditors in the distribution of the estate, & their agent should be allowed to execute the deed.—HALIBURTON *v.* DE WOLFE (1866), 2 Old. 381; 7 N. S. R. 12.—CAN.

9153 iii. —— —— *After great delay.*]—A trust deed had been made in 1857, & the assignment was to be executed by the creditors within two months of its date. Six years afterwards certain creditors sought to come in. Leave to sign the deed & participate in its benefits was refused.—SCHREIBER *v.* FRASER (1870), 2 Ch. Ch. 271.—CAN.

9153 iv. —— —— ——.]—GUNN *v.* ADAMS, 8 C. L. J. N. S. 211.—CAN.

v. TUTIN (1855), 2 K. & J. 18 ; 1 Jur. N. S. 1201 ; 69 E. R. 676.

Annotations :—**Apld.** Whitmore *v.* Turquand (1861), 3 De G. F. & J. 107, L. C. **Mentd.** Biron *v.* Mount (1857), 24 Beav. 642 ; Brandling *v.* Plummer (1857), 6 W. R. 117 ; *Re* A Composition Deed, *Ex p.* Shettle (1862), 7 L. T. 366.

9159. —— Creditor having done nothing contrary to deed.]—J., by a deed, conveyed to a trustee all his real & personal estate, upon trust for conversion, & to divide the net proceeds ratably amongst all his creditors who should execute or accede to the deed within three calendar months after the date thereof. Pltfs. were creditors, but never executed the deed, but they had, within the three months, joined with other creditors in giving J. a letter of licence to come & go for three months, without molestation, for the purpose of giving his assistance in explaining the state of his affairs ; they did not in any other way accede to the deed. Five years after the date of the deed they filed a bill, claiming to be entitled to the benefit thereof :—*Held :* never having done anything contrary to the deed, they were not precluded from claiming the benefit of it, though the three months had long since expired.—WHITMORE *v.* TURQUAND (1861), 3 De G. F. & J. 107 ; 30 L. J. Ch. 345 ; 4 L. T. 38 ; 7 Jur. N. S. 377 ; 9 W. R. 488 ; 45 E. R. 819, L. C. ; *subsequent proceedings*, 4 L. T. 702.

Annotations :—**Apld.** *Re* A Disputed Adjudication (1860), 3 L. T. 634. **Consd.** Durant *v.* Robinson (1876), 34 L. T. 617 ; Mendelssohn *v.* Ratcliff (1904), 91 L. T. 204, H. L. **Refd.** *Re* A Composition Deed, *Ex p.* Shettle (1862), 7 L. T. 366. **Mentd.** Jones *v.* Morris (1865), 6 B. & S. 198 ; *Re* Foster, *Ex p.* Foster (1883), 52 L. J. Ch. 577, C. A. ; *Re* Cutler, Shoolbred *v.* Leslie (1892), 8 T. L. R. 584 ; Ratcliff & Dealtry *v.* Mendelssohn, [1902] 2 K. B. 653, C. A. ; *Re* Mendelssohn, *Ex p.* Mendelssohn, [1903] 1 K. B. 216, C. A.

9160. —— Time not of essence of deed—Acts inconsistent with deed.]—*Held :* (1) a limit of time imposed by a deed of arrangement was not of the essence of the deed, & creditors could come in after that time ; (2) proving under one deed was inconsistent with their proving under another deed.—*Re* CUTLER, SHOOLBRED *v.* LESLIE (1892), 8 T. L. R. 584.

9161. Provision excluding creditors not assenting within given time—Mortgagee failing to express any intention of coming in.]—Debtor assigned all his property to trustees for the benefit of his creditors, with a proviso that, in case any creditor should not come in under the deed for six months after its date, he should be peremptorily excluded from the benefit of it :—*Held :* a mtgee. of part of the property, whose solr. corresponded with the trustees on the subject of the mtge., but did not express any intention to come in under the deed for some years afterwards, was not entitled to the benefit of the trust.—GOULD *v.* ROBERTSON (1851), 4 De G. & Sm. 509 ; 64 E. R. 934.

Annotation :—**Distd.** Nicholson *v.* Tutin (1855), 2 K. & J. 18.

9162. —— Creditor abroad—Power of attorney arriving too late.]—Debtor by deed conveyed real & personal property to trustees upon trust for the benefit of creditors who should sign the deed, with a proviso that such creditors as should not execute or assent in writing to take the benefit of the deed, on or before July 22 then next, or within such time, not exceeding thirty days, as the trustees should appoint, should be excluded from all benefit under the deed. At the time of the execution of the deed by debtor, R., a creditor to a considerable amount, was in America, but on July 22 W., as his attorney, wrote to the trustees, assenting to the deed on his behalf. On Aug. 15 W. received a power of attorney from R., who was still in America, authorising him to execute the deed for him, but upon W. claiming to execute the deed, the trustees & the other creditors refused to allow him to do so : —*Held :* R. was entitled to execute & have the benefit of the deed.—RAWORTH *v.* PARKER (1855), 2 K. & J. 163 ; 25 L. J. Ch. 117 ; 27 L. T. O. S. 62 ; 4 W. R. 273 ; 69 E. R. 736.

Annotations :—**Refd.** Brandling *v.* Plummer (1857), 6 W. R. 117 ; Whitmore *v.* Turquand (1861), 30 L. J. Ch. 345.

9163. —— With discretion to trustees to extend same—Judgment creditor seeking benefit of deed on judgment being found invalid.]—Under trust-deeds for the benefit of creditors, a time was fixed within which the creditors were to execute or be excluded from the benefit of such deeds, the trustees having discretion to allow creditors to sign after the period fixed. A judgment creditor relying upon his claim as paramount to the deeds, declined to execute during twenty-two years. The judgment subsequently turned out to be invalid, & he then petitioned the ct., in a suit instituted for carrying into effect the trusts of the deeds, to be allowed the benefit of such deeds, & offered to execute them :—*Held :* (1) there was no such case of mistake or misapprehension as to constitute an equity ; (2) the petition must be dismissed.—BRANDLING *v.* PLUMMER (1857), 27 L. J. Ch. 188 ; 6 W. R. 117.

9164. —— Deed whereby third party covenanted to pay composition—Time of essence of deed.] A. by deed covenanted to pay a composition of 6*s.* 8*d.* in the pound to all the creditors of his father & grandfather who should execute the deed within a given time, & charged certain estates with the amount of the composition. The deed contained a special provision that no creditor not executing within the prescribed time should be admitted to the benefit thereof. After the death of A., a bill was filed, by the trustees of the deed, praying that the trusts might be carried into execution by the ct. Various creditors who had not executed the deed within the given time, claimed to be entitled to the benefit of it :—*Held :* (1) in the absence of fraud, creditors who had executed the deed within the prescribed time were alone entitled to the benefit of it ; (2) creditors were not entitled to any notice of the deed ; (3) time was the essence of the contract, & as against creditors who had executed the deed, neither A. nor the trustees could waive actual execution of the deed within the prescribed period, & any claim founded on allegation of fraud must be asserted by a distinct suit.

The distinction in reference to letting in creditors after the prescribed time, between a deed by which a third party covenants to pay a certain composition to the creditors of A., & a conveyance by A. of property upon trust for his own creditors, pointed out & explained.—WILLIAMS *v.* MOSTYN (1863), 3 New Rep. 61 ; 33 L. J. Ch. 54 ; 9 L. T. 476 ; 12 W. R. 69.

9165. —— Creditor not executing but acquiescing.] —Debtor executed an assignment to trustees for the benefit of his creditors in consideration of their covenanting not to take any proceedings against him for three years, & it was provided that those creditors who should not execute the deed within six months should be excluded from the benefits conferred thereby. One of the creditors neglected to sign the deed, but acquiesced in it, & took no proceedings against debtor :—*Held :* such creditor, having treated the deed as valid, & acquiesced in its provisions, was entitled to the benefits conferred by it.—*Re* BABER'S TRUSTS (1870), L. R. 10 Eq. 554 ; 40 L. J. Ch. 144 ; 18 W. R. 1131.

Annotation :—**Refd.** *Re* Sanders' Trusts (1878), 47 L. J. Ch. 667.

9166. Last date for execution advertised by trustee—Right to come in without disturbing

Sect. 10.—*Position of creditors: Sub-sect.* 2, *A. & B.*]

dividends.]—Debtors, on June 11, 1847, assigned by deed their property, upon trust for their creditors, whose names & seals were thereunto affixed. In July the trustees sold, &, at the sale, pltf. stated that he was a creditor, but mentioned no particulars of his demand, which, in fact, was one requiring investigation. The trustees advertised Oct. 11 as the last day for creditors to execute the deed, & stated that creditors who had not signed by that day would be excluded. On a bill filed by pltf. in Apr., 1848, after a dividend had been made:—*Held:* upon establishing that he was a creditor & executing the deed, he was entitled to participate in any future assets, but not to disturb the dividend already made.—BROADBENT *v.* THORNTON (1850), 4 De G. & Sm. 65; 64 E. R. 736.

Annotations:—**Consd.** Watson *v.* Knight (1854), 19 Beav. 369. **Folld.** Nicholson *v.* Tutin (1855), 2 K. & J. 18. **Consd.** Durant *v.* Robinson (1876), 34 L. T. 617. **Refd.** Brandling *v.* Plummer (1857), 6 W. R. 117.

B. Sufficiency of Assent.

9167. General rule—Placing himself in same position as if he had signed.]—A creditor cannot be said in any sense to have acceded to the provisions of a composition deed, unless he has put himself in the same situation with regard to debtor, as if he had actually executed the deed.—FORBES *v.* LIMOND (1854), 4 De G. M. & G. 298; 23 L. T. O. S. 42; 2 W. R. 362; 43 E. R. 522, L. C. & L. JJ.

Annotation:—**Consd.** Whitmore *v.* Turquand (1860), 1 John. & H. 444.

9168. —— Absence of clear acquiescence.]—In Mar., 1821, property was assigned for the benefit of creditors who should execute, without limiting a time. The attorney who prepared the deed & solicited signatures, was a creditor. The assignor died insolvent. The deed was taken out of his hands by a trustee in Dec., 1822, & he never executed, nor applied to do so, but when the property was divisible in 1830, he claimed a benefit under the deed, as having acquiesced under it:—*Held:* his claim was inadmissible, as he had not done any unequivocal act of acquiescence, binding him to the terms of it.—TAPSTER *v.* PLACE (1831), 1 L. J. Ch. 19.

9169. —— Mere standing by insufficient.]—The joining in a letter of licence is not an accession to a composition deed. The mere standing by or doing of any act which does not preclude a creditor from afterwards acting in opposition to the deed, is not accession.—WHITMORE *v.* TURQUAND (1861), 3 De G. F. & J. 107; 30 L. J. Ch. 345; 4 L. T. 38; 7 Jur. N. S. 377; 9 W. R. 488; 45 E. R. 819, L. C.; *subsequent proceedings*, 4 L. T. 702.

Annotations:—**Mentd.** Jones *v.* Morris (1865), 6 B. & S. 198; Durant *v.* Robinson (1876), 34 L. T. 617; *Re* Foster, *Ex p.* Foster (1883), 52 L. J. Ch. 577, C. A. *Re* Cutler, Shoolbred *v.* Leslie (1892), 8 T. L. R. 584; Ratcliff & Dealtry *v.* Mendelssohn, [1902] 2 K. B. 653, C. A.; *Re* Mendelssohn, *Ex p.* Mendelssohn, [1903] 1 K. B. 216, C. A.; Mendelssohn *v.* Ratcliff (1904), 91 L. T. 204, H. L.

9170. Acceptance of composition—Acceptance of security.]—Where a composition deed or instrument is entered into by an insolvent, with a clause, that if certain creditors do not sign the deed, it shall be null & void, if such creditors accept the composition, or the security for the composition, though they do not actually sign the instrument, it is valid & good.—JOLLY *v.* WALLIS (1800), 3 Esp. 228.

Annotations:—**Expld.** Forbes *v.* Limond (1853), 1 Sm. & G. 554. **Refd.** Smith *v.* Winter (1838), 1 Horn. & H. 384; Kitchin *v.* Hawkins (1866), L. R. 2 C. P. 22.

9171. —— Under mistake of law & not of fact.]—Deft. called a meeting of his creditors & proposed a composition of 10*s.* in the pound, payable by two instalments, & a deed was prepared in supposed compliance with 1861 Act, s. 192. Pltfs., creditors, declined to assent, but, subsequently, on being informed by deft. that the deed had been executed by the required number of creditors, & had been registered, & the amount of the instalments having been remitted to them, they took the money & said nothing. The deed was afterwards decided to be void for want of a strict compliance with the above Act:—*Held:* pltfs. were precluded from suing defts. for the balance of their debt, as the mistake, if any, under which they had received the instalments, was one of law & not of fact.—KITCHIN *v.* HAWKINS (1866), L. R. 2 C. P. 22; 15 L. T. 185; 12 Jur. N. S. 928; 15 W. R. 72.

9172. —— Retention of dividend.]—A party who has received & retained a dividend under a composition deed, cannot be heard to object to the resolution.—LEWIS *v.* LEONARD (1880), 5 Ex. D. 165; 49 L. J. Q. B. 308; 42 L. T. 351; 28 W. R. 719, C. A.

9173. —— Assent subject to note attached thereto.]—A deed of assignment by debtors to a trustee for the benefit of all creditors who should execute the deed was executed by pltfs., who appended a note that they executed only in respect of certain claims scheduled to the deed & amounting to $73,531. Subsequently thereto they received a sum of money from the trustee by virtue of their execution of the deed:—*Held:* the note did not amount to a refusal to execute, & pltfs. having received payment under the deed could not be heard to repudiate it & deny their execution.—EXCHANGE BANK OF YARMOUTH *v.* BLETHEN (1885), 10 App. Cas. 293; 54 L. J. P. C. 27; 53 L. T. 537; 33 W. R. 801; 1 T. L. R. 269, P. C.

9174. Acting under composition.]—Creditors are bound by acting under a composition, as if they had signed.—*Ex p.* SADLER & JACKSON (1808), 15 Ves. 52; 33 E. R. 675.

Annotations:—**Folld.** Kitchin *v.* Hawkins (1866), L. R. 2 C. P. 22. **Refd.** Took *v.* Tuck (1827), 4 Bing. 224. **Mentd.** Lee *v.* Lockhart (1837), 3 My. & Cr. 302.

9175. ——.]—A deed of composition by creditors not signed within the time stated in it, though void at law, is good in equity, if the

PART XXIII. SECT. 10, SUB-SECT. 2. —B.

9170 i. *Acceptance of composition.*]—*Held:* it was no objection that some of the assenting creditors had executed in the name of their firms & by procuration, & that no power of attorney was proved, for they had accepted the composition under it.—ALLAN *v.* GARRATT (1870), 30 U. C. R. 165.—**CAN.**

9170 ii. ——.]—Defts. were the makers of two promissory notes to A. & Co., which the latter indorsed to H. Co. Before the notes became due, both defts. & A. & Co. became insolvent. A composition deed was executed between defts. & their creditors. The deed was not executed by H. Co., but they took new notes from defts., embracing at agreed amount all their claims against defts. on the two notes & gave a receipt for the composition:—*Held:* by the acceptance of the composition H. Co. became virtually parties to the composition deed, & bound by all its terms.—LAWSON *v.* SALTER (1861), 1 Old. 79, 731.—**CAN.**

9170 iii. ——.]—*Held:* the mere payment to, & acceptance by, the creditor of a composition on his whole demand did not operate as an accord & satisfaction thereof, as it was not shown that he had in fact, or by implication from his acts, concurred in the arrangement, & received the composition notes with the intention of accepting same in full satisfaction of his entire demand.—*Re* ROONEY'S ESTATE (1874), 8 I. L. T. 125.—**IR.**

9174 i. *Acting under assignment.*]—An assignment contained three parties, B., the assignor, being the party of the first part, the assignees, of the second part, & "the several other persons whose names & seals are hereunto subscribed & fixed, creditors of B., of the third part." No creditor executed the assignment, but the assignees admitted a creditor's claim by letter:—*Held:* such admission made such creditor a party to the assignment, although he had not executed it.—BURROWS *v.* GATES (1858), 8 C. P. 121.—**CAN.**

creditors, who have not signed it, act under it.—SPOTTISWOODE *v.* STOCKDALE (1815), Coop. G. 102 ; 35 E. R. 493.

Annotations :—**Distd.** Tapster *v.* Place (1831), 1 L. J. Ch. 19. **Consd.** Raworth *v.* Parker (1855), 2 K. & J. 163 ; Whitmore *v.* Turquand (1861), 30 L. J. Ch. 345. **Apld.** *Re* Baber's Trusts (1870), L. R. 10 Eq. 554. **Refd.** Collins *v.* Reece (1845), 1 Coll. 675.

9176. Acts not precluding creditor from suing parties to bill of exchange held by him.]—By a composition deed for winding up, under an inspector, the affairs of a partnership in Calcutta, it was provided that four members of the partnership should collect & pay the assets into the hands of the inspector, to be applied by him, after payment of costs, in payment among the several creditors of the partnerships who should have become parties to, & have executed or otherwise acceded to, the terms of the deed, but if a commission of bkpcy. or an adjudication of insolvency should be awarded issued or prosecuted against the partnership, or any of them, in respect of their then debts or liabilities, before any release should be executed, the deed should thenceforth be absolutely void. Pltfs., indorsees of two bills of exchange drawn by the partnership, remitted the bills from London to their agents in Calcutta, who, in Apr., 1848, forwarded them " to the trustees " of the partnership to be registered. The partners acting under liquidation acknowledged the receipt of the bills, &, with respect to one of them, wrote, " We have registered the claim you make on our estate ; " & with respect to the other, " We have duly noted the claim," returning the bills, which were transmitted back to pltfs. in London. In Feb., 1849, the inspector advertised a dividend of 10 per cent., which was shortly afterwards paid on several of the debts of the creditors who had executed the deed. In Mar., 1849, four members of the partnership were, on their own petition in India, adjudicated insolvent, & thereupon the inspector handed over to their official assignee the balance remaining in his hands. Pltfs. having received dividends on the bills under the insolvency in India, & from other parties in England liable upon the bills, in 1851 instituted a suit against the inspector for the payment of the 10 per cent. dividend advertised by him :—*Held :* pltfs., not being precluded from suing any of the parties liable upon the bills, could not be considered to have acceded to the composition deed.—FORBES *v.* LIMOND (1854), 4 De G. M. & G. 298 ; 23 L. T. O. S. 42 ; 2 W. R. 362 ; 43 E. R. 522, L. C. & L. JJ.

Annotation :—**Refd.** Whitmore *v.* Turquand (1860), 1 John. & H. 444.

9177. Execution of deed as trustee—Schedule not signed.]—Declaration on a guarantee by deft. for payment of goods supplied by pltfs. to J. Plea, that after J. became indebted to pltfs., J. being also indebted to other persons, by an indenture between J. of the first part, E., & B., one of pltfs., trustees, for themselves & the rest of the creditors, of the second part, & the several other persons whose names & seals were thereunto subscribed & set, being creditors of J., of the third part, after reciting that J. was indebted to the parties thereto of the second & third parts, in the several sums set opposite to their names in the schedule thereunder written, which he was unable to pay in full, it was witnessed, that J. assigned all his estate & effects to the trustees, upon trust to pay ratably & without preference to themselves & their partners, & the parties thereto of the third part, the sums set opposite their names in the schedule, & in consideration of the assignment, the several creditors, parties thereto of the second & third parts, released J. from all debts which they or their partners might have against J. up to the date thereof. Replication, on equitable grounds, that B. executed the deed in his character of trustee, & not in his character of creditor, & that he did so merely for the purpose of declaring the trusts of the deed, & not with any intention of releasing the debt, that he did not sign or seal the schedule, nor was the debt of pltfs. contained therein, & that if the deed operated in law as a release, it was executed by mistake, & in ignorance that such would be its legal effect :—*Held :* the facts disclosed by the replication did not afford any answer to the plea on equitable grounds.—TEEDE & BISHOP *v.* JOHNSON (1856), 11 Exch. 840 ; 25 L. J. Ex. 110 ; 156 E. R. 1073.

Annotations :—**Consd.** Exchange Bank of Yarmouth *v.* Blethen (1885), 10 App. Cas. 293, P. C. **Mentd.** Vorley *v.* Barrett (1856), 26 L. J. C. P. 1.

9178. Examining witnesses in bankruptcy court.]—A creditor impeached a deed of composition, & in the Ct. of Bkpcy. examined two of the creditors in support of his case :—*Held :* such examination amounted to a recognition of the validity of the deed.—*Re* SULLIVAN, *Ex p.* SULLIVAN (1866), 36 L. J. Bcy. 1 ; 15 L. T. 434 ; 15 W. R. 185, L. JJ.

Annotations :—**Mentd.** *Re* Prior, *Ex p.* Osenton (1869), 4 Ch. App. 690, L. JJ ; *Re* Pullen, *Ex p.* Williams (1870), L. R. 10 Eq. 57.

9179. Failure to contradict statements at meeting—Other creditors induced to give time.]—At the meeting of the creditors of bkpt., a statement was made on behalf of debtor that the L. Bank, who were secured creditors, had agreed to accept a composition of 6*s.* in the pound upon the balance of their claim after deducting the value of the securities in their hands. The statement in question was uncontradicted by the agent of the bank, who was then present, & upon the faith of it the unsecured creditors executed a letter of licence to debtor, whereby they allowed time for payment of their demands. It subsequently appeared that on the day previously to the meeting of the creditors a private arrangement was made between bkpt.'s solr. & the bank for payment of a composition of 10*s.* in the pound. The bank having received the 6*s.* in the pound & bkpcy. intervening :—*Held :* the bank must be considered to have assented to the arrangement for payment of the 6*s.* in the pound.—*Re* HOILE, *Ex p.* THE ASSIGNEES (1864), 12 W. R. 1087.

9180. Qualified assent—Condition fulfilled before registration.]—The following document was signed by the requisite proportion of the creditors of A. :—" We hereby assent to & approve of a deed of composition by A., whereby in consideration of the payment to the creditors of a composition of 8*s.* in the pound, by two instalments, of 2*s.* 6*d.* each, at six and twelve months respectively, & one of 3*s.* at eighteen months, the last secured, the creditors release A. from the payment of their debts." A deed was subsequently registered, which provided reasonable security for the payment of the third instalment, but the creditors had not approved of such security before the registration of the deed :—*Held :* though the assents were at first conditional on the third instalment being secured, that condition had been fulfilled before the registration of the deed, & the assents were sufficient under 1861 Act, s. 192.—HORSFALL *v.*

p. *Signature by partner at request of creditors.*]—An assignment for the benefit of creditors was executed by one partner in the partnership name & was made at the request of several creditors :—*Held :* there was sufficient assent of the creditors.—NOLAN *v.* DONNELLY (1883), 4 O. R. 440.—CAN.

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SWAN BANK & BRICK WORKS CO., LTD. (1868), 18 L. T. 409 ; 16 W. R. 934.

9181. —— Reserving right under former deed.]—A written assent to a deed intended to operate under 1861 Act, appearing on its face to be given "without prejudice to the assenting creditors' rights under a former deed" is invalid, because qualified, & tending to produce inequality.—JOHNSON *v.* OSENTON (1869), L. R. 4 Exch. 107 ; 38 L. J. Ex. 76 ; 19 L. T. 793 ; 17 W. R. 675.

Annotations:—**Consd.** Exchange Bank of Yarmouth *v.* Blethen (1885), 33 W. R. 801, P. C. **Mentd.** *Re* Prior, *Ex p.* Osenton (1869), 4 Ch. App. 690, L. JJ.

9182. Assents failing to state how instalments secured—Failing to state how time to be reckoned—Assent not acted on within reasonable time.]—In pursuance of a resolution passed at a meeting of creditors, C. & Co., on May 28, 1869, issued a circular to the creditors containing a proposal by debtor for a "composition of 6*s.* 8*d.* in the pound, payable in equal instalments at three, six, & nine months, the two last instalments to be secured." Assents were given to such proposal in the following form : "We, the undersigned, hereby agree to the composition proposed, & authorise you, or either of you, to sign such deed on our behalf, & undertake to execute the deed of release, if tendered for that purpose." A deed was afterwards executed on Aug. 7, & registered on the 11th, under 1861 Act, s. 192, by which debtor covenanted to pay the composition by instalments of 2*s.* 3*d.*, 2*s.* 2*d.*, & 2*s.* 3*d.*, at three, six, & nine months from the date of registration, & to deliver promissory notes for same within fourteen days of the registration, the notes for the two last instalments to be signed by debtor & W. :—*Held :* the deed was not duly assented to, because, (1) the assents did not state how the instalments were to be secured ; (2) they did not state the point of time from which the periods of three, six, & nine months were to be reckoned ; &, (3) they were not acted upon within a reasonable time.—BIRKS *v.* CLARKE (1870), L. R. 5 Exch. 197 ; 39 L. J. Ex. 166 ; 23 L. T. 162 ; 18 W. R. 814.

9183. Assents differing from deed.] — A deed contained a licence for three years to debtor to attend to his affairs without hindrance by his creditors, & an assignment of part of his property to a trustee for the benefit of his creditors, & it was declared to be a deed within 1861 Act, s. 192. Some of the creditors necessary to make up the statutory majority had assented to a letter of licence granting debtor a period of three years for payment of 20*s.* in the pound to his creditors :—*Held :* this was a substantial difference between the deed & the assents, & the deed was no answer to an action by a non-assenting creditor.—STYRING *v.* WATERS (1870), 22 L. T. 541.

9184. Assents otherwise than by proving & accepting dividend.] — Pltfs., creditors of deft., a trader in insolvent circumstances, took an active part in procuring the acceptance of a scheme of composition of deft.'s affairs, & obtained proxies from debtor's other creditors. At a meeting of the creditors pltfs. withdrew the proof of their debt against the estate of deft. on the ground that, owing to a fraudulent statement on his part on an earlier occasion, they had been induced to forbear to press their claim against him, but they proposed a resolution that a composition of 11*s.* 3*d.* in the pound should be accepted in satisfaction of the debts due from debtor, & by using the proxies held by them they carried the resolution. A dividend of 11*s.* 3*d.* in the pound was received by pltfs. on their proof. They subsequently brought an action in the county ct. for the unpaid balance of their debt, & the county ct. judge gave a verdict & judgment for the amount claimed. Deft. obtained a rule *nisi* to set aside the verdict & judgment or for a new trial :—*Held :* pltfs., having acted as they had done, had assented to the composition otherwise than by proving their debt & accepting a dividend on it, & they could not maintain an action for the unpaid balance of their debt, & judgment should be entered for deft.—THORP *v.* DAKIN (1885), 52 L. T. 856 ; 1 T. L. R. 516, D. C.

9185. Words used by creditor at meeting.]—Debtor made a deed of assignment for the benefit of his creditors generally. At the time he owed his landlord, deft., two years' rent. Deft. attended a meeting of creditors, & was there informed by pltf., the trustee of the deed, that if he assented to the deed, he would receive six months' rent in full, & that he could claim with the other creditors for the balance. The deed contained no provision to that effect, & the other creditors did not assent to the payment. Deft., having to leave the meeting, said to one of the creditors present, "Whatever you do, I will do," but he did not sign the form of assent sent to him, nor did he give any notice of dissent from the deed. Deft. subsequently distrained for the two years' rent owing to him, & pltf. thereupon brought an action against him claiming damages for illegal distress. At the close of pltf.'s case the county ct. judge found that the remark made by deft. did not amount to an assent to the deed & gave no cause for legal action :—*Held :* (1) there was some evidence to support that finding ; (2) in any event a new trial would be bound to end in favour of deft., on the ground that his assent to the deed if any, was conditional on his right to receive six months' rent in full, & he acquired no such right.—SIER *v.* BULLEN (1915), 84 L. J. K. B. 1288 ; 113 L. T. 278 ; [1915] H. B. R. 132, D. C

9186. Sufficiency of authority to assent—Assent given by managing clerk of London agent.]—*Semble :* where a creditor authorises his attorney to assent for him to a deed of composition, & the attorney, being himself also a creditor of debtor, instructs his London agents to assent to the deed on behalf of the creditor & himself, an assent drawn in conformity with such instructions, & signed, not by the London agents themselves, but by their managing clerk in their names, & at their request, would be a valid & sufficient assent in writing, under 1861 Act, s. 192.—JOHNSON *v.* OSENTON (1869), L. R. 4 Exch. 107 ; 38 L. J. Ex. 76 ; 19 L. T. 793 ; 17 W. R. 675.

Annotations:—**Refd.** *Re* Prior, *Ex p.* Osenton (1869), 4 Ch. App. 690, L. JJ. **Mentd.** Exchange Bank of Yarmouth *v.* Blethen (1885), 10 App. Cas. 293, P. C.

9187. —— Assent given by solicitor retained to conduct action.]—A retainer to a solr. to conduct an

9186 i. *Sufficiency of authority to assent—Assent given by manager of branch bank.*]—At a meeting of deft.'s creditors, at which pltf. bank were not represented, an arrangement was made to accept a composition on the amount of the claims. A deed with a covenant to accept the composition was executed by C., the manager of pltfs.' branch at L. At the time the manager executed the deed, there were two creditors mentioned in the sched. who had not executed. Before either of those creditors had executed, & before the composition notes had been tendered to the manager, he withdrew from the arrangement. It did not appear that the head office had repudiated the manager's authority :—*Held :* the manager had authority to agree to accept less than the whole of the claim, & did so agree, & under R. S. O. 1887, c. 44, s. 53 (7), the agreement was irrevocable.—BANK OF COMMERCE *v.* JENKINS (1888), 16 O. R. 215.—CAN.

q. —— *Execution by debtor for*

action does not authorise him after judgment to assent, on behalf of pltf., to a deed of assignment executed by deft. for the benefit of his creditors.—*Re* A DEBTOR (No. 1 OF 1914), *Ex p.* THE DEBTOR *v.* THE PETITIONING CREDITOR, [1914] 2 K. B. 758; 83 L. J. K. B. 1176; 58 Sol. Jo. 416; 21 Mans. 155, D. C.

9188. Necessity for proof of assent—Sufficiency of evidence.]—The ct. will require good proof that the requisite amount of assents in number & value has been obtained to a deed registered under 1861 Act, s. 192. The statement of accounts & the affidavits filed upon registering the deed, accompanied by an affidavit of debtor, stating generally that all the requirements of the Act have been observed, are insufficient.—*Re* WARDELL & ROLLS, *Ex. p.* WATTS (1864), 10 L. T. 74.

C. Position after Assent.

(a) In General.

9189. Whether bound by agreement—Obtained by misrepresentation.]—If, in consequence of debtor representing to one of his creditors that if he will agree to accept a composition for his debt, all the other creditors will do the same, such creditor does agree, etc., the agreement is not binding on him, if that representation is untrue.—COOLING *v.* NOYES (1795), 6 Term Rep. 263; 101 E. R. 544.

Annotation :—**Mentd.** Walker *v.* Seabourne (1809), 1 Taunt. 526.

9190. —— —— Agreement in fraud of other creditors.]—Defts. being indebted to pltf. for goods, & being also indebted to other persons, entered into a composition with their creditors. Pltf. refused to join, unless defts. would pay him dividends at a rate exceeding that which was accepted by the other creditors, & this was agreed upon between pltf. & defts. without the knowledge of the other creditors. Defts. stated to pltf. as an inducement for his making this contract that no other creditor had a similar preference. Such statement was false to the knowledge of defts. In an action on the securities given under the agreement :—*Held :* (1) (WIGHTMAN, J.) pltf. might allege the deception put upon him by defts. in answer to the plea of release; (2) (COLERIDGE & ERLE, JJ.) pltf. could not so allege a deception practised on himself by defts. in the execution of a fraud by himself and them upon other parties.—MALLALIEU *v.* HODGSON (1851), 16 Q. B. 689; 20 L. J. Q. B 339; 15 Jur. 817; 117 E. R. 1045; *sub nom.* MALALIEU *v.* HODGSON, 17 L. T. O. S. 37.

Annotations :—**Apprvd.** *Re* Harvey, *Ex p.* Phillips, [1888] W. N. 88, C. A.; Mayhew *v.* Boyes (1910), 103 L. T. 1, C. A.

9191. —— —— Onus on trustee seeking to maintain deed.]—Where fallacious representations as to the amount of debts owing by debtor are made to creditors as an alleged inducement to them to assent to a deed, the burden of proof is thrown upon the trustees seeking to uphold the deed, to satisfy the ct. that the requisite majority of assents has not been obtained by means of such representations.—*Re* WILLMETT, *Ex p.* GOSS (1864), 9 L. T. 734.

9192. —— Signing last—Not actively inducing other creditors or surety to sign.]—Debtor entered into an agreement with his creditors, whereby they agreed to receive 20 per cent. in satisfaction of their several demands, & released the remainder, in consideration that half of the composition should be secured by the acceptances of a certain person, also a creditor. The security was given & paid when due :—*Held :* such agreement was binding on pltf., one of the creditors, though he were the last who signed it, & it did not appear that he had actively induced any of the other creditors or the surety to sign it.—STEINMAN *v.* MAGNUS (1809), 11 East, 390; 2 Camp. 124; 103 E. R. 1055.

Annotations :—**Apld.** Wilkin *v.* Manning (1854), 9 Exch. 575. **Refd.** Good *v.* Cheesman (1830), 4 C. & P. 513; Foakes *v.* Beer (1884), 9 App. Cas. 605, H. L.

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creditor.]—A. executed an assignment for the benefit of creditors, & received authority by telegram to sign same for L. The deed was dated Oct. 8, 1881. On Nov. 5, L. wrote to A.: "I have done as you desired by telegraphing you to sign deed for me, & I feel confident that you will see that I am protected & shall not lose one cent by you" :—*Held :* the execution of the deed on his behalf being made without sufficient authority & never having subsequently assented to the deed, or recognised or acted under it, L. was not estopped from denying that he had executed it.—LAWRENCE *v.* ANDERSON (1890), 17 S. C. R. 349.—**CAN.**

PART XXIII. SECT. 10, SUB-SECT. 2. —C. (a).

r. *Whether relation of trustee & cestui que trust established.*]—GUNN *v.* ADAMS, 8 C. L. J. N. S. 211.—**CAN.**

s. ——.]—The assent of the creditors to the deed creates the relation of trustee & *cestui que trust*, & when the trust is created the deed becomes a deed for valuable consideration.—BRIGHAM *v.* MORTON, 4 J. R. N. S. 6.—**N.Z.**

t. *Whether partners of trustee carrying on business—Liability for goods supplied to trustee.*]—An assignment for the benefit of creditors gave the trustees power from time to time, as they should deem expedient, "to purchase stock for the purpose of enabling them to assort & sell off the present stock to the best advantage, for the benefit of the estate" :—*Held :* creditors executing would not become partners in the business.—MAULSON *v.* PECK (1859), 18 U. C. R. 113.—**CAN.**

a. —— ——.]—W. assigned for the benefit of creditors to L., who was empowered to carry on the business of W. It was agreed that all goods purchased by L. for the purpose of the business should be paid in priority to the claims of the then creditors. L. carried on the business for some time & incurred liabilities thereby :—*Held :* the agreement did not constitute the creditors a partnership carrying on the business, nor make them liable for goods ordered by L.—*Re* WILSON (1915), 31 W. L. R. 798.—**CAN.**

b. ——.]—Creditors who execute a deed of assignment do not thereby become partners.—CARGILL *v.* HENDERSON, Mac. 850.—**N.Z.**

c. —— *Liability for tort of trustee's servant.*]—J. assigned to trustees for the benefit of his creditors. The creditors were parties to the deed. The trustees under their powers carried on the business & employed a driver, who, in the course of his employment, caused damages to pltf. by negligent driving :—*Held :* the deed had not constituted the creditors partners in the business or principals of the trustees, & they were not liable personally for the damages.—EHRLICH *v.* RAND COLD STORAGE & SUPPLY CO., LTD. (1911), T. P. D. 170.—**S. AF.**

d. *Whether bound not to do act affecting control of majority.*]—Debtor assigned for the benefit of his creditors. Part of his estate consisted of a life interest. The deed contained a provision that the trustee should not dispose of such life interest except with the consent & by the direction of a three-fourths majority in number & value of the creditors, & with the consent of debtor, or, failing his consent, then under & subject to the approval of the ct. The mother of debtor was one of the creditors. Certain creditors assigned to her their debts, proofs of debt, & the benefit of such proofs, & authorised her to exercise in her name all rights which they might be able to exercise under the deed. The mother used the votes based on those debts to defeat proposals for the disposal of the life interest :—*Held :* there was no implied obligation on the part of each creditor not to do any act by which the qualified power of control given to a majority of three-fourths in number & value of the creditors would be affected.—*Re* COCK, HOWDEN *v.* COCK, [1915] V. L. R. 324.—**AUS.**

9189 i. *Whether bound by agreement—Obtained by misrepresentation.*]—D. offered to purchase the estate of insolvent, who at a meeting of his creditors, gave a list of his liabilities. On the insolvent's representation as to his liabilities pltf. entered into a composition agreement, but it was subsequently discovered that insolvent's statement of his liabilities was very much below the actual sum owing by him. Pltfs. thereupon, & before D. had paid any purchase-money, repudiated the agreement, & sued the insolvent :—*Held :* as pltfs. had been induced by misrepresentation to enter into the agreement, which they had repudiated before receiving any benefit thereunder, the agreement was not binding upon them.—PLISSON *v.* SKINNER (1902), 5 Terr. L. R. 391.—**CAN.**

Sect. 10.—*Position of creditors: Sub-sect.* 2, *C.* (*a*).]

9193. —— Signature of other creditors sufficient consideration.]—A man being embarrassed in his circumstances, all his creditors signed an agreement to give him time for the payment of their respective demands by instalments, & to take his promissory notes for the amount:—*Held:* such agreement was binding upon each of the creditors, the signing of the others being a sufficient consideration.—BOOTHBEY *v.* SOWDEN (1812), 3 Camp. 175, N. P.

Annotations:—**Consd.** Cranley *v.* Hillary (1813), 2 M. & S. 120. **Folld.** Garrard *v.* Woolner (1832), 8 Bing. 258. **Mentd.** *Re* Charlton, *Ex p.* Charlton (1877), 6 Ch. D. 45, C. A.

9194. —— As regards debts then existing—No amount set opposite his name.]—Where a creditor signs, seals, & delivers a composition deed, although he does not set the amount of his debt opposite to his name in the deed, yet he is bound by the terms of the composition to the amount of his then existing debt.—HARRHY *v.* WALL (1817), 1 B. & Ald. 103; 2 Stark. 195; 106 E. R. 39, N. P.

Annotations:—**Consd.** Britten *v.* Hughes (1829), 3 Moo. & P. 77. **Refd.** Fazakerly *v.* M'Knight & Abbinett (1856), 2 Jur. N. S. 1020; Buvelot *v.* Mills (1865), 6 B. & S. 986.

9195. —— Concealment of property.]—If a party obtains the benefit of a trust deed executed by his creditors, & in it is contained a consideration that he shall make a full disclosure of his property, but he conceals a portion of it, the creditors signing the deed may still proceed against him.—WENHAM *v.* FOWLE (1834), 3 Dowl. 43.

9196. —— ——.]—When a creditor compounds with his debtor under a false impression, in which debtor knowingly leaves him, as to the extent of debtor's estate, the creditor is not estopped from suing for the balance of his debt.—VINE *v.* MITCHELL (1834), 1 Mood. & R. 337, N. P.

9197. —— Agreement not between debtor & all creditors.]—An agreement entered into between debtor & any number of his creditors less than the whole number to take a composition for their debts, is binding upon those who enter into the agreement.—NORMAN *v.* THOMPSON (1850), 4 Exch. 755; 19 L. J. Ex. 193; 14 L. T. O. S. 353; 154 E. R. 1420.

Annotations:—**Refd.** Garrod *v.* Simpson (1864), 3 H. & C. 395. **Mentd.** Boyd *v.* Hind (1857), 26 L. J. Ex. 164, Ex. Ch.; Foakes *v.* Beer (1884), 9 App. Cas. 605, H. L.

9198. —— Right to question same.]—A. filed a petition under the arrangement clauses of 1869 Act. The first meeting of the creditors was duly held, & a resolution was passed accepting a composition of 5*s.* in the pound, payable one month after registration. On May 19 the second meeting of the creditors was held, at which the resolution was confirmed, & it was registered on the following day. At the first meeting B. attended by proxy, & tendered a proof for £15 12*s.* debt, & £1 16*s.* 6*d.* costs. The debt was admitted, but the costs were objected to. He also attended the second meeting. No tender of the composition was ever actually made to B., but on or about June 20 a circular letter was sent to the unpaid creditors, giving notice that the composition was payable at the office of A.'s solr., but that if required it would be forwarded by Post-Office order. B. alone of the then unpaid creditors denied having received such circular letter, & on Dec. 5 he entered a plaint in the county ct. for the amount of the debt admitted by bkpt. The county ct. judge having given a verdict for B. for the full amount, an injunction was granted, restraining B. from recovering under his judgment more than the composition & the costs of the action:—*Held:* the resolution, having been duly passed at meetings, which B. by his solr. attended, could not be called in question, but was binding on all the creditors equally.—*Ex p.* HEMINGWAY (1872), 7 Ch. App. 724, n.; *sub nom. Re* HOWARD, *Ex p.* HEMMINGWAY, 26 L. T. 298; 20 W. R. 572.

Annotations:—**N.F.** *Re* Hatton (1872), 7 Ch. App. 723, L. JJ. There were peculiar circumstances in [the above] case which may have had some influence upon the mind of the Chief Judge (JAMES, L.J.). **Mentd.** Edwards *v.* Coombe (1872), L. R. 7 C. P. 519.

9194 i. —— *As regards debts then existing—Wrong amount set opposite his name.*]—Debtor made a composition with his creditors. In his statement he included the debts of two secured creditors, stating the amount he alleged to be due to them. After the resolution accepting the composition had been registered, the two creditors sent in to the trustee a proof of their debt for a different amount:—*Held:* the debt could not be proved for an amount differing from that in the statement.—*Re* FINK (1894), 20 V. L. R. 223.—**AUS.**

9194 ii. —— —— ——.]—A trader assigned his estate & effects to trustees for his creditors. The claim of one was stated by debtor to be "$3,500, or thereabouts," & that sum was stated in the sched. as the amount, & the several creditors executed the assignment. The creditor afterwards ascertained that his claim was $5,062, which the trustees refused to pay, whereupon the creditor filed a bill to reform the deed, by introducing that sum as his claim. The ct. dismissed the bill with costs.—CHAPIN *v.* CLARK (1859), 7 Gr. 75.—**CAN.**

9195 i. —— *Concealment of property.*]—An agreement of compromise by debtor with his creditors is a contract *uberrimæ fidei*, & debtor must disclose every fact which would affect the judgment of a rational creditor. Where such agreement is drawn up, reciting that there is an insufficiency of assets as shown by an account annexed, the fact that debtor has in his possession shares, then of no realisable value, but which subsequently become valuable, is not a material fact, the omission to disclose which entitled the creditors to avoid the agreement.—*Re* WARREN'S ESTATE, NATIONAL TRUSTEES EXECUTORS & AGENCY CO. OF AUSTRALIA, LTD. *v.* WHITE (DANIEL) & CO., LTD., [1908] V. L. R. 6.—**AUS.**

e. —— *Concealment of facts.*]—H. agreed with his creditors to execute a deed conveying his property to a trustee for their benefit. A deed was executed, whereby H. conveyed his estates in trust to pay himself an annuity & then to apply the residue in discharge of his debts. After executing the deed H. exercised a power of charging part of the lands conveyed, of which power no mention had been made to the creditors:—*Held:* the trust deed, from the circumstances of concealment attending it, was not binding upon the creditors, notwithstanding their acts of acquiescence.—FOLEY *v.* HOARE (1832), Hayes & Jo. 90.—**IR.**

f. —— *Failure to get statutory majority.*]—Insolvent offered a compromise to his creditors. A meeting of creditors was held to consider the offer. The support of the necessary majority of creditors not being obtained, an entry was made in the minutes to the effect that the offer was rejected. Subsequent meetings of creditors were held to consider the compromise. At all the meetings insolvent was unable to obtain the necessary majority:—*Held:* on the failure of insolvent at the first meeting to obtain the acceptance of the necessary majority of creditors, such creditors as had voted for the compromise were no longer bound by their votes.—POTE *v.* WOOD (1878), 8 Buch. 64.—**S. AF.**

g. —— *Nothing done under deed.*]—*Semble:* parties executing a deed may abandon it, when nothing has been done under it.—*Re* FIVEY (1860), 13 Ir. Jur. 22.—**IR.**

9198 i. —— *Right to question same.*]—A creditor who attended a meeting of creditors after the execution of a deed of assignment, & assented to be appointed an inspector to aid the assignee in winding up the estate:—*Held:* estopped from afterwards denying the validity of the assignment.—GARDNER *v.* KLOEPFER (1884), 7 O. R. 603.—**CAN.**

9198 ii. ——————.]—Where an assignment has been acted upon by the creditors, it is not open to the objection, even if made by an execution creditor, that no creditor executed it.—BALL *v.* TENNANT (1895), 21 A. R. 602.—**CAN.**

9198 iii. —— ——.]—A trader executed a trust deed for the benefit of all his creditors who executed it within a month. A creditor, who had at first assented to it, afterwards obtained an adjudication against the trader, & sought to compel the trustees under the deed to bring in & lodge in the bkpcy. matter whatever they had realised, on the ground that the deed was not protected, inasmuch as it was an act of bkpcy.:—*Held:* he could not question its validity.—*Re* SMART (1864), 16 Ir. Jur. 194.—**IR.**

9198 iv. —— —— *After receiving benefit.*]—A creditor who has benefited by the realisation of the assets, & by his action given the body of the creditors reason to believe that he has adopted an arrangement, cannot repudiate the transaction, upon the ground that the arrangement was not fully understood, without at least a surrender of the advantage he has received through it.—HOWLAND, SONS & CO. *v.* GRANT (1896), 26 S. C. R. 372.—**CAN.**

9199. —— —— After six years' delay.]—The ct. will not entertain a question by an assenting creditor respecting the validity of a deed, by reason that debtor has not obtained the requisite majority of assents, after the lapse of more than six years.—*Re* MILSTED, *Ex p.* JOREY (1868), 18 L. T. 158 ; 16 W. R. 582.

9200. —— —— By proceedings at law to test validity.]—Where resolutions accepting a composition payable by debtor have been duly passed & registered under 1869 Act, a creditor will be restrained from proceeding at law in order to try the validity of the resolutions.—*Re* THORPE, *Ex p.* HARTEL (1873), 8 Ch. App. 743 ; 42 L. J. Bcy. 34 ; 28 L. T. 530 ; 21 W. R. 428, L. J.

Annotations :—**Folld.** *Re* Harper, *Ex p.* King (1873), L. R. 17 Eq. 336, n. **Consd.** *Re* Glover, *Ex p.* Radcliffe Investment Co. (1873), 43 L. J. Bcy. 4. **Refd.** *Re* Barnett, *Ex p.* Reynolds (1885), 15 Q. B. D. 169, C. A. **Mentd.** Eyre *v.* Smith (1877), 2 C. P. D. 435, C. A.

9201. —— —— After registration—On ground for refusing registration.]—If it is clear *ex facie* that the statement produced by debtor could not have been accepted *bonâ fide* in the interests of the creditors, this may be taken as an objection to the registration of the resolution, but it cannot be raised after registration.—*Re* WEBB, *Ex p.* WALTER (1876), 2 Ch. D. 326 ; 45 L. J. Bcy. 105 ; 34 L. T. 701 ; 24 W. R. 834, C. A.

Annotations :—**Consd.** *Re* Aaronson, *Ex p.* Aaronson (1878), 7 Ch. D. 713, C. A. **Mentd.** Eyre *v.* Smith (1877), 2 C. P. D. 435, C. A. ; *Re* Hope, *Ex p.* Hope (1878), 38 L. T. 762, C. A.; *Re* Sidebotham, *Ex p.* Sidebotham (1880), 14 Ch. D. 458, C. A.

9202. —— Name not scheduled.]—*Held :* the provision in 1869 Act, s. 126, as to the insertion of the names, etc., of creditors in debtor's statement only applied to non-assentient creditors, & creditors, who voluntarily came in & joined in passing the resolution for the composition, were bound, although their names, etc., were not inserted.—CAMPBELL *v.* IM THURN (1876), 1 C. P. D. 267 ; 45 L. J. Q. B. 482 ; 35 L. T. 265 ; 40 J. P. 775 ; 24 W. R. 675.

Annotations :—**Distd.** *Re* Lang, *Ex p.* Lang (1877), 5 Ch. D. 971, C. A. **Folld.** Wilson *v.* Breslauer (1877), 2 C. P. D. 314, C. A. **Expld.** Breslauer *v.* Brown (1878), 3 App. Cas. 672, H. L. **Consd.** Oppenheim *v.* Jackson (1879), 48 L. J. Q. B. 441. **Folld.** Lewis *v.* Leonard (1880), 5 Ex. D. 165, C. A.

9203. —— Receiving no benefit—Proof refused.]—The trustee under a scheme of arrangement rejected the proof of a creditor under a judgment, upon the ground that the consideration for the judgment was a gambling debt. The creditor issued execution upon the judgment :—*Held :* the judgment debt was a debt "provable in bkpcy.," & the scheme was binding on the creditor, although he had received no benefit under it.—SEATON *v.* DEERHURST, [1895] 1 Q. B. 853 ; 64 L. J. Q. B. 430 ; 72 L. T. 453 ; 59 J. P. 357 ; 43 W. R. 436 ; 11 T. L. R. 316 ; 2 Mans. 355 ; 14 R. 523, C. A.

9204. —— Permission to withdraw signature—When granted.]—The ct. will not permit a creditor, who has signed a resolution for liquidation, to withdraw his signature, unless he gives the ct. very cogent reasons for so doing.—*Re* BUTLIN, *Ex p.* ATKINSON (1873), 21 W. R. 593.

9205. Right to redeem against mortgagee—On trustee refusing.]—Creditors under a deed of trust cannot have a decree for redemption against a mtgee., except in special circumstances, *e.g.*, collusion, that the trustee refuses, etc. Where the bill by the creditors prayed, not a redemption but a sale, & the mtgee. would not consent to a sale, but submitted to be redeemed, the bill was dismissed.—TROUGHTON *v.* BINKES (1801), 6 Ves. 573 ; 31 E. R. 1202.

Annotations :—**Apprvd.** White *v.* Parnther (1829), 1 Knapp 179, P. C. ; Gordon *v.* Horsfall (1846), 5 Moo. P. C. C. 393, P. C. **Distd.** National Bank of Australasia *v.* United Hand in Hand & Band of Hope Co. (1879), 4 App. Cas. 391, P. C. **Refd.** Fray *v.* Drew (1865), 11 Jur. N. S. 130.

9206. Right to sue for execution of trust—Other creditors refusing to come in.]—A bill by such creditors as had signed a deed of composition, arising from a trust estate, conveyed for the purpose of paying debts in general, other creditors refusing to come in, to have the trusts of the deed carried into execution, was dismissed.—ATHERTON *v.* WORTH (1674), Dick. 375 ; 21 E. R. 315.

9207. —— On behalf of self & other creditors—Judgment debt assigned by creditor suing to trustees—Whether judgment merged by assignment.]—A judgment creditor, who had executed a deed, whereby the real & personal estate of debtor were conveyed to trustees for the benefit of such of his creditors as should execute the deed, assigned his judgment to such trustees :—*Held :* (1) the trustees could not be considered as owners of the trust estate, so that the assignment by the judgment creditor would have the effect of merging the judgment ; (2) the judgment creditor was entitled to sue on behalf of himself & all such other creditors, for the establishment of their rights in respect of the trust estate & the execution of the trusts.—SQUIRE *v.* FORD (1851), 9 Hare 47 ; 20 L. J. Ch. 308 ; 17 L. T. O. S. 119 ; 15 Jur. 619 ; 68 E. R. 408.

Annotations :—**Mentd.** Fessard *v.* Mugnier (1865), 18 C. B. N. S. 286 ; Adams *v.* Angell (1877), 5 Ch. D. 634.

9208. —— Notwithstanding licence to debtor to reside & carry on business.]—A trust deed by creditors, who have granted to debtor a licence to reside & attend to his affairs without suit or molestation, is no bar to an action by the creditors against the trustee & debtor to enforce the trusts of the deed.—O'BRIEN *v.* OSBORNE (1852), 10 Hare, 92 ; 20 L. T. O. S. 201 ; 16 Jur. 960 ; 68 E. R. 852.

9209. —— Debt within trusts of deed.]—A. & B., father & son, executed in 1818 an indenture of settlement on occasion of the son's intended

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s. —— *Specific performance.*]—L. & M. being indebted to P. & H., gave the latter an irrevocable power of attorney to collect rents due & still to become due to them, & to appropriate the proceeds in liquidation of their indebtedness. Thereafter L. & M. being practically insolvent, called a meeting of their creditors, & P. & H. with the other creditors verbally agreed to sign a deed of assignment to assignees, & agreed to continue to collect the rents on commission for the benefit of the creditors, but subsequently refused to sign the deed of assignment, & to pay over the rents collected. On action brought by L. & M., an order was granted compelling P. & H. to sign the deed & pay over the rents collected since the date of the verbal agreement to the assignees enumerated in the deed.—LABE & MEYEROWITZ *v.* PATERSON & DE HETON (1904), 21 S. C. 370 ; 14 C. T. R. 510.—S. AF.

9204 i. —— *Permission to withdraw signature.*]—A deed of assignment was executed by L. in favour of his creditors, & recited that it was made between L. of one part & the assignee of the second part, & "the several creditors whose signatures were affixed to the deed." B., a creditor, signed the deed, & afterwards gave notice that he withdrew his signature, but the withdrawal was not accepted by the assignee. Several creditors signed after B. While the assignment was being carried out, B. sued L. on a mtge. bond passed by L. to B. before the assignment :—*Held :* B. was bound by his signature, & was not justified in withdrawing.—HOSSACK *v.* LIPPERT (1885), 3 S. C. 272.—S. AF.

a. *Right to sue for execution of trust—Trustee guilty of delay.*]—Where debtor assigned his estate to trustees on trust to sell for the benefit of creditors, & the trustees were guilty of delay in selling, & of other misconduct :—*Held :* the ct. had jurisdiction at the suit of a creditor to execute the trusts of a deed.—QUEBEC BANK *v.* SNURE (1869), 16 Gr. 681.—CAN.

b. —— *Whether other creditors necessary parties.*]—B. executed a trust deed, to which the scheduled creditors were parties. Pltf., a creditor of B. refused to execute the deed, & pro-

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marriage. The father & son, the intended wife & her father, & other persons, trustees, were parties to the indenture. Certain freehold estates were conveyed to the trustees for A. for life, remainder to B., & the estates were exonerated from debts due by A., which debts were made charges on certain leasehold premises expressly named. The premises were vested in trustees, on trust to keep down the interest of A.'s debts affecting any of the estates comprised in the deed, & they were empowered "with the desire & consent" of A. & B., & notwithstanding any of the trusts therein contained, to sell the leasehold premises so put in settlement for the payment of the debts & incumbrances. Another deed was executed by A. & B. in 1824, which recited the former, appointed new trustees, added new debts, & made provision for the payment of all. The trustees never acted in discharge of the trust, & the deeds were not communicated to the creditors, but B., who by an arrangement with his father had possession & management of the estates, paid the interest on the debts. After the deaths of both A. & B., the son of the latter entered into possession of the estates. C., a bond creditor, whose name & claim were set forth in the schedule to the deed of 1818, filed a bill to have the trusts of that deed carried into execution:—*Held:* the debt "was within the trust contained in the indenture for the payment of the scheduled debts."—SYNNOT *v.* SIMPSON (1854), 5 H. L. Cas. 121; 23 L. T. O. S. 263; 10 E. R. 844, H. L.

Annotations:—**Folld.** Montefiore *v.* Browne (1858), 7 H. L. Cas. 241, H. L. **Consd.** English, Scottish & Australian Chartered Bank *v.* Royal Mail Steam Packet Co. & European & Australian Royal Mail Co. (1862), 7 L. T. 211. **Folld.** Priestley *v.* Ellis, [1897] 1 Ch. 489. **Refd.** Peddie *v.* Brown (1857), 29 L. T. O. S. 302, H. L.; *Re* Fitzgerald's S. E., Fitzgerald *v.* White (1887), 57 L. J. Ch. 594, C. A.

9210. —— ——.]—By a deed of family arrangement executed in 1867 on the resettlement of an estate by father & son, the estate was limited to the use of the father for life, with remainder to the use of trustees, upon trust, with the consent of the father & son during their joint lives, or of the survivor during his life, & after the death of the survivor at the discretion of the trustees, to sell same & apply the proceeds, & also the rents & profits until sale, in payment, in such order & in such manner as the trustees should, with the concurrence of the father during his lifetime, determine, of all debts owing by the father, & subject thereto to hold any unsold hereditaments to the uses of an indenture of even date under which the father & son were successive tenants for life with remainder to an infant son of the son in tail. The father's creditors were neither parties to nor named in the deed, nor was it ever communicated to them. After the father's death the trustees sold part of the settled estate with the consent of the son, & applied the proceeds in payment of all the father's debts, except one due to a sister, of which the trustees were unaware. In 1889 the trustees, with the concurrence of the son, who was his father's legal personal representative, conveyed the unsold hereditaments to the uses of the second indenture of 1867. The son died in 1890. In 1896 the exors. of the sister, who had died, having become aware of the deeds of 1867 & 1889, brought an action seeking to charge the hereditaments in the possession of the infant tenant in tail with the debt due to the sister's estate:—*Held:* the case fell within *Synnot* v. *Simpson*, No. 9209, *ante*, & not within *Garrard* v. *Lauderdale*, No. 9536, *post*, & the infant tenant in tail took the estate subject to the liability for the debt.—PRIESTLEY *v.* ELLIS, [1897] 1 Ch. 489; 66 L. J. Ch. 240; 76 L. T. 187; 45 W. R. 442; 41 Sol. Jo. 296.

9211. Right to contribution—Assenting creditor supplying goods to inspectors—Deed containing covenant to indemnify inspectors against liabilities incurred in trading—Accounts.]—The creditors, parties to an inspection deed, severally covenanted to indemnify to a certain extent the inspectors against liabilities incurred in carrying on the business of debtor, which they were empowered to do. One of the creditors who had executed the deed, & to whom the inspectors had incurred a large debt for goods supplied & advances made for the purpose of the business, filed a bill against the inspectors, debtor, & all the other acceding creditors, to have the inspectorship wound up, & the accounts taken, & to have the assets applied in payment of his claim, & the deficiency made good by rateable contributions of all the acceding creditors, including pltf., in proportion to their debts:—*Held:* there was no right to contribution, &, a decree for accounts having been made in a previous suit, the bill was dismissed.—SELWYN *v.* HARRISON (1862), 2 John. & H. 334; 70 E. R. 1085.

9212. Loss of vendor's lien.]—Assent to execution of a composition deed by an unpaid vendor is equivalent to proof in bkpcy. & has the effect of extinguishing his right of retainer.—*Re* OXLEY, *Ex p.* TURNBULL (1868), 19 L. T. 463; 17 W. R. 200.

Annotation:—**Mentd.** *Re* Peters & Warburton, *Ex p.* Lloyd's Banking Co. (1869), 17 W. R. 492.

9213. Right to dividends—On what sum—Sum due at making of deed.]—Where debtor makes a deed of trust for payment of debts, it extends only to debts contracted at the time of making the deed, unless it is expressed to be for payment also of such other debts as he should afterwards contract.—PUREFOY *v.* PUREFOY (1681), 1 Vern. 28; 23 E. R. 283, L. C.

Annotation:—**Mentd.** Jones *v.* Smith (1794), 2 Ves. 372.

9214. —— —— **Costs—Judgment signed after registration.**]—Where a verdict is obtained against deft. in an action of contract, & he, on the same day, executes a composition deed under 1861 Act, s. 192, pltf. is entitled to the composition on the amount of his taxed costs, although judgment in the action is signed after the issuing of the certificate of registration.—*Re* ENEFER, *Ex p.* BROWNING (1867), 16 W. R. 248.

9215. —— —— **Whether amount due when claim sent in—Or at registration of deed.**]—Under a creditors' deed, registered under 1861 Act, the amount for which a creditor is entitled to prove is to be determined at the period at which he sends in his claim to the trustees, & establishes it to their satisfaction, & not at the date of the registration

ceeded at law against B., to recover his demand. That action having abated by B.'s death, pltf., submitted his claim to arbn. The amount due to pltf. having been ascertained, the trustee permitted him to subscribe the deed. In a suit by pltf. to carry into execution the trusts of that deed:—*Held:* the other subscribing creditors were not necessary parties.—FIELD *v.* DONOUGHMORE (LORD) (1841), 1 Dr. & War. 227.—IR.

9213 i. *Right to dividends—On what sum—Sum due at making of deed.*]—Where a deed of assignment for the benefit of creditors recited that the assignor was indebted to the creditors in the amounts set forth in a sched. thereto, & contained a release as to such debts:—*Held:* a creditor, who had executed the deed, was estopped thereby, & not entitled to claim a dividend upon a larger amount than appeared in such sched.—HERMANN *v.* FRENCH (1879), 5 V. L. R. 15.—AUS.

of the deed. *Semble:* the registration of the deed would be equivalent to proof under an adjudication of bkpcy. against debtor, & the amount for which a creditor would be entitled to prove would be the sum due at the date of the registration (MELLISH, L.J.).—*Re* DAUNT, *Ex p.* JOINT STOCK DISCOUNT CO. (1871), 6 Ch. App. 455; 24 L. T. 306; 19 W. R. 667, L. JJ.

9216. —— —— Claim partly unascertained at date of execution of deed.]—A creditor, at the date of a deed of inspectorship & trust made by debtor for the benefit of his creditors, had a claim against debtor for an ascertained sum of £1,974, & an unascertained sum on account of acceptances, which he had given to debtor on goods shipped by debtor through the creditor as his factor, on a *del credere* commission, & which had not then been sold, of which acceptances £5,000 had then become due. The creditor, in such state of things, executed the deed generally, without specifying on the deed the amount of his debt or claim. Upon the ultimate account after the goods were sold it appeared that a balance of £5,348 was due to the creditor from debtor:—*Held:* the creditor was entitled to a dividend from debtor's estate for £5,348, & not merely for £1,974.—GRAHAM *v.* ACKROYD (1853), 10 Hare, 192; 22 L. J. Ch. 1046; 17 Jur. 657; 1 W. R. 107; 68 E. R. 894.

Annotation:—**Refd.** Teed & Bishop *v.* Johnson (1856), 25 L. J. Ex. 110.

9217. —— Such dividends as made previously to insolvency of debtor.] — Creditors, who sign or assent to a composition deed, are entitled to such dividends as are made previous to the insolvency of debtor.—BIRON *v.* MOUNT (1857), 24 Beav. 642; 27 L. J. Ch. 191; 30 L. T. O. S. 344; 4 Jur. N. S. 43; 53 E. R. 506.

9218. —— Right to reduce same.] — The creditors of debtor accepted a composition payable by instalments. Before the second instalment fell due a claim to a large amount, which debtor had not inserted in his statement of affairs, was unexpectedly substantiated against his estate. The creditors, by an extraordinary resolution, confirmed a previous resolution, reducing the amount of the second instalment:—*Held:* the creditors had power under 1869 Act, s. 126, to alter the amount of the composition by an extraordinary resolution, & the dissentient creditor was bound by such resolution.—*Re* GLOVER, *Ex p.* RADCLIFFE INVESTMENT CO. (1873), L. R. 17 Eq. 121; 43 L. J. Bcy. 4; 29 L. T. 694; 22 W. R. 235.

9219. Right to waive conditions imposed by 1869 Act, s. 126.]—The conditions imposed by the above sect. are conditions for the benefit of creditors, & the creditors may waive them.—BRESLAUER *v.* BROWN (1878), 3 App. Cas. 672; 47 L. J. Q. B. 729; 39 L. T. 67; 26 W. R. 536, H. L.; *affg.* S. C. *sub nom.* WILSON *v.* BRESLAUER (1877), 2 C. P. D. 314, C. A.

Annotations:—**Folld.** Tea Co. *v.* Jones (1880), 43 L. T. 255. **Mentd.** Oppenheim *v.* Jackson (1879), 49 L. J. Q. B. 216, C. A.; Burliner *v.* Royle (1880), 5 C. P. D. 354; *Re* Lacey, *Ex p.* Lacey (1880), 16 Ch. D. 131, C. A.; Lewis *v.* Leonard (1880), 5 Ex. D. 165, C. A.; *Re* Englehart, *Ex p.* Englehart (1883), 52 L. J. Ch. 748, C. A.; Morgan *v.* Hardy (1887), 18 Q. B. D. 646, C. A.

9220. Under deed of inspectorship—Rights restricted to provisions of deed.]—A deed of inspectorship executed under 1861 Act, s. 192, is a contract between debtor & his trustees & the creditors who are bound by it, there can be no rights claimed on behalf of any person beyond those which are expressed in the deed itself.—*Re* SYMONS (1869), 17 W. R. 1040.

(*b*) *Right to sue Debtor.*

9221. Fraud on other creditors & surety for composition.]—Debtor entered into an agreement with his creditors, whereby they agreed to receive 20 per cent. in satisfaction of their several demands, & released the remainder, in consideration that half of the composition should be secured by the acceptances of a certain person, also a creditor, which security was given & paid when due:—*Held:* one of the creditors suing debtor, after having received the composition, was a fraud upon the surety & the other creditors.—STEINMAN *v.* MAGNUS (1809), 11 East, 390; 2 Camp. 124; 103 E. R. 1055.

Annotations:—**Apld.** Wilkin *v.* Manning (1854), 9 Exch. 575. **Refd.** Foakes *v.* Beer (1884), 9 App. Cas. 605, H. L. **Mentd.** Good *v.* Cheesman (1830), 4 C. & P. 513.

9222. For original debt.]—A creditor who has signed a deed of composition will be restrained from prosecuting his claim at law against debtor.—*Ex p.* HEMINGWAY (1872), 7 Ch. App. 724 n.; *sub nom. Re* HOWARD, *Ex p.* HEMMINGWAY, 26 L. T. 298; 20 W. R. 572.

Annotations:—**Consd.** *Re* Hatton (1872), 42 L. J. Bcy. 12, L. JJ. **Refd.** Edwards *v.* Coombe (1872), L. R. 7 C. P. 519.

9223. —— Debtor executing assignment on faith of agreement to accept composition—Creditor refusing to sign.]—Where a creditor agrees to take a composition from his debtor, on the faith of which debtor executes a deed of assignment of all his property to a trustee for the benefit of his creditors, such creditor shall not be allowed, by refusing to execute such deed, to sue his debtor for the whole of his demand.—BUTLER *v.* RHODES (1794), 1 Esp. 236; Peake, 315, N. P.

Annotations:—**Distd.** Took *v.* Tuck (1827), 4 Bing. 224; Lee *v.* Lockhart (1837), 1 Jur. 769, L. C. **Expld.** Smith *v.* Winter (1838), 1 Horn & H. 384. In *Butler v. Rhodes* the creditor accepts the terms of the deed, & it would be a fraud upon the other creditors afterwards to enforce his debt (LORD ABINGER, C.B.). **Distd.** Boyd *v.* Hind (1857), 1 H. & N. 938, Ex. Ch.

9224. —— —— ——.]—Where at a meeting of the creditors of a deceased insolvent, called by his exor., they agree to a rateable distribution, on the faith of which he executes a deed of assignment of all the assets which have come to his hands, for the benefit of the creditors, one of them cannot afterwards refuse to come in under the deed, & bring an action for his debt against the exor.—BRADY *v.* SHEIL (1807), 1 Camp. 147.

Annotation:—**Consd.** Took *v.* Tuck (1827), 4 Bing. 224.

9225. —— —— ——.]—Where creditors agree to take a composition on their respective debts, to

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c. *Right to interest.*]—When a creditor accedes to a trust for behoof of creditors, his debt is thereby liquidated so as to bear interest from the date of the accession.—SCOTT *v.* ELIOTT (1865), 37 Sc. Jur. 460.—**SCOT.**

PART XXIII. SECT. 10, SUB-SECT. 2. —C. (b).

9222 i. *For original debt.*]—T. & C., doing business under the name of T. & Co., made an assignment for the benefit of creditors, & T. then induced the D. Co., a creditor, to pay off a chattel mtge. on the stock, & a composition of 25 cents on the dollar of unsecured claims, the co. to receive its own debt in full with interest. The assignee of T. & Co. then transferred all the assets to the D. Co., & the arrangement was carried out, the co. eventually as provided in a contemporaneous deed executed by the parties interested reconveying the assets to T., taking his promissory notes & a chattel mtge. as security. In an action by the co. against T. & Co. on the original debt:—*Held:* the original debt was extinguished & C. released from all liability thereunder.—DUEBER WATCH CASE MANUFACTURING CO. *v.* TAGGART (1900), 30 S. C. R. 373.—**CAN.**

9223 i. —— *Debtor executing assignment on faith of agreement to accept composition.*]—Debtor, who assigns all his property to trustees for the benefit of his creditors on the faith of an agreement on their part that the debts due to them should be suspended if not extinguished, ought not afterwards to to be sued by those creditors for the same debts.—GOLDSBROUGH *v.* MCCULLOCH (1869), 6 W. W. & A'B. 113.—**AUS.**

Sect. 10.—*Position of creditors : Sub-sect.* 2, *C.* (*b*).]

be secured partly by the acceptances of a third person, & partly by debtor's own notes, & to execute a composition deed containing a clause of release, debtor cannot be sued for the original debt due to a creditor, who had promised to come in under the agreement, to whom the acceptances & notes were regularly tendered, & who refused to execute the composition deed after it had been executed by all the other creditors.—BRADLEY *v.* GREGORY (1810), 2 Camp. 383.

9226. —— Mere agreement to accept composition.]—An agreement between debtor & his creditors, that they will accept a composition in satisfaction of their respective debts, to be paid in a reasonable time, cannot be pleaded to an action brought by one of the creditors to recover his whole demand.—HEATHCOTE *v.* CROOKSHANKS (1787), 2 Term Rep. 24 ; 100 E. R. 14.

Annotations :—**Distd.** Cooling *v.* Noyes (1795), 6 Term Rep. 263. **Consd.** Fetil *v.* Sutton (1804), 1 Smith, K. B. 415. **Distd.** Good *v.* Cheesman (1831), 2 B. & Ad. 328. **Consd.** Foakes *v.* Beer (1884), 9 App. Cas. 605, H. L. **Refd.** Cork *v.* Saunders (1817), 1 B. & Ald. 46. **Mentd.** Steinman *v.* Magnus (1809), 11 East, 390 ; Cupit *v.* Jackson (1824), M'Cle. 495 ; Sibree *v.* Tripp (1846), 15 M. & W. 23.

9227. —— ——.]—Plea to an action of covenant that pltf. agreed with deft. & his other creditors to execute a composition deed :—*Held :* ill.—LOWE *v.* EGINTON (1819), 7 Price, 604 ; 146 E. R. 1075.

9228. —— Mere promise to sign if another creditor signed first—Such other induced to sign on statement that former would then sign.]—Deft. being unable to pay his debts, an agreement for a composition with his creditors was prepared, by the terms of which each of the undersigned creditors, in consideration of the agreement therein contained on the part of the others, agreed with the others, & with deft., to accept a composition of 10*s.* in the pound. Some creditors having signed it, pltf., a creditor, said to D., deft.'s agent, that he would not sign it until L., another creditor, had signed it. D. thereupon induced L. to sign the paper, but pltf. refused to sign it notwithstanding : —*Held :* a mere promise by pltf. to deft. that he would sign it if L. signed, did not prevent pltf. from suing deft. for his original debt, nor was there any defence to the action, even if it was to be assumed that D., as deft's. agent, & by his authority, induced L. to sign the document, on the faith that pltf. would afterwards sign it, since the paper, in express terms, purported to be an agreement between those creditors only who had signed, & L. by signing the document, entered into no agreement with pltf., who had not signed.—BOYD *v.* HIND (1857), 1 H. & N. 938 ; 26 L. J. Ex. 164 ; 28 L. T. O. S. 358 ; 3 Jur. N. S. 566 ; 5 W. R. 361 ; 156 E. R. 1481, Ex. Ch.

Annotations :—**Consd.** Slater *v.* Jones, Capes *v.* Ball (1873), L. R. 8 Exch. 186. **Distd.** West Yorkshire Darracq Agency *v.* Coleridge, [1911] 2 K. B. 326. **Mentd.** Lewis *v.* Leonard (1880), 5 Ex. D. 165, C. A.

9229. —— On breach of agreement by debtor.]—Creditors, who sign an agreement giving debtor time for payment of their respective demands by instalments, cannot sue for their original cause of action, without proving that the agreement has been broken on the part of debtor.—BOOTHBEY *v.* SOWDEN (1812), 3 Camp. 175, N. P.

Annotations :—**Consd.** Cranley *v.* Hillary (1813), 2 M. & S. 120. **Apld.** Garrard *v.* Woolner (1832), 8 Bing. 258. **Expld.** *Re* Charlton, *Ex p.* Charlton (1877), 6 Ch. D. 45, C. A.

See, further, Nos. 9071 *et seq., ante.*

9230. —— Further extension of time given by second agreement—Second agreement not concurred in—Debt existing at date of first agreement.]—A., being insolvent, by agreement stipulated to assign his property immediately, the creditors consenting that the business should be carried on for their benefit until the next Michaelmas, & that then the property should be divided among them. The insolvent assigned his effects, & at the next Michaelmas several of the creditors, who had signed the instrument, agreed that the business should be carried on by the trustees for a further time :—*Held :* a creditor, who had signed the first agreement, but who had not in any way concurred in the second, could not maintain an action against the insolvent for a debt existing at the time of the first agreement.—CORK *v.* SAUNDERS (1817), 1 B. & Ald. 46 ; 106 E. R. 17.

Annotation :—**Distd.** Garrard *v.* Woolner (1832), 8 Bing. 258.

9231. —— Agreement not acted on—Debtor willing to perform his part.]—Debtor being unable to meet the demands of his creditors, they signed an agreement, which was assented to by debtor, to accept payment by his covenanting to pay two-thirds of his annual income to a trustee of their nomination, & give a warrant of attorney as a collateral security. The creditors never nominated a trustee, & the agreement was not acted upon, & one of the creditors brought an action against debtor for his demand. Debtor appeared to have been always willing to perform his part of the engagement :—*Held :* the agreement, though not properly in accord & satisfaction, was still a good defence an the general issue, as it constituted a valid new contract between the creditors & debtor, capable of being immediately enforced, & the consideration for which to each creditor was the forbearance of the rest, & as there appeared no failure of performance on debtor's part.—GOOD *v.* CHEESMAN (1831), 2 B. & Ad. 328 ; 9 L. J. O. S. K. B. 234 ; 109 E. R. 1165.

Annotations :—**Apprvd.** Alchin *v.* Hopkins (1834), 1 Bing. N. C. 99. **Consd.** Bayley *v.* Homan (1837), 3 Bing. N. C. 915 ; *Re* Kearney, *Ex p.* Kearney (1851), 17 L. T. O. S. 18 ; Boyd *v.* Hind (1857), 1 H. & M. 938 ; Société Générale de Paris *v.* Geen (1883), 8 App. Cas. 606, H. L. **Refd.** Reay *v.* Richardson (1835), 1 Gale, 219 ; Bird *v.* Gammon (1837), 3 Bing. N. C. 883 ; Evans *v.* Powis (1847), 1 Exch. 601 ; Gibbons *v.* Vouillon (1849), 8 C. B. 483 ; Slater *v.* Jones, Capes *v.* Ball (1873), L. R. 8 Exch. 186 ; Lewis *v.* Leonard (1880), 5 Ex. D. 165, C. A. ; West Yorkshire Darracq Agency *v.* Coleridge, [1911] 2 K. B. 326.

See, also, Sub-sect. 1, A., *ante.*

9232. —— Refusal by debtor & trustee to allow creditor to come in.]—Pltf. & other creditors of defts. signed resolutions for entering into a composition deed with defts., upon their property being assigned to trustees for payment of the creditors. Defts. & their trustees having refused to allow pltf. to come in as a creditor under the deed :—*Held :* he might sue defts., notwithstanding the execution of the resolution.—GARRARD *v.* WOOLNER (1832), 8 Bing. 258 ; 1 Moo. & S. 327 ; 131 E. R. 401.

9233. —— Proviso for determination if all creditors did not sign within specified time—Attempt to obtain dividend after notice that all creditors had not signed.]—A deed of inspectorship & composition made between debtor & his creditors contained a covenant that in a certain event debtor would, if required by the inspector, assign all his

d. —— *Agreement obtained by debtor fraudulently.*]—A declaration alleged that deft. was indebted to pltfs. in a large sum of money, & that deft. fraudulently represented to pltfs. that he was insolvent & unable to pay the indebtedness in full, & thereby induced pltfs. to take a composition in respect of the debt & costs, whereas deft. was not insolvent :—*Held :* the declaration was bad because no damage was shown, for if pltfs. were induced to take a less sum through deft.'s fraud the original cause of action still existed. —ONTARIO COPPER LIGHTNING ROD CO. *v.* HEWITT (1879), 29 C. P. 491.—CAN.

property to the inspector for the benefit of the creditors, that upon such assignment the inspector should give a certificate that debtor had so assigned, & that thereupon debtor should be released from his debts. The deed contained a proviso that it should "cease, determine, & be void," if all the creditors to a certain amount did not execute it within six months from its date. Debtor was duly required by the inspector to execute an assignment, & did so, & received a certificate :—*Held :* the release constituted a good defence against a creditor who had executed the deed, & who, having had notice that all the creditors had not signed the deed, had endeavoured to obtain payment of a dividend out of the property assigned to the inspector. *Semble :* the proviso was inserted in the deed for the benefit of debtor, & a creditor who had executed could not take advantage of it.—DUNN *v.* WYMAN (1881), 51 L. J. Q. B. 623.

9234. —— Power of court to restrain action in Ireland.]—Where an inspectorship deed has been duly executed under 1861 Act, the ct. has power to restrain a creditor under the deed from continuing an action against debtor in Ireland.

The right to restrain such a creditor is a right against him personally, because he sues in respect of a claim enforceable under a deed.—*Re* TAIT & Co., *Ex p.* TAIT (1872), L. R. 13 Eq. 311 ; 41 L. J. Bcy. 32 ; 20 W. R. 318.

Annotation :—**Consd.** *Re* Chapman (1872), L. R. 15 Eq. 75.

See, also, Nos. 9071 *et seq., ante.*

9235. In respect of what debts—Whole debt known to all not to be included in release.]—Where a creditor executed a composition deed, expressed to contain a general release of debtor, but it was known to all parties that part of the debt due to him was not in fact included, he was afterwards allowed to sue for that part of his debt. —FENNELL *v.* DAY (1828), cited 5 Bing. at pp. 463, 464 ; 130 E. R. 1140.

9236. —— Bill of exchange for larger amount than that for which deed signed—Bill in creditor's hands—Bill paid away by creditor.]—If deft. has entered into a deed of composition with his creditors, containing the usual clause of release & pltf. has executed the deed as a creditor for a certain sum, that is a good defence to an action by pltf. as indorsee of a bill of exchange to a larger amount, of which deft. was indorser, & which then lay dishonoured, in pltf.'s hands. But it is no defence as to two similar bills, also of larger amount, which pltf. had paid away, & which were then in the hands of third parties.—MARGETSON *v.* AITKEN (1828), 3 C. & P. 338.

9237. —— Bills of exchange held secretly—Other creditors induced to compound under impression that all bills disclosed.]—If a creditor induces others to agree to the composition, on the faith of his false representation that he is not the holder of bills of exchange other than those on which he accepts a composition, or that the bills for which he accepts the composition are the only bills of debtor which he holds, he cannot sue debtor upon them, if such defence be properly pleaded & proved. —BLACKSTONE *v.* WILSON (1857), 26 L. J. Ex. 229.

9238. —— Debt not inserted after creditor's name at request of debtor—Other creditors ignorant of debt.]—Pltf., holding two bills of exchange drawn by deft., one for £400, the other for £156 19*s.* 10*d.*, executed a composition deed, containing a general release of deft., & a schedule of the sums due to various creditors, who executed the deed. After pltf.'s name was put the sum of £156 19*s.* 10*d.* only, at the request of deft., who expected pltf. would recover the bill for £400, by suing the acceptor. The other creditors were not made acquainted with the fact, that pltf. had a debt of £400 as well as £156 19*s.* 10*d.* :—*Held :* he could not afterwards sue deft. on the bill for £400.—BRITTEN *v.* HUGHES (1829), 5 Bing. 460 ; 3 Moo. & P. 77 ; 7 L. J. O. S. C. P. 188 ; 130 E. R. 1139.

Annotations :—**Refd.** Wilkin *v.* Manning (1854), 9 Exch. 575. **Mentd.** Wood *v.* De Mattos (1865), L. R. 1 Exch. 91, Ex. Ch.

9239. —— Debts not set against creditor's name.]—*Assumpsit* on a joint & several promissory note for £1,000. One of the makers had become embarrassed, & by a deed of assignment, reciting that he was indebted to the creditors, parties to the deed, "in the sums set against their respective names," assigned the whole of his personal estate & effects to trustees, to sell & distribute the amount among the creditors proportionally, which the creditors thereby accepted, "in discharge of all their claims & demands." It was provided that if any creditor did not sign the deed, his dividend was to become forfeit. Pltf. was a party to the deed, & the sum of £536 5*s.* was set against his name. It was conceded on the pleadings, that the demand for which the action was brought, was different from such debt :—*Held :* the deed did not operate as a release from pltf., of other debts, besides that named in the instrument, & he was not barred by it from recovering on the promissory note.—READ *v.* WROUT (1839), 9 L. J. Q. B. 4 ; *subsequent proceedings,* 4 Jur. 577.

9240. —— —— Creditor not voting in respect of same.]—Debtor filed a petition under 1869 Act, s. 126, which resulted in resolutions for a composition of 2*s.* in the pound, payable in one month from the registration. A. was inserted in the statement of debts & assets, under the name of A. & Co., as a creditor for a certain sum, & he proved for, voted in respect of, & received the dividend on, a larger sum. At the time of the petition A. was under liability, jointly with J., on a bail-bond, which had been given by them to free debtor's ship from arrest in a collision suit in the Ct. of Admlty., but their liability on the bond was not inserted in the statement, & no claim against debtor's estate was made in respect of it. After the dividend had been paid, the suit was decided against debtor, & A. was called upon to pay under the bond :—*Held :* (BRETT, L.J., *diss.*) A. was not bound as to such debt by the composition resolutions, the debt not having been inserted in debtor's statement under s. 126, & A. not having voted in respect of it.—WILSON *v.* BRESLAUER (1877), 2 C. P. D. 314 ; 46 L. J. Q. B. 593 ; 37 L. T. 24 ; 25 W. R. 818, C. A. ; *affd. sub nom.* BRESLAUER *v.* BROWN (1878), 3 App. Cas. 672, H. L.

Annotations :—**Consd.** Oppenheim *v.* Jackson (1879), 48 L. J. Q. B. 441 ; Burliner *v.* Royle (1880), 5 C. P. D. 354 ; *Re* Lacey, *Ex p.* Lacey (1880), 16 Ch. D. 131, C. A. **Refd.** Oppenheim *v.* Jackson (1879), 49 L. J. Q. B. 216, C. A. ; Lewis *v.* Leonard (1880), 5 Ex. D. 165, C. A. ; *Re* Engelhardt, *Ex p.* Engelhardt (1883), 23 Ch. D. 706, C. A. ; Morgan *v.* Hardy (1887), 18 Q. B. D. 646, C. A. **Mentd.** Tea Co. *v.* Jones (1880), 43 L. T. 255.

9241. —— Separate debt—Where composition agreement is joint.]—A composition deed, in the form of 1861 Act, Sched. D, made between deft. & his two partners of the one part, & certain trustees on behalf of the undersigned creditors of deft. & his two partners of the other part, by which all the estate & effects of deft. & his two partners were assigned by deft. & his two partners for the

e. —— *Creditor taking secret advantage.*]—A creditor, who assents to & signs the resolution, but before so doing makes a secret bargain with debtor for payment of his claim in full, is not debarred from suing debtor for the original indebtedness upon default in payment of the composition according to the terms of the resolution, the debt not being in fact released or otherwise discharged.—WEESE *v.* BANFIELD (1895), 22 A. R. 489 —CAN.

Sect. 10.—*Position of creditors: Sub-sect.* 2, *C.* (*b*) *&* *D.* (*a*) *&* (*b*).]

benefit of the creditors of deft. & his two partners, affords no answer on equitable grounds to an action against deft. by a creditor of deft. for his separate debt.—EUROPEAN CENTRAL RY. CO. *v.* WESTALL (1865), L. R. 1 Q. B. 167; 6 B. & S. 970; 35 L. J. Q. B. 9; 14 W. R. 177; 122 E. R. 1451.

Annotations:—**Apld.** *Re* Cope, *Ex p.* Jones (1866), 14 W. R. 542. **Distd.** Eastwood *v.* Ward (1876), 35 L. T. 502, C. A. **Refd.** *Re* Trust Deed, *Ex p.* Jones (1866), 14 L. T. 106.

9242. —— —— ——.]—Pltfs., being the holders of a joint & several promissory note of deft. & H., sued deft. on the note. Deft. pleaded that the note was given by him & H. to pltfs. on account of a partnership debt, & that afterwards deft. & H., as partners, being unable to pay their debts, instituted proceedings, which took place under 1869 Act, ss. 126, 127, &, thereupon, an extraordinary resolution of the creditors of deft. & H. that a composition of 8*s.* 6*d.* in the pound, payable by instalments, should be accepted in satisfaction of the debts due from them to their creditors was passed, that the provisions of the composition became binding on pltfs. & on all the creditors of deft. & H., & that the debts due to pltfs. & to all other creditors became & were satisfied within the above sects:—*Held:* the acceptance of a composition on the joint debt under s. 126, was not a satisfaction of deft.'s separate liability.—SIMPSON *v.* HENNING (1875), L. R. 10 Q. B. 406; 44 L. J. Q. B. 143; 33 L. T. 508, Ex. Ch.

Annotations:—**Distd.** Couldery *v.* Bartrum (1881), 19 Ch. D. 394, C. A. **Consd.** Société Générale De Paris *v.* Geen (1883), 8 App. Cas. 606, H. L.

9243. —— **Separate liability—Created as security for previous joint debt.**]—To a declaration on a promissory note, declared on as the joint note of J. & F., J. pleaded a composition deed under 1861 Act, s. 192, which recited that J. had carried on the business of a wine merchant, & that he had also carried on the business of an hotel in partnership with F., & that F. had assigned all her interest in the hotel to him, & had no other separate property, & witnessed that J. assigned all his property to trustees to pay a composition to the joint creditors, & also to his separate creditors. The deed did not profess to be made with or to bind the separate creditors, & that it had been approved by the statutory majority of the joint creditors & of the separate creditors of J.:—*Held:* the deed was binding on all the creditors of defts., though it did not expressly refer to the separate creditors of F.

The replication set out the note sued on, which was a joint & several note. The rejoinder stated that the note was given as a collateral security only for a joint debt:—*Held:* as the deed discharged the joint debt, it also discharged the several liability on the note.—RIXON *v.* EMARY (1868), L. R. 3 C. P. 546; 37 L. J. C. P. 243; 18 L. T. 637; 16 W. R. 1171.

9244. —— **Debt incurred by fraud.**]—A creditor, who alleges that his debt has been contracted fraudulently by his debtor, may, after receiving a composition from him under 1869 Act, s. 126, commence an action against him for the balance of the debt, without being obliged to prove to the Ct. of Bkpcy. a *primâ facie* case of fraud. The Ct. of Bkpcy. has no jurisdiction to interfere with such an action.—*Re* JACOBS, *Ex p.* HALFORD (1875), L. R. 19 Eq. 436; 44 L. J. Bcy. 53; 32 L. T. 103; 23 W. R. 442.

Annotation:—**Distd.** *Re* Balbirnie, *Ex p.* Jameson (1876), 3 Ch. D. 488 C. A.

9245. —— ——.]—After a liquidating debtor has obtained from his creditors an order of discharge, a creditor, who has proved a debt in the liquidation, but who alleges that the debt has been incurred by means of fraud on the part of debtor, is entitled, although the liquidation has not been closed, to prosecute an action against debtor for the full amount of the debt, such right being given to him by 1869 Act, s. 49, & not taken away by Debtor's Act, 1869 (c. 62), s. 15. *Semble:* Debtors Act, 1869, s. 15, applies only to cases of composition under 1869 Act, s. 126, & arrangements under s. 28, & not to liquidations by arrangement, under s. 125.—*Re* CHATTERTON, *Ex p.* HEMMING (1879), 13 Ch. D. 163; 49 L. J. Bcy. 17; 41 L. T. 513; 44 J. P. 153; 28 W. R. 218, C. A.

Annotation:—**Refd.** Ross *v.* Gutteridge (1882), 52 L. J. Ch. 280.

See, also, cases in Sect. 11, sub-sect. 3, C., *post.*

D. Where secret Advantage taken in respect of Assent.

(*a*) *Right to enforce Composition Agreement.*

See, also, Sub-sect. 1, B., *ante.*

9246. By suing surety for composition—Creditor signing last.]—Pltf. agreed to accept a composition of 10*s.* in the pound for a debt, on his debtor's brother's agreeing to supply him with coals to the amount of the remaining moiety of the debt. Pltf. was the last person who signed the agreement for the composition. The coals were delivered, & pltf. afterwards sued the surety on the composition note:—*Held:* the note was void, the stipulation for the coals being a fraud on the rest of the creditors.—KNIGHT *v.* HUNT (1829), 5 Bing. 432; 3 Moo. & P. 18; 7 L. J. O. S. C. P. 165; 130 E. R. 1127.

Annotations:—**Distd.** Howden *v.* Haigh (1840), 11 Ad. & El. 1033. **Apld.** Pendlebury *v.* Walker (1841), 4 Y. & C. Ex. 424. **Folld.** *Re* Ellis, *Ex p.* Nelson (1865), 13 W. R. 760. **Consd.** *Re* Milner, *Ex p.* Milner (1885), 15 Q. B. D. 605, C. A. **Refd.** *Re* Westrop, *Ex p.* Underwood (1859), 32 L. T. O. S. 395. **Mentd.** Davidson *v.* M'Gregor (1841), 8 M. & W. 755.

9247. —— **Right of surety to bring bill to set aside guarantee.**]—If a banking co. agree that, upon receiving the guarantee of a particular person, they will advance a certain sum of money for the purpose of securing to the creditors of a trader a composition of 10*s.* in the pound, & setting up the trader in business again, & at the same time, the co., being themselves creditors of the trader, enter into a secret arrangement with him, by which they secure to themselves repayment of the difference between their composition & the full amount of their debt, this is a fraud upon the guarantor, & upon the creditors who execute the composition deed on the faith of the ostensible agreement, & the guarantor may sustain a bill in equity to set aside the guarantee.—PENDLEBURY *v.* WALKER (1841), 4 Y. & C. Ex. 424; 10 L. J. Ex. Eq. 27; 5 Jur. 334; 160 E. R. 1072.

Annotations:—**Mentd.** Steel *v.* Dixon (1881), 17 Ch. D. 825; *Re* Arcedeckne, Atkins *v.* Arcedeckne (1883), 24 Ch. D. 709; Ellesmere Brewery Co. *v.* Cooper, [1896] 1 Q. B. 75, D. C.; *Re* Denton's Estate, Licenses Insce. Corpn. & Guarantee Fund *v.* Denton, [1903] 2 Ch. 670.

9248. By suing debtor—Payment of secret acceptance not enforced.]—An agreement was made between deft., & pltf. & others, creditors of deft., that deft. should pay, & that pltf. & the other creditors should accept, the amount of their debts by certain instalments secured by deft.'s notes, & it was at the same time, without the knowledge or consent of the other creditors, agreed between pltf. & deft., that deft. should indorse to pltf. a bill, accepted by a third party, in order to give

pltf. a fraudulent preference, & induce him to become party to the composition. The notes were given & the bill indorsed by deft. in pursuance of the agreement:—*Held:* pltf. could not sue deft. even on the notes given for the instalments, although pltf. had not enforced or received payment of the acceptance when due.—HOWDEN *v.* HAIGH (1840), 11 Ad. & El. 1033; 3 Per. & Dav. 661; 9 L. J. Q. B. 198; 4 Jur. 821; 113 E. R. 706.

Annotations:—**Consd.** Davidson *v.* M'Gregor (1841), 8 M. & W. 755; Pendlebury *v.* Walker (1841), 4 Y. & C. Ex. 424. **Refd.** Higgins *v.* Pitt (1849), 4 Exch. 312; Mallalieu *v.* Hodgson (1851), 16 Q. B. 689. **Mentd.** Bradshaw *v.* Bradshaw (1841), 9 M. & W. 29; *Re* Westrop, *Ex p.* Underwood (1859), 32 L. T. O. S. 395; Mayhew *v.* Boyes (1910), 103 L. T. 1, C. A.

9249. By suing out fiat against debtor.]—A creditor, in consideration of bills for 10*s.* in the pound on his debt, executed a composition deed, whereby it was expressed that the creditors who executed it released debtor from all demands. At the same time he secretly obtained security for the balance:—*Held:* he ceased to be a creditor, & could not sue out a fiat against debtor, the original debt being released, & the claim under the composition bills being invalidated by the fraud.—*Re* CROSS (1848), 4 De G. & Sm. 364 n.; 11 L. T. O. S. 534; 64 E. R. 870.

Annotations:—**Folld.** *Re* Harvey, *Ex p.* Phillips, [1888] W. N. 88, C. A. **Apld.** *Re* Myers, *Ex p.* Myers, [1908] 1 K. B. 941, D. C.

9250. By presenting bankruptcy petition.]—By a composition deed the creditors of H., in consideration of the payment of the composition, agreed to release to H. all debts owing from him to them respectively, on condition that, if H. made default in payment of the composition, the deed should be void. P., one of the creditors, at the time of executing the deed, made a secret bargain with H., by which he was to receive from H. a larger proportion of his debt than any of the other creditors. H. having made default in paying the composition, P. presented a bkpcy. petition against him. The registrar refused to make a receiving order:—*Held:* the effect of the secret bargain was that the release of P.'s debt was absolute & the condition void, & the refusal of the registrar to make a receiving order was right.—*Re* HARVEY, *Ex p.* PHILLIPS (1888), 36 W. R. 567, C. A.

Annotations:—**Folld.** *Re* Myers, *Ex p.* Myers, [1908] 1 K. B. 941, D. C. **Apld.** Mayhew *v.* Boyes (1910), 103 L. T. 1, C. A.

9251. By proving in debtor's bankruptcy—After default.]—A composition deed contained a release of debtor, subject to a proviso making the release void on non-payment of any of the instalments covenanted to be paid by the deed:—*Held:* as against a creditor who had acceded to the deed, but by means of a secret arrangement had received more than the amount of the whole composition, the release was absolute, although the instalments had not been paid according to the covenant, & the creditor could not prove in his debtor's bkpcy.—*Re* HODGSON, *Ex p.* OLIVER (1851), 4 De G. & Sm. 354; 64 E. R. 866.

Annotations:—**Apprvd.** *Re* Harvey, *Ex p.* Phillips, [1888] W. N. 88, C. A. **Apld.** *Re* Myers, *Ex p.* Myers, [1908] 1 K. B. 941, D. C. **Mentd.** Mayhew *v.* Boyes (1910), 103 L. T. 1, C. A.

9252. —— Fresh debt contracted after payment of original debt in full.]—Insolvent compounded with her creditors for 13*s.* 6*d.* in the pound, but promised to pay one of her creditors the whole of his debt, in order to induce him to sign the composition deed. After paying him in full, she contracted a fresh debt with him, & then became bkpt.:—*Held:* the payments made to the creditor above the composition of 13*s.* 6*d.* in the pound were fraudulent & void, & the creditor could not prove for the amount of his fresh debt contracted with bkpt., without first deducting those payments.—*Re* GREEN, *Ex p.* MINTON (1834), 3 Deac. & Ch. 688; 1 Mont. & A. 440, Ct. of R.

(b) Right to enforce secret Agreement.

9253. General rule.]—A separate agreement, securing to some creditors, who had executed a deed of composition, a greater advantage than the other creditors would have under the deed, & without their knowledge, cannot be enforced.—MAWSON *v.* STOCK (1801), 6 Ves. 300; 31 E. R. 1062, L. C.; *earlier proceedings sub nom.* STOCK *v.* MAWSON (1798), 1 Bos. & P. 286.

Annotations:—**Distd.** Thomas *v.* Courtnay (1817), 1 B. & Ald. 1. **Refd.** *Re* Westrop, *Ex p.* Underwood (1959), 32 L. T. O. S. 395.

9254. ——.]—A trust deed was proposed to the creditors at large of insolvent, whereby they all engaged to accept payment of their whole debts by certain instalments, the first four of which were to be guaranteed by collateral security, the two last to remain upon the single security of insolvent. Several of the creditors refused to sign unless pltfs. did, & pltfs. stipulated privately with insolvent as the condition of their signature that he should procure them collateral security for the two last instalments as well as the prior ones, conceiving that they had collateral security originally to cover their debt, & upon the faith of such private agreement they signed the general trust deed, which was then signed by the rest of the creditors:—*Held:* such private agreement was a fraud upon the other creditors, & void, although the effect of it was not to secure to pltfs. the

PART XXIII. SECT. 10, SUB-SECT. 2.—D. (a).

9251 i. *By proving on estate.*]—Insolvent made a compromise with his creditors, borrowing from his wife the money to pay the composition. She borrowed the money from a creditor, agreeing to pay a bonus of a large amount, & giving the creditor for his composition payment & the bonus, her promissory note indorsed by her husband, with a mtge. on her real estate, & a chattel mtge. on his stock, as collateral security. The creditor signed the composition agreement, nothing being said about the bonus to the other creditors, who knew that some arrangement had been made with the creditor for the supply of the necessary funds. Insolvent, after incurring further liabilities, made an assignment for the benefit of his creditors:—*Held:* the creditor could not rank on estate.—SMALL *v.* HENDERSON (1901), 27 A. R. 492.—**CAN.**

PART XXIII. SECT. 10, SUB-SECT. 2.—D. (b).

9253 i. *General rule.*]—Where debtor obtains the assent in writing of his creditors to an extension of time for payment of their respective debts, upon an undertaking that he will not "give a preference" without their consent, a prior secret arrangement, by which one of such creditors obtains security & more favourable terms of payment than that provided in the agreement, is void as a fraud against the other creditors & as against public order.—HOCHBERGER *v.* RITTENBERG (1917), 54 S. C. R. 480; 36 D. L. R. 450.—**CAN.**

9253 ii. ——.]—Parties to a composition deed cannot stipulate for special advantage. The assent by creditors to the composition is founded on the understanding that all share alike.—RIDLEY & SONS TRUSTEES INSOLVENT ESTATE *v.* ALLIANCE BANK (1875), 6 Nfld. L. R. 68.—**NFLD.**

f. —— *Inducement proceeding from third party.*]—A creditor in an insolvent estate, the other creditors having no knowledge thereof, was induced to sign a deed of composition by the offer of payment of portion of his claim for which he held security on condition that he surrendered his security & signed the deed for the balance of his claim. The creditor subsequently sued on the balance of his agreement:—*Held:* (1) the transaction was a fraud on the other creditors & no action would lie thereon; (2) the nature of the transaction was not affected by the fact that the inducement proceeded from a person other than insolvent, or by the fact that the creditor negotiated for the secured portion of his claim & merely signed the deed for the balance.—MERWITZ *v.* JAGGER & CO. (1910), T. P. D. 1016; L. L. R. 751.—**S. AF.**

Sect. 10.—*Position of creditors: Sub-sect.* 2, *D.* (*b*).]

payment of more money than the other creditors were to receive, but only further security for the same sum.—LEICESTER *v.* ROSE (1803), 4 East, 372; 1 Smith, K. B. 41; 102 E. R. 874.

Annotations:—**Apprvd.** *Ex p.* Sadler & Jackson (1808), 15 Ves. 52, L. C. **Folld.** Wells *v.* Girling (1819), 1 Brod. & Bing. 447. **Consd.** Lee *v.* Lockhart (1837), 3 My. & Cr. 302, L. C.; Howden *v.* Haigh (1840), 11 Ad. & El. 1033. **Refd.** Britten *v.* Hughes (1829), 5 Bing. 460; Davis *v.* Holding (1836), 1 Gale, 380; Cullingworth *v.* Loyd (1840), 2 Beav. 385; Higgins *v.* Pitt (1849), 4 Exch. 312; Mallalieu *v.* Hodgson (1851), 16 Q. B. 689; Pfleger *v.* Browne (1860), 28 Beav. 391; Mayhew *v.* Boyes (1910), 103 L. T. 1, C. A. **Mentd.** Bush *v.* Shipman (1844), 14 Sim. 239.

9255. ——.] —Upon a composition a private agreement by some creditors for additional security, though for no greater sum, is void.—*Ex p.* SADLER & JACKSON (1808), 15 Ves. 52; 33 E. R. 675.

Annotations:—**Distd.** Took *v.* Tuck (1827), 4 Bing. 224; Lee *v.* Lockhart (1837), 3 My. & Cr. 302, L. C. **Refd.** Kitchin *v.* Hawkins (1866), L. R. 2 C. P. 22.

9256. ——.]—Where there is a deed of composition, a private bargain, whereby one creditor is to receive a larger sum than the others, will be set aside.—MARE *v.* SANDFORD (1859), 1 Giff. 288; 1 L. T. 183; 5 Jur. N. S. 1339; 65 E. R. 923.

Annotations:—**Apld.** McKewan *v.* Sanderson (1875), L. R. 20 Eq. 65. **Consd.** *Re* Milner, *Ex p.* Milner (1885), 15 Q. B. D. 605, C. A. **Refd.** Mare *v.* Warner (1861), 3 Giff. 100; McKewan *v.* Sanderson (1873), L. R. 15 Eq. 229.

9257. ——.]—If upon a composition between debtor & his creditors, one accepts the composition, & in addition, agrees that debtor shall keep up a policy on his life for the ultimate payment of the remainder of the debt, such an agreement is void, unless every creditor assents, & the policy belongs to the representatives of debtor.—PFLEGER *v.* BROWNE (1860), 28 Beav. 391; 54 E. R. 416.

9258. ——.]—A banker holding bills & acceptances as a security for advances made to a customer, took a guarantee from the brother of the customer that the loss of the bank should not exceed £2,000. The transaction took place after the customer had commenced proceedings for liquidation, & unknown to his other creditors, with a view to prevent the bank from opposing a composition:—*Held:* the arrangement, which would have the effect of giving one creditor a secret advantage over the others, could not be enforced.—MCKEWAN *v.* SANDERSON (1875), L. R. 20 Eq. 65; 44 L. J. Ch. 447; 32 L. T. 385; 23 W. R. 607.

9259. —— **Parol promise of relinquishment of security to pay debt—No consideration.**]—By the release of a debt by a composition deed, the creditor loses also the right to retain a written instrument deposited with him by debtor as a security for the debt; & the relinquishment of such security, for the benefit of debtor, forms no consideration for a parol promise by debtor to pay the residue of the debt, beyond the amount of the composition received under the deed.—COWPER *v.* GREEN (1841), 7 M. & W. 633; 10 L. J. Ex. 346; 151 E. R. 920.

Annotations:—**Refd.** Bateson *v.* Gosling (1871), 41 L. J. C. P. 53; Cragoe *v.* Jones (1873), L. R. 8 Exch. 81. **Mentd.** Shadwell *v.* Shadwell (1860), 7 Jur. N. S. 311.

9260. —— **Agreement for payment of debt in full.**]—Insolvent assigned over his effects for the benefit of his creditors, & in the deed there was a proviso that the shares of those creditors who did not execute it before a given day, should be paid to insolvent:—*Held:* an agreement made between insolvent & a creditor after that day that the latter should sign the deed, & the former pay the remainder of the whole debt, was fraudulent & void.—JACKSON *v.* LOMAS (1791), 4 Term Rep. 166; 100 E. R. 953.

Annotations:—**Folld.** Leicester *v.* Rose (1803), 4 East, 372; Wells *v.* Girling (1819), 1 Brod. & Bing. 447. **Refd.** Fawcett *v.* Gee (1797), 3 Anst. 910.

9261. —— —— **In consideration of creditor becoming surety.**]—A bargain by which a creditor, in consideration of his being surety for the payment to the other creditors of a composition, agreed with debtor, without the knowledge of the other creditors, for the payment of his own debt in full, was set aside at the instance of debtor.—WOOD *v.* BARKER (1865), L. R. 1 Eq. 139; 35 L. J. Ch. 276; 13 L. T. 318; 11 Jur. 905; 14 W. R. 47.

9262. —— **Creditor agreeing to supply goods to debtor on credit immaterial.**]—When resolutions for composition have been passed in manner required by 1869 Act, one of the creditors who is bound by the composition cannot, behind the backs of the other creditors who are also bound thereby, enter into an arrangement with debtor whereby he is to be paid his own particular debt in full, nor can the fact that the creditor agrees on his part to supply debtor with goods on credit at all validate the arrangement.—*Re* ANDREWS, *Ex p.* BARROW (1881), 18 Ch. D. 464; 50 L. J. Ch. 821; 45 L. T. 197, C. A.

Annotations:—**Distd.** Wild *v.* Tucker, [1914] 3 K. B. 36. **Mentd.** *Re* Bonacina, Le Brasseur *v.* Bonacina, [1912] 2 Ch. 394, C. A.

9263. —— **Creditor put in worse position.**]—In 1904 A. & B. were jointly interested in certain cos. B. was adjudicated bkpt. & A. proved in the bkpcy. for three debts in respect of the cos. In consideration of A. withdrawing his proof for two of the debts & accepting a composition on the third debt & agreeing to pay B. one-fourth share of the future profits of the cos., etc., B. agreed to assign & release to A. all his interest in the cos. The composition was duly accepted by the various creditors of B. & the adjudication in bkpcy. annulled. In an action by A. for specific performance of his agreement with B.:—*Held:* it

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9260 i. —— *Agreement for payment of debt in full.*]—Deft. presented a petition for the liquidation of his affairs by arrangement. Pltfs., his bankers, put in a proof. Shortly after the first meeting, pltfs., at deft.'s request, agreed to refrain from claiming a dividend in the estate for the time being, & to assist deft. in his business, deft. agreeing to pay at a later date pltfs.' original claim in full. These arrangements were made with the knowledge & approval of the trustee of the estate:—*Held:* the agreement for the eventual payment of pltfs. in full was not illegal.—UNION BANK OF AUSTRALIA, LTD. *v.* PATON (1897), 8 Q. L. J. 28.—**AUS.**

9261 i. —— —— *In consideration of creditor becoming security.*]—A., with the knowledge of the other creditors, agreed with B., his debtor, to guarantee a composition to the other creditors, & that A. should be paid in full. All the creditors except A. signed & accepted the composition. Upon A. proving for his entire debt, B. applied to have it rejected upon the ground that the agreement was illegal:—*Held:* the agreement was valid.—*Re* HICKINBOTHAM (1879), 5 C. L. R. 101.—**AUS.**

9261 ii. —— —— ——.]—By a deed executed by N., an arranging debtor, & F., one of his creditors, reciting that N. was compounding with his creditors, & that F. had agreed to become surety on N.'s promissory notes for the payment of the composition, & reciting that the condition of F. so becoming surety was that N. should assign all his property to F., to secure him against loss as such surety, N. thereby, "for the consideration aforesaid," undertook to pay F.'s debt in full, & that F. should hold the property to be so assigned to him as security for that debt:—*Held:* deed was an illegal agreement for the payment in full of F.'s debt.—FURNIVALL *v.* O'NEILL, [1902] 2 I. R. 422.—**IR.**

h. —— *Mortgage securing payment of debt in full—In consideration of creditor becoming security.*]—The majority of creditors agreed to take a composition payable in three instalments. Three creditors refused to agree, unless payment of the last instalment was secured. In consideration of A., a creditor, securing payment of the last instalment to the three creditors, debtor conveyed premises to A., to secure to A. payment in full of his own debt & against loss from his having secured payment of the instalment; but the deed left unaffected a large residue of debtor's property:—*Held:* the deed was valid.—*Re* GASS (1868), 2 I. L. T. Jo. 40.—**IR.**

would be carrying the policy of the bkpcy. law too far if an agreement was to be upset which was not preferential, but which put the creditor in a worse position for the benefit of bkpt. or of the person providing the money for the composition.—BEALE *v.* BEALE (1909), 126 L. T. Jo. 328.

9264. Private notes set aside.]—If on the consent of the wife & her trustees, & in order to arrange a composition with the husband's creditors, the ct. orders part of the trust-money to be paid to the creditors, thus consenting to discharge the husband of the debts, any private notes, etc., taken by any of the creditors for part of their debts, besides their share with the rest of the creditors, will be set aside.—MIDDLETON *v.* ONSLOW (LORD) (1721), 1 P. Wms. 768; 24 E. R. 605.

Annotations:—**Apld.** Cecil *v.* Plaistow (1794), 1 Anst. 202; Fawcett *v.* Gee (1797), 3 Anst. 910; *Re* Westrop, *Ex p.* Underwood (1859), 32 L. T. O. S. 395.

9265. Bond for residue beyond composition—Whether within design of 5 Geo. 2, s. 30—Though not within express words thereof.]—A., being upon an agreement for a composition gave one of his creditors, who would not consent to it otherwise, a bond for the residue, over & above his composition:—*Semble:* such contract, though not void by the express words of the above Act was within the reason & design of the Act.—SPURRETT *v.* (SPILLER) 1740, 1 Atk. 105; 26 E. R. 69, L. C.

9266. Proceedings at law on promissory note restrained.]—Pltf., being insolvent, agreed with his creditors that they should take 15*s.* in the pound in satisfaction of their debts. Deft., a creditor, refused to come in, unless pltf. gave his promissory note for the remainder, which was done. There was no stipulation in the composition deed that all the creditors should accede to it within a given time, nor did it appear in fact that all the creditors had done so:—*Held:* deft. should be restrained by injunction from proceeding at law on the promissory note.—CONSTANTEIN *v.* BLACHE (1786), 1 Cox. Eq. Cas. 287; 29 E. R. 1169.

9267. Promissory note—Whether subsequent promise to pay same enforceable.]—If all the creditors of an insolvent consent to accept a composition for their respective demands upon an assignment of his effects by a deed of trust, to which they are all parties, & one of them, before he executes, obtain from the insolvent a promissory note for the residue of his demand, by refusing to execute till such note be made, the note is void in law, as a fraud on the rest of the creditors, & a subsequent promise to pay it is a promise without consideration, which will not maintain an action.—COCKSHOTT *v.* BENNETT (1788), 2 Term Rep. 763; 100 E. R. 411.

Annotations:—**Folld.** Jackson *v.* Lomas (1791), 4 Term Rep. 166. **Apprvd.** Sumner *v.* Brady (1791), 1 Hy. Bl. 647, L. C. **Distd.** Feize *v.* Randall (1794), 1 Esp. 224, N. P. **Folld.** Fawcett *v.* Gee (1797), 3 Anst. 910. **Consd.** Steinman *v.* Magnus (1809), 11 East, 390. **Folld.** Wells *v.* Girling (1819), 1 Brod. & Bing. 447. **Apld.** Rogers *v.* Kingston (1825), 10 Moore C. P. 97. **Folld.** Coleman *v.* Waller (1829), 3 Y. & J. 212. **Distd.** *Re* Kidder, *Ex p.* Crosbie (1835), 5 L. J. Bcy. 7. **Apld.** Davis *v.* Holding (1836), 1 M. & W. 159. **Consd.** Wilson *v.* Ray (1839), 10 Ad. & El. 82. **Distd.** Warwick *v.* Richardson (1842), 10 M. & W. 284. **Apld.** *Re* Westrop, *Ex p.* Underwood (1859), 32 L. T. O. S. 395. **Refd.** Nerot *v.* Wallace (1789), 3 Term Rep. 17; Leicester *v.* Rose (1803), 1 Smith K. B. 41; Took *v.* Tuck (1827), 4 Bing. 224; Read *v.* Wrout (1839), 9 L. J. Q. B. 4; Higgins *v.* Pitt (1849), 4 Exch. 312; *Re* Milner, *Ex p.* Milner (1885), 15 Q. B. D. 605, C. A. **Mentd.** Atkinson *v.* Denby (1861), 6 H. & N. 778.

See, also, Part XX., Sect. 12, *ante.*

9268. —— Creditor not receiving more than other creditors.]—By a deed of composition between a trader & his creditors it was agreed that the trader should give them his bills, accepted by a friend, for 10*s.* in the pound, payable in certain portions at fixed periods, & his own promissory notes for the remaining 5*s.*, & that the creditors should be at liberty to take his own notes only for their full demands if they pleased. One of the creditors who signed the deed took bills from debtor, accepted by his friend for the whole 15*s.* in the pound, payable at the same respective times as the bills agreed to be given by the deed of composition. The payment of the bills was resisted, on the ground that it was a security beyond that agreed for, & greater than the other creditors obtained:—*Held:* the transaction was fair, the creditor not receiving by it more than the others.—FEISE *v.* RANDALL (1795), 6 Term Rep. 146; 101 E. R. 480; *affg.* (1794), 1 Esp. 224.

Annotations:—**Distd.** Leicester *v.* Rose (1803), 4 East, 372. *Feise* v. *Randall* was not sufficiently expounded to the consideration of the whole ct. so as to establish a precedent which should break in upon the authority of the former decisions which were more maturely weighed (LORD ELLENBOROUGH, C.J.) **Dbtd.** *Ex p.* Sadler & Jackson (1808), 15 Ves. 52, L. C. I take the liberty of saying in terms less qualified than the language of the Ct. of King's Bench in *Leicester* v. *Rose* that *Feise* v. *Randall* is overruled (LORD ELDON, C.).

9269. —— Given after composition.]—Where a creditor, who is a party to a deed of composition whereby the creditors release debtor from their debts, subsequently receives from debtor a

k. —— *New bill given for former debt.*]—A creditor in a pending arrangement matter cannot, by compelling debtor to sign a fresh bill for a former debt, confer any right upon himself enforceable in law.—*Re* CAMPBELL (1890), 25 L. R. Ir. 50.—**IR.**

9265 i. *Bond for residue beyond composition.*]—J. desired to compromise with his creditors, & pltf. agreed, provided the residue of his debt was secured to him. Deft. gave pltf. a bond to secure it on real estate:—*Held:* the bond was void.—SMITH *v.* DITTRICH (1852), 8 U. C. R. 589.—**CAN.**

9266 i. *Proceedings on bond restrained.*]—A bond with warrant was given by debtor to A., a creditor, in order to induce the other creditors to accept a composition, & the other creditors accepted the composition. A., after the entire transaction was arranged, entered up judgment upon the bond, & issued execution. The ct. restrained a sale under the execution.—DICKSON *v.* FLETCHER (1830), 3 Ir. L. Rec. 1st ser. 222.—**IR.**

9267 i. *Promissory note.*]—A note given by insolvent to one of his creditors, for the purpose of obtaining his signature to a deed of composition, is given for a fraudulent consideration, & cannot be made a ground of action against insolvent.—SINCLAIR *v.* HENDERSON (1865), 9 L. C. J. 306; 1 L. C. L. J. 54.—**CAN.**

9267 ii. *S. P.*—BUDDEN *v.* ROCHON (1898), Q. R. 13 S. C. 322.—**CAN.**

9267 iii. ——.]—A creditor of an insolvent estate was appointed one of the inspectors thereof. A compromise was proposed, but the inspector would only agree to same upon insolvent giving him promissory notes in return for his assent to the arrangement. An action was subsequently brought on the notes:—*Held:* the notes were null & void, both because made in fraud of the other creditors, & also as being against public order, & no action could be maintained on them.—CARTIER *v.* GENSER (1902), 22 C. L. T. Occ. N. 416; Q. R. 21 S. C. 139.—**CAN.**

m. —— *Right of indorsee.*]—Deft. assigned to a trustee a portion of his annual income, for the purpose of paying his creditors a composition on the amount of their respective demands. C., one of the creditors, refused to execute the composition deed until deft. gave him a note, which he did without the knowledge of the other creditors, & after which C. signed as a creditor:—*Held:* the note was a fraud upon the other creditors, & pltf. having become indorsee after it was due could not recover on it.—MCCALMONT *v.* BAILLIE (1849), 1 All. 573.—**CAN.**

n. —— *For balance of claim.*]—A promissory note to a creditor for the balance of his claim, in consideration of his having signed a deed of composition, is void.—BLACKWOOD *v.* CHINIC (1809), 2 R. de L. 27.—**CAN.**

o. —— *For excess of claim over dividend—Post-dated note.*]—An engagement entered into by insolvent with one of his creditors to obtain his consent to the act of composition & discharge, to pay him the excess of his claim over the fixed dividend, is null, & a note given by insolvent in favour of the creditor for the amount of such excess & post-dated, is not recoverable in law.—GARNEAU *v.* LARIVIÈRE (1892), Q. R. 1 S. C. 491.—**CAN.**

9269 i. —— *Given after composition.*]—Several of the creditors of deft. entered into a composition agreement

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promissory note for the amount of his original debt, the note is void as being given without consideration, & a petition cannot be founded on it.—*Re* HALL, *Ex p.* HALL (1835), 1 Deac. 171; 4 L. J. Bcy. 91, Ct. of R.

9270. —— No express agreement that payee should sign first.]—A., a creditor, was applied to to sign a composition deed, to which the other creditors had assented. He agreed to do so upon the condition of receiving more than the other creditors, & consented that that should be concealed from them. The composition deed, releasing debtor, was signed first by A., & afterwards by the other creditors:—*Held:* a note given to secure the debt released by A. was fraudulent & void, although the jury found that it was not expressly agreed that A. should sign first, & then that the deed should be shown, to induce the other creditors to come in.—BARKER *v.* JARVIS (1847), 10 L. T. O. S. 183.

9271. I.O.U. given for whole debt—Subsequently exchanged for bills of exchange in consideration of loan.]—Bkpt., a trader, compounded with his general creditors for 4*s.* in the pound, but gave, as security to one creditor, his I. O. U. for the whole debt, in order to induce him to concur in annulling the bkpcy. Afterwards, in consideration of a loan, he exchanged the I. O. U. for bills of exchange which he accepted:—*Held:* the bills were invalid.—MARE *v.* WARNER (1861), 3 Giff. 100; 4 L. T. 351; 7 Jur. N. S. 1228; 66 E. R. 340.

Annotations:—**Refd.** McKewan *v.* Sanderson (1875), 44 L. J. Ch. 447; *Re* Milner, *Ex p.* Milner (1885), 15 Q. B. D. 605, C. A.

9272. Bill of exchange given as additional composition.]—Pltf., after having been adjudged bkpt. in 1855, commenced negotiations with his creditors for a composition of 5*s.* in the pound. Defts., who were creditors, & who had proved their debt under the bkpcy., arranged with pltf. that they should have a further composition of 5*s.* in the pound, & in Apl., 1856, a bill of exchange was drawn by pltf.'s brother, accepted by pltf., & indorsed to defts., for £931, an amount equal to a composition of 5*s.* in the pound on their debt. Defts. by deed assigned their debt to pltf.'s brother, in consideration of a sum of £931 paid by defts. & also of the bill of exchange. The deed contained a proviso that if the estate should ultimately realise more than 10*s.* in the pound, such additional dividend should be paid to defts. The bkpcy. was afterwards annulled, & a composition of 4*s.* in the pound was paid upon the debt of defts. The bill was not paid at maturity, & defts. commenced an action:—*Held:* the bill was invalid & must be delivered up.—MARE *v.* EARLE (1861), 3 Giff. 108; 4 L. T. 352; 7 Jur. N. S. 1230; 66 E. R. 343.

9273. —— Security given on dishonour of bill.]—Deft., being indebted to pltf. & other creditors, in order to induce pltf. to accept a composition, agreed to pay him an additional composition, which was secured by a bill of exchange drawn by pltf. upon & accepted by deft.'s brother. The bill being dishonoured, & pltf. having threatened legal proceedings, deft. by indenture assigned to pltf. a policy of assurance as security for payment of the bill:—*Held:* the indenture was tainted with the illegality of the original transaction, & could not be enforced.—GEERE *v.* MARE (1863), 2 H. & C. 339; 2 New Rep. 284; 33 L. J. Ex. 50; 8 L. T. 463; 9 Jur. N. S. 827; 12 W. R. 17; 159 E. R. 141.

Annotations:—**Apld.** Yorkshire Rail. Wagon Co. *v.* Maclure (1881), 19 Ch. D. 478. **Refd.** McKewan *v.* Sanderson (1873), L. R. 15 Eq. 229.

9274. Guarantee given on dishonour of note.]—A., being about to compound with his creditors, in order to induce B., one of them, to execute the deed, without the knowledge of the other creditors gave him two promissory notes for £25 each beyond the amount of the composition. Upon the first becoming due it was dishonoured, & an action was brought upon it, & judgment obtained & execution issued. C., who was a party to the notes, in consideration of A.'s forbearing to enforce the judgment, gave him a guarantee for the amount of the judgment & the outstanding note, & thereupon the two notes were given up:—*Held:* the guarantee was tainted with the original fraud, & could not be enforced, notwithstanding part of the consideration for it was the giving up a judgment in an action in which the illegality might have been but was not pleaded.—CLAY *v.* RAY (1864), 17 C. B. N. S. 188; 144 E. R. 76.

Annotation:—**Refd.** *Re* Lenzberg's Policy (1877), 7 Ch. D. 650.

9275. Promissory notes given to provide funds to enable creditor to fulfil agreement.] — Defts. being indebted to pltf. for goods, & being indebted also to other persons, entered into a composition

with him, whereby they engaged to accept payment of their debts in certain stated periods, & among the rest, pltf. agreed to grant three years for the payment of his debt:—*Held:* pltf. could not before the expiration of that period maintain an action on a promissory note, which he had afterwards induced deft. to give him for the amount of his debt, payable by annual instalments.—WILLARD *v.* KILMAN (1840), 1 Kerr. 105.—**CAN.**

9269 ii. ——.]—Where insolvent gave the creditor a note for an amount equivalent to an extra 5*s.* in the pound to induce him to sign his composition deed:—*Held:* as the note was signed after the composition was agreed to by the other creditors, it was not given in fraud of their rights & was good.—PERRAULT *v.* LAURIN (1863), 8 L. C. J. 195; 14 L. C. R. 85.—**CAN.**

9269 iii. —— ——.]—Deft. entered into an arrangement with his creditors. Pltf. was a party to the arrangement, but after he had signed the deed of composition he obtained a promissory note for the balance of the original debt owing to him. Pltf. alleged that after the arrangement, at which he was present, had been made with the creditors, he changed his mind & that he signed the deed on condition that deft. should pass a promissory note for the balance of his claim:—*Held:* as pltf. did not communicate his change of mind to the remaining creditors, the condition was a fraud on them & did not constitute a good consideration for the note.—COHEN *v.* HERMAN & CANARD (1904), 21 S. C. 621; 14 C. T. R. 927.—**S. AF.**

q. —— *For settlement of creditor's claim against third party—For which debtor was surety.*]—A promissory note was given by insolvent to one of his creditors in settlement of a claim of the creditor against another party, for whom insolvent was surety, the creditor refusing to sign the composition deed of insolvent unless such settlement were made:—*Held:* the settlement was in no way prejudicial to the other creditors, & the note was good, & action on it must be maintained.—GREENSHIELDS *v.* PLAMONDON (1860), 8 L. C. J. 192; 10 L. C. R. 251; *n. f.* GARNEAU *v.* LARIVIÈRE (1892), Q. R. 1 S. C. 491; GREENE & SONS *v.* TOBIN (1892), Q. R. 1 S. C. 378.—**CAN.**

r. *Bill of exchange given to make up difference between amount of composition & original debt.*]—Bills passed to creditors without the knowledge of the others, contemporaneously with the signing of a deed of composition, in order to make up the difference between the amount secured by the deed & the original debt:—*Held:* void.—MERRICK *v.* MACAULEY (1846), Bl. D. & Osb. 7.—**IR.**

s. ——.]—A. called a meeting of his creditors, at which B. refused to attend, or to sign any composition deed, unless a part of his debt was secured to him. A. drew a bill on C., which C. accepted & which was handed to B.:—*Held:* the bill being given by C. to B., as a consideration for his signature to the composition deed, B. could not recover on such bill against C.—LINDSAY *v.* ROGERSON (1845), 8 I. L. R. 179.—**IR.**

t. *Mortgage given to provide funds for payment of composition.*]—B. & other creditors of L. resolved to accept a composition payable by his promissory notes. At the time L. was indebted to the E. Bank, which did not sign the composition deed. B. was at that time an accommodation indorser for a part of the amount owing to the bank, but held as security a

with their creditors. Pltf. refused to join unless defts. would pay him dividends at a rate exceeding that which was accepted by the others, & this was agreed upon between pltf. & defts. without the knowledge of the other creditors. Pltf. received securities from defts. on account of the composition bargained for by him. At the time of the above agreement between pltf. & defts., & of the composition, there were bills outstanding which defts. had accepted in payment of the debts compounded for as above stated with pltf. Pltf., after executing the release, omitted to take up the bills, & defts., being threatened with proceedings on the acceptances, gave him their promissory notes, in order that he might provide funds to meet the bills. Being afterwards sued by him upon the notes, they pleaded the facts, & averred that, on the execution of the release, it was pltf.'s duty to take up the bills, but he had neglected to do so, & that there had been no consideration for the notes, except as above stated :—*Held :* the facts showed no valid consideration, for pltf., when he received the notes, was already bound to take up the bills, & defts. might allege such duty against him, though it arose out of a transaction which was a fraud upon other parties.—MALLALIEU *v.* HODGSON (1851), 16 Q. B. 689 ; 20 L. J. Q. B. 339 ; 15 Jur. 817 ; 117 E. R. 1045. *Sub nom.* MALALIEU *v.* HODGSON, 17 L. T. O. S. 37.

Annotations :—**Apprvd.** *Re* Harvey, *Ex p.* Phillips, [1888] W. N. 88, C. A. **Apld.** Mayhew *v.* Boyes (1910), 103 L. T. 1, C. A.

9276. Joint promissory note given by debtor & surety for full debt—In consideration of creditor procuring others to accept composition—Failure to arrange composition—Whether note enforceable against surety.]—S. was indebted to pltf. for money lent, & being embarrassed, the latter informed him that if he would give security for its repayment, he would procure his creditors to accept a composition. Deft. became surety for S. in a joint promissory note, & the transaction was to be kept a secret from the other creditors. Pltf. endeavoured to obtain a composition, but failed :—*Held :* he could not recover as against deft. on the note, as the transaction was fraudulent & void in its inception.—WELLS *v.* GIRLING (1819), 1 Brod. & Bing. 447 ; 4 Moore C. P. 78 ; 129 E. R. 795.

Annotations :—**Distd.** *Re* Trye, *Ex p.* Guillebert (1838), 7 L. J. Bcy. 25. **Mentd.** *Re* Westrop, *Ex p.* Underwood (1859), 32 L. T. O. S. 395.

9277. Creditor induced to enter debt below true value—Notes given for dividends on remainder enforceable after other creditors paid—Bonds for balance unenforceable.]—Upon a deed of composition, one creditor was prevailed upon by debtor to represent his debt below the real amount, receiving notes for the dividend upon the remainder & bonds for the remainder of his debt beyond the amount of the dividend. Upon the bill of debtor & a creditor, party to the deed, the bonds were decreed to be delivered up ; but the ct. was of opinion deft. would be entitled to the benefit of the notes, after all the trusts of the deed were satisfied, though not as against the creditors, & directed an inquiry as to that, reserving the question.—EASTABROOK *v.* SCOTT (1797), 3 Ves. 456 ; 30 E. R. 1103.

9278. Delivery up of bond—No one deceived by fraud.]—Where a creditor apparently accepts & gives a receipt for a composition, in order to enable debtor to deceive his other creditors, but takes a bond as security for the rest of his demand, such bond is void, & will be ordered to be delivered up, although there is no joint agreement among the creditors, nor any one is in fact deceived by the fraud.—FAWCETT *v.* GEE (1797), 3 Anst. 910 ; 145 E. R. 1079.

9279. —— On grounds of public policy.]—A bond, to secure to one creditor the deficiency of a composition, not communicated to the other creditors, will be decreed to be delivered up, with costs, though to *particeps criminis*, the ct. proceeding upon public policy, & the relief being given on account, not of the individual, but of the public.—JACKMAN *v.* MITCHELL (1807), 13 Ves. 581 ; 33 E. R. 412.

Annotations :—**Distd.** Lee *v.* Lockhart (1837), 3 My. & Cr. 302, L. C. **Folld.** Wood *v.* Barker (1865), L. R. 1 Eq. 139 ; *Re* McHenry, McDermott *v.* Boyd, [1894] 2 Ch. 428. **Distd.** *Re* McHenry, McDermott *v.* Boyd, Levita's Claim, [1894] 3 Ch. 365, C. A. **Refd.** Wells *v.* Girling (1819), 4 Moore C. P. 78 ; Simpson *v.* Howden (1837), 3 My. & Cr. 97, L. C. ; Mare *v.* Sandford & Sandford (1859), 5 Jur. N. S. 1339 ; McKewan *v.* Sanderson (1875), L. R. 20 Eq. 65.

9280. Bond given after signature—Grantee receiving no composition.]—Deft. entered into a composition to pay his creditors 6*s.* 8*d.* in the pound, upon condition of being released. Nearly two years afterwards he gave one of them, who had agreed to sign the composition deed, a bond for the residue of her debt, without the knowledge of the other creditors, she not having received the amount of her composition, but some of the other creditors having signed the deed & received their composition :—*Held :* an action might be sustained on the bond.—TOOK *v.* TUCK (1827), 4 Bing. 224 ; 12 Moore C. P. 435 ; 5 L. J. O. S. C. P. 156 ; 130 E. R. 755 ; *subsequent proceedings, sub nom.* TUCK *v.* TOOKE (1829), 9 B. & C. 437.

Annotation :—**Refd.** *Re* Kidder, *Ex p.* Crosley (1834), 1 Deac. 107, Ct. of R.

See, also, No. 9315, *post.*

(c) *Liability to refund Sums paid under secret Agreement.*

9281. Money paid to induce assent—Debtor guilty of breach of trust.]—A., being indebted to B. in respect of fraud & breach of trust, failed & compounded with his creditors for 9*s.* in the pound. B. refused to come in, unless A. paid £100 down & gave security for a further 3*s.* in the pound :—*Held :* although this was a fraud on the other creditors, A. was not entitled to relief from the security, because of his own breach of trust.—SMALL *v.* BRACKLEY (1707), 2 Vern. 602 ; 23 E. R. 993.

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mtge. on L.'s real estate. The bank having agreed to accept an amount in cash for its claim, B. advanced money to L. & took his promissory notes & a new mtge. for the amount, having released the previous mtge. The new transaction was not made known to D., another creditor not a party to the deed of composition, who advanced a sum to L. to enable him to pay off the bank, for which he accepted L.'s promissory notes. L., having failed to pay the second instalment of his notes, D. brought an action to have the transaction between L. & B. set aside & the mtge. declared void, on the ground of having been granted in fraud of the rights of debtor's creditors :—*Held :* the agreement by L. with B. was valid, debtor having at the time the right to pledge a part of his assets to secure the payment of a loan made to assist in the payment of his composition.—BROSSARD *v.* DUPRAS (1891), 19 S. C. R. 531.—**CAN.**

u. *Mortgage granted under pressure—To obtain assent of creditor's agent.*]—B. & another, the trustees of an arranging debtor, had partly realised & divided the estate, when debtor proposed that the unsold portion should be reassigned to him for a certain sum. B., who was not a creditor himself, but was agent for a creditor, refused his consent unless a mtge. to debtor to secure £2,873 was assigned to his principal for £1,500. This was agreed to under pressure ; debtor obtained a reassignment of the balance of his property, & B. recovered the whole amount secured by the mtge. :—*Held :* (1) a fraud upon the creditors ; (2) it made no difference that B. was not a creditor in his own right.—NEWTON *v.* BURKE (1882), 1 N. Z. L. R. 46.—**N.Z.**

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9282. —— Realisation of policy.]— Defts., holding as security for a debt due to them from D. a policy of assurance effected by D., refused to join in a composition deed, by which D. was to be released from his debts on paying 8*s.* in the pound, unless D. assigned the policy to them. D. assigned it, & defts. then executed the composition deed:—*Held:* such assignment was a fraud, &, D. having become bkpt., his assignees were entitled to recover from defts. money they had received on the policy, notwithstanding the 8*s.* in the pound was never paid.—ALSAGER *v.* SPALDING (1838), 4 Bing. N. C. 407; 6 Scott, 204; 7 L. J. C. P. 225; 132 E. R. 844.

9283. —— Whether recoverable.] — *Qu.:* whether debtor, paying money down to a creditor before he enters into a composition as the price of procuring a fraud on his other creditors, may recover the money.—HIGGINS *v.* PITT (1849), 4 Exch. 312; 18 L. J. Ex. 488; 15 L. T. O. S. 139; 154 E. R. 1231.

Annotations:—**Consd.** Atkinson *v.* Denby (1861), 6 H. & N. 778. **Refd.** Haddon *v.* Ayers (1858), 1 E. & E. 118. **Mentd.** Mallalieu *v.* Hodgson (1851), 16 Q. B. 689; Bowes *v.* Foster (1858), 6 W. R. 257; Dauglish *v.* Tennent (1866), 8 B. & S. 1.

9284. —— ——.]—Pltf., being insolvent, proposed to his creditors to pay them a composition of 10*s.* in the pound, to be secured by his acceptances. All the creditors agreed to the arrangement except deft., who refused to execute the agreement unless he were paid an additional 2*s.* in the pound on his debt. A cheque for that amount was given him by a relation of pltf., without pltf.'s knowledge, & he then signed the agreement, & received from pltf. his acceptances for the 10*s.* composition. *Semble:* in the circumstances, pltf., if he were compelled to pay the bills at maturity to *bonâ fide* indorsees, to whom they had been transferred by deft. for value, might recover back from deft. the excess received by him beyond the amount of the composition.—BRADSHAW *v.* BRADSHAW (1841), 9 M. & W. 29; 11 L. J. Ex. 5; 152 E. R. 13.

9285. —— Action for money had & received.]—A. being in insolvent circumstances, was about to enter into a composition deed with his creditors. B., a creditor, who influenced many others, would not agree, & at a private meeting between him & A., refused to sign the deed, unless A. gave him, besides the composition, a sum of £50, & a bill of exchange for £108. A. & B. knew that several other creditors were then waiting to see what B. did, whether he would sign the deed, whereupon A., to induce him to do so, paid him the £50 in cash, & gave him the bill of exchange, & the composition deed was executed:—*Held:* A. might recover back the money in an action for money had & received.—ATKINSON *v.* DENBY (1862), 7 H. & N. 934: 31 L. J. Ex. 362; 8 Jur. N. S. 1012; 10 W. R. 389; 158 E. R. 749, Ex. Ch.; *sub nom.* DANBY *v.* ATKINSON (1862), 7 L. T. 93, Ex. Ch.

Annotations:—**Consd.** Clay *v.* Ray (1864), 17 C. B. N. S. 188; *Re* Lenzberg's Policy (1877), 7 Ch. D. 650. **Refd.** Latter *v.* Braddell (1880), 50 L. J. Q. B. 166.

9286. Payments made subsequently under secret agreement at time of executing deed.]—A creditor at the time of signing a composition deed under 1861 Act, s. 192, took from debtor a private agreement that debtor should make future payments on his account:—*Held:* the agreement was so far fraudulent that debtor could recover back from the creditor the payments subsequently made thereunder.—*Re* LENZBERG'S POLICY (1877), 7 Ch. D. 650; 47 L. J. Ch. 178; 26 W. R. 258.

9287. —— Necessity for proof that composition paid.]—A., being a creditor of B., executed a composition deed, on condition that he was paid in full. It was stipulated in the deed that the debt should be paid at 6*s.* in the pound, by promissory notes. After executing the deed, A. obtained payment from B. in full:—*Held:* B. could not recover back the difference between the full amount & 6*s.* in the pound, without proving that the composition notes had been paid, or giving some evidence that would be equivalent to such proof.—WARD *v.* BIRD (1832), 5 C. & P. 229, N. P.

Annotation:—**Refd.** Bradshaw *v.* Bradshaw (1841), 9 M. & W. 31.

9288. Sum paid by debtor on promissory note given to creditor—Payment made to holder.]—Deft., being a creditor of pltf., entered into a composition deed with the other creditors to receive 10*s.* in the pound, under an agreement with pltf. that he would give deft. his promissory notes for the remainder of the debt. The notes were given, & the composition was paid to deft., who negotiated the promissory notes, the holder of one of which enforced payment from pltf. by action:—*Held:* pltf. might recover back the amount from deft. in an action for money paid, had, & received.—SMITH *v.* CUFF (1817), 6 M. & S. 160; 105 E. R. 1203.

Annotations:—**Folld.** *Re* Green, *Ex p.* Minton (1834), 3 Deac. & Ch. 688, Ct. of R. **Apld.** Alsager *v.* Spalding (1838), 4 Bing. N. C. 407. **Consd.** Wilson *v.* Ray (1839), 2 Per. & Dav. 253. **Folld.** Horton *v.* Riley (1843), 11 M. & W. 492. **Dbtd.** Higgins *v.* Pitt (1849), 4 Exch. 312. **Folld.** Atkinson *v.* Denby (1862), 7 H. & N. 934, Ex. Ch. **Refd.** Clay *v.* Ray (1864), 17 C. B. N. S. 188; *Re* Lenzberg's Policy (1877), 7 Ch. D. 650.

9289. —— —— Action for money paid.]—Deft., being a creditor of pltf., entered into a composition deed, with the other creditors, to receive 10*s.* in the pound, under an agreement with pltf. that he would give deft. his promissory note for the remainder of the debt, which deft. should keep in his own hands. The note was given, & the composition paid to deft., who negotiated the promissory note, the holder of which enforced payment from pltf.:—*Held:* pltf. might recover back from deft. the sum so paid by him in an action for money paid.—HORTON *v.* RILEY (1843), 11 M. & W. 492; 13 L. J. Ex. 81; 152 E. R. 899.

Annotation:—**Refd,** Danby *v.* Atkinson (1862), 7 L. T. 93, Ex. Ch.

9290. —— —— Whether holders were creditor's agents.]—In 1837 A., being in embarrassed circumstances, executed a deed to secure to his creditors a composition of 7*s.* in the pound. B., a creditor, refused to sign the deed, until A. made B. a promise to give him security for the difference between the composition & the full amount of the debt. Pursuant to that agreement A. subsequently handed over to B. his promissory notes, payable to B. or order. B. indorsed the notes, & paid them in to his bankers at Leeds, to whom B. was in the habit of indorsing all bills & notes received by him, & drawing generally on account. When

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PART XXIII. SECT. 10, SUB-SECT. 2. —D. (*c*).

a. *Goods delivered to induce assent —Whether proceeds recoverable.*]—Pltf. proposed to his creditors to compound their debts. Deft. refused to accede to the composition, unless, prior to his signing the composition deed, he received, in addition, goods to the value of 3*s.* 4*d.* in the pound. Pltf. gave deft. goods to the amount required, & deft. signed the composition deed:—*Held:* pltf. entitled to recover the amount for which the goods were sold by deft., such agreement being contrary to public policy whether the contract were executed or executory.—HELY *v.* HICKS (1840), 3 I. L. R. 92.—IR.

the notes were at maturity the London correspondents of the Leeds bankers presented them to A., by whom they were paid. A. continued to deal with B. down to his bkpcy. in 1840, without ever complaining of the transaction or attempting to set off the payments made in respect of the notes against the subsequent demands of B. against him. No evidence was given to show the state of the account between B. & the Leeds bankers at the time of the payments, or that A. knew the character in which the notes were held by the bankers who presented them. In an action for money paid by A. to the use of B., brought by the assignees of A. to recover back the amount of the notes, the judge left it to the jury to say whether or not the payment was voluntary, & told them that if the payment was made to the bankers as agents only, it must be considered as voluntary, & that if they found the payment to be voluntary, & to have been made with a full knowledge of the circumstances, they must find for B., otherwise for pltfs. :—*Held :* there must be a new trial, in order that the attention of the jury might be more precisely called to the question, whether A. knew the character in which the bankers presented the notes for payment, *viz.*, whether as agents of B. or as holders for value.—GIBSON *v.* BRUCE (1843), 5 Man. & G. 399 ; 6 Scott N. R. 309 ; 12 L. J. C. P. 132 ; 134 E. R. 619.

Annotation :—**Refd.** Atkinson *v.* Denby (1861), 4 L. T. 252.

See, also, No. 9284, *ante.*

9291. —— Payment made to creditor—Action for money had & received—For amount in excess of composition.]—A creditor signed a composition deed in favour of his debtor, but afterwards induced the latter to give him bills of exchange for the full amount of his debt, dated on the day before the composition deed bore date. After receiving one instalment, the creditor sued debtor upon the bills, & recovered the amount, *minus* the instalment paid :—*Held :* debtor might maintain action for money had & received against his creditor, to recover the difference between the amount of the composition & the full amount of the debt.—TURNER *v.* HOOLE (1822), Dow. & Ry. N. P. 27.

Annotations :—**Folld.** Alsager *v.* Spalding (1838), 4 Bing. N. C. 407. **Consd.** Wilson *v.* Ray (1839), 10 Ad. & El. 82 ; Bradshaw *v.* Bradshaw (1841), 9 M. & W. 31.

9292. —— —— Voluntary payment with full knowledge—Payee creditor's agent.]—Pltf. being about to compound with his creditors, deft., a creditor, refused to subscribe the deed, unless he were paid in full. Pltf., to obtain his signature, gave a bill of exchange, payable to deft.'s agent, for the difference between 20*s.* in the pound & 8*s.*, the proportion compounded for. Deft. then signed the deed. Pltf. did not honour the bill when due, but, on subsequent application, he paid it, some months after the dishonour, by two instalments, to the payee, & deft. received the money. The other creditors were paid according to the deed :—*Held :* pltf. could not recover back the amount paid to deft. above 8*s.* in the pound, for the transaction had been closed by a voluntary payment with full knowledge of the facts, & ought not to be reopened, & it made no difference that the sum in question had not been recovered by action.—WILSON *v.* RAY (1839), 10 Ad. & El. 82 ; 2 Per. & Dav. 253 ; 8 L. J. Q. B. 224 ; 3 Jur. 384 ; 113 E. R. 32.

Annotations :—**Consd.** Atkinson *v.* Denby (1861), 6 H. & N. 778. **Refd.** Bradshaw *v.* Bradshaw (1841), 9 M. & W. 29 ; Gibson *v.* Bruce (1843), 5 Man. & G. 399 ; Higgins *v.* Pitt (1849), 4 Exch. 312 ; Mallalieu *v.* Hodgson (1851), 16 Q. B. 689.

SUB-SECT. 3.—DISSENTING CREDITORS.

A. In General.

9293. Whether bound by deed—Claim for unliquidated damages.]—To an action for unliquidated damages, for breach of contract in not accepting timber, defts. pleaded a deed under 1861 Act, s. 192, made after action brought, between defts. (debtors) of the one part, & trustees on behalf of "undersigned creditors" of the other, by which defts. conveyed all their estate & effects to the trustees for the benefit of "the creditors of debtors" ; & in consideration thereof, "the creditors" released defts. from all debts, claims, & demands whatsoever, & averred the assent of the requisite majority of creditors, & of the due execution by defts. & the trustees, & of the registration of the deed, that possession of deft.'s property was given to the trustees, & that pltf. was a creditor in respect of the claim pleaded to within 1861 Act, & was bound by the deed. Pltf. was not an undersigned creditor, & did not assent to the deed :—*Held :* the plea was no answer to the action, for pltf.'s claim, being for unliquidated damages, & not having been assessed under s. 153, was not provable in bkpcy., & pltf. was not a creditor within s. 192, & not bound by the deed.—SHARLAND *v.* SPENCE (1867), L. R. 2 C. P. 456 ; 36 L. J. C. P. 230 ; 16 L. T. 355 ; 15 W. R. 767.

Annotations :—**Folld.** Robertson *v.* Goss (1867), L. R. 2 Exch. 396. **Apld.** Solomon *v.* Isaacs (1872), 27 L. T. 624, Ex. Ch.

9294. —— ——.]—To an action for unliquidated damages for breach of contract by wrongful dismissal of pltf. from deft.'s service, deft. pleaded a deed under 1861 Act, s. 192, between deft., debtor,

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9292 i. *Sum paid by debtor on promissory note given to creditor—Payment made to creditor—Voluntary payment with full knowledge.*]—Certain creditors of insolvent & his assignee for the general benefit of creditors sued to recover from other creditors money paid to them on promissory notes by insolvent before the assignment, under an alleged secret agreement :—*Held :* the payments not being procured by unjust oppression or extortion on the part of defts., but being voluntary, the action failed.—LANGLEY *v.* VAN ALLAN (1901), 32 S. C. R. 174.—**CAN.**

b. *Promissory notes made & discharged by third party—Penalty.*]—M. filed his petition & called a meeting of his creditors. His wife, who had separate property, sent her three promissory notes to J., a partner in the firm of L. & Co., who were the largest creditors. J. thereupon promised to accept M.'s proposal. D., the other partner, without at the time knowing of the transaction, presided at the meeting, when a composition was agreed to, & L. & Co., in common with the other creditors, received composition notes in respect of their debt. Mrs. M. discharged her liability to L. & Co. upon her three notes, which they credited to M.'s debt :—*Held :* the above facts evidenced a corrupt agreement, within Irish 1872 Act, & L. & Co. must forfeit treble the amount of the three promissory notes.—*Re* MONTGOMERY (1880), 7 L. R. Ir. 27.—**IR.**

PART XXIII. SECT. 10, SUB-SECT. 3. —A.

c. *Whether bound by deed.*]—A creditor of debtor who has assigned his estate is not bound by the deed of assignment, unless he has become a party to it.—FARR *v.* BERGMANN & CO.'S ASSIGNEES (1913), E. D. L. 252.—**S. AF.**

d. —— *Acceptance by statutory majority.*]—No majority of creditors consenting to a composition can bind any minority of dissenting creditors to take less than the full amount of their debts, unless the power of so binding the minority is by legal enactment expressly given to the majority.—DE SMIDT *v.* BLANCKENBERG (1844), 2 Men. 248.—**S. AF.**

e. —— —— *Performance of composition.*]—Dissenting creditors are not bound by a composition, accepted by the statutory majority of creditors, unless the composition is fully carried out.—*Re* KELLY (1861), 13 Ir. Jur. 258.—**IR.**

f. —— —— *Debtor's conduct.*]—Where the statutory majority of the creditors agree to accept the composition offered by an arranging debtor, the wishes of that majority must prevail over those of the minority, unless there has been bad trading or something wrong in the conduct of the debtor.—*Re* M. (1912), 47 Ir. L. T. 26.—**IR.**

g. —— —— *Creditors who have*

Sect. 10.—*Position of creditors: Sub-sect.* 3, *A.*]

two sureties, & the creditors of deft., by which debtor & sureties covenanted to pay a certain composition in a specified time, the payment to be secured by joint & several promissory notes. In consideration of the premises, the creditors released debtor "from their respective debts, & all claims & demands in respect thereof." Pltf. did not assent to or approve of the deed:—*Held:* the plea was no answer to the action, the claim of pltf. being for unliquidated damages.—HOGGARTH *v.* TAYLOR (1867), L. R. 2 Exch. 105; 36 L. J. Ex. 61; *sub nom.* HOGARTH *v.* TAYLOR, 15 L. T. 588.

Annotations:—**Folld.** Robertson *v.* Goss (1867), L. R. 2 Exch. 396; Sharland *v.* Spence (1867), L. R. 2 C. P. 456. **Refd.** Solomon *v.* Isaacs (1872), 27 L. T. 624, Ex. Ch.

9295. —— ——.]—A deed under 1861 Act, s. 192, does not bind one who has a claim for unliquidated damages against debtor, & whose damages have not been assessed under s. 153.—ROBERTSON *v.* GOSS (1867), L. R. 2 Exch. 396; 36 L. J. Ex. 251; 16 L. T. 566; 15 W. R. 965.

Annotation:—**Apld.** Solomon *v.* Isaacs (1872), 27 L. T. 624, Ex. Ch.

9296. —— ——.]—Declaration upon an indenture made Aug. 16, 1861, between C., since deceased, & deft. of the one part, & pltf. of the other part, whereby C. & deft. covenanted to pay the premiums upon a certain policy of assurance upon the life of C., which had been deposited with pltf., until the payment of a certain bond therein mentioned. Pltf. alleged that although the bond had not been paid, both C. & deft. had neglected to pay any of the premiums upon the policy of assurance, from the date of the indenture. Deft. pleaded a deed, dated June 21, 1869, under 1868 Act, between himself, two inspectors, & the creditors, who would be entitled to prove under an adjudication of bkpcy. against deft., founded on a petition filed upon the day of the date of the presents, upon an act of bkpcy. committed upon the day of the date thereof. The plea merely stated that it was agreed by the deed that the provisions therein contained should operate & have the same force & effect as an order of discharge under 1861 Act, & might be so pleaded in bar of every action commenced by any creditor of deft., & with the same effect as an order of discharge under 1861 Act, in case deft. had been adjudicated bkpt. The plea then averred the performance of all conditions precedent, & that at the time of the execution of the deed pltf. was a creditor of deft. in respect of the claim herein pleaded to within 1861 Act:—*Held:* the plea was no answer to the action.—SOLOMON *v.* ISAACS (1872), 27 L. T. 624, Ex. Ch.

See, also, cases in Sect. 10, sub-sect. 2, *A.*, *ante.*

9297. —— **Name not inserted in statement of affairs.**]—A creditor refused to be bound by a resolution registered under 1869 Act, s. 125, on the ground that his name was not duly inserted in debtor's statement of debts:—*Held:* he ought not to be restrained from suing debtor at law.—*Re* BISHOP, *Ex p.* PAPER STAINING CO. (1873), 8 Ch. App. 595; 37 J. P. 660, L. C. & L. J.

Annotations:—**Folld.** *Re* Watson, *Ex p.* Watson (1876), 2 Ch. D. 63, C. A. **Refd.** *Re* Harper, *Ex p.* King (1873), L. R. 17 Eq. 336, n.

9298. —— —— **Drawer of bill of exchange entered instead of holder.**]—In the statement of debts produced by debtor at the meetings of creditors, at which resolutions for accepting a composition were passed, debtor had inserted the amount coming due on two bills of exchange & the name & address of the drawer as the creditor, believing the drawer to be the holder of the bills. The bills had, in fact, been negotiated:—*Held:* the actual holder, having had no notice of the meeting of creditors, was not bound by the resolutions to accept a composition.—*Re* ANGEL, *Ex p.* MATHEWES (1875), 10 Ch. App. 304; 44 L. J. Bcy. 128; 32 L. T. 631; 23 W. R. 736, L. JJ.

Annotation:—**Folld.** *Re* Engelhardt, *Ex p.* Engelhardt (1883), 23 Ch. D. 706, C. A.

9299. —— —— —— **Bill indorsed after deed.**]—Debtor under a composition inserted in his statement of affairs the names of certain creditors as drawers of certain bills of exchange. The bills were actually held by a bank, but were after the date of the petition indorsed to a firm consisting of the drawers & another person, which firm sued upon them:—*Held:* the composition was a good defence to the action.—FORWOOD *v.* WALKER (1877), 36 L. T. 21.

9300. —— **Debt shown in statement not definite in amount—Nor admitted.**]—At a meeting of defts.' creditors held pursuant to 1869 Act, s. 126, which resulted in a resolution by the creditors to accept a composition in satisfaction of their debts, defts. produced their statement of affairs, in which pltfs.' names & addresses were inserted in the list of persons claiming to be creditors, but in which, instead of the amount of a debt admitted to be due, there was put opposite to their names a large sum as the amount of their claim, with a note thereunder in the following words: "Acting under legal advice this claim was resisted, & became the subject of an action, & reference to J., which reference is now pending":—*Held:* this was not a statement showing the amount of the debt due to pltfs. within s. 126 so as to make the provisions of the composition binding on pltfs., though they were non-assenting creditors, as in order to be binding, the statement must show a debt of definite amount, admitted to be due.—MELHADO *v.* WATSON (1877), 2 C. P. D. 281; 46 L. J. Q. B. 502; 36 L. T. 724; 25 W. R. 562, C. A.

Annotations:—**Apprvd.** Breslauer *v.* Brown (1878), 3 App. Cas. 672, H. L. **Mentd.** *Re* Wright, *Ex p.* Willey (1883), 23 Ch. D. 118, C. A.

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proved—Release from sequestration.]—The whole body of creditors who have proved on the estate are bound where an offer of composition by the insolvent has been accepted by a three-fourths majority of creditors who have proved & the estate has been released from sequestration.—CONNELL *v.* CARROLL (1884), 10 V. L. R. 169.—**AUS.**

h. —— *Deed not executed by creditors.*]—A., against whom a decree had been obtained, executed a deed, in trust for his creditors. The deed was not signed by any creditor, nor had the creditors assented in any manner:—*Held:* the deed void as against the execution creditor.—FLYNN *v.* MITCHELL (1857), 10 Ir. Jur. 68.—**IR.**

k. —— ——.]—Pltf. was the payee, & deft. the indorser, of a dishonoured promissory note. The maker of the note was indebted to pltf. in a sum considerably exceeding the amount of the note. After dishonour pltf. suggested to the maker that he should assign his estate in trust for creditors. The maker agreed, & the deed of assignment was prepared & executed by the maker & by the trustee, & was then forwarded to pltf. for execution by himself & the other creditors. He neither executed it nor obtained the execution of other creditors. The deed did not reserve the rights of the creditors against sureties, but provided that in the event of assets being insufficient for payment of debts in full, the maker "should forthwith pay the balance owing" of such debts, & contained a further clause "that nothing herein contained or implied shall operate as a discharge of the debts or any of them, unless & until same shall be respectively paid in full":—*Held:* pltf. was bound by the deed, although he had not executed it.—HATRICK *v.* NICOL (1910), 30 N. Z. L. R. 257.—**N.Z.**

l. —— *Deed executed only by minority.*]—A deed of assignment for benefit of creditors is not invalid if executed only by the minority of the creditors.—STEPHENSON *v.* BAUMGARTNER, BAUMGARTNER *v.* STEPHENSON (1868), 3 Agra. 104, 321.—**IND.**

9301. —— —— **Estimated costs.**]—On Apr. 24 B., pltf. in an action, recovered judgment for £53 & costs. On Apr. 25 deft. filed a liquidation petition. In his statement of affairs he inserted B. as a creditor for the £53, but made no mention of the costs. The first meeting of the creditors was held on May 19. B. attended & proved a debt of £203, being the £53, & £150, the estimated amount of the costs. The meeting was adjourned to May 29, when the creditors resolved to accept a composition, B. voting in the minority. On June 8 the costs of the action were taxed at £147. On June 9 B. gave notice to debtor that he withdrew his proof, & the same day he issued execution against debtor for the judgment debt & costs. On June 11 the second meeting of the creditors was held, & B. then gave written notice that he withdrew his proof, without prejudice to again proving on a subsequent occasion. The chairman refused to take the proof off the file. The composition resolutions were confirmed. B. took objections to the resolutions, & opposed their registration, but the registration was made :—*Held :* by reason of the insufficient statements of B.'s debt in debtor's statement, B. was not bound by the composition, & he was not estopped by his conduct from enforcing his execution against debtor.—*Re* LANG, *Ex p.* LANG (1877), 5 Ch. D. 971 ; 37 L. T. 449 ; 26 W. R. 68, C. A.

Annotations :—**Folld.** Oppenheim *v.* Jackson (1879), 49 L. J. Q. B. 216, C. A. ; Burliner *v.* Royle (1880), 5 C. P. D. 354 ; Macdonald *v.* Chesney (1880), 50 L. J. Q. B. 87, C. A. ; *Re* Engelhardt, *Ex p.* Engelhardt (1883), 23 Ch. D. 706, C. A.

9302. —— —— **Contingent debt.**]—If an estimate of a contingent debt can be made so as to be inserted in the statement, the stat. [1869 Act] throws the burden of making it on debtor (LORD BLACKBURN).—BRESLAUER *v.* BROWN (1878), 3 App. Cas. 672 ; 47 L. J. Q. B. 729 ; 39 L. T. 67 ; 26 W. R. 536, H. L. ; *affg.* S. C. *sub nom.*—WILSON *v.* BRESLAUER (1877), 2 C. P. D. 314, C. A.

Annotations :—**Mentd.** Oppenheim *v.* Jackson (1879), 49 L. J. Q. B. 216, C. A. ; Burliner *v.* Royle (1880), 5 C. P. D. 354 ; *Re* Lacey, *Ex p.* Lacey (1880), 16 Ch. D. 131, C. A. ; Lewis *v.* Leonard (1880), 5 Ex. D. 165, C. A. ; Tea Co. *v.* Jones (1880), 43 L. T. 255 ; *Re* Engelhardt, *Ex p.* Engelhardt (1883), 23 Ch. D. 706, C. A. ; Morgan *v.* Hardy (1887), 18 Q. B. D. 646, C. A.

9303. —— **Part only of debt shown in statement—Balance entered as due to another creditor.**]—Pltf. entered into a composition with his creditors, under 1869 Act, s. 126. In his statement of affairs, presented at the meeting of creditors, he set down defts. as his creditors for a certain amount, but set down a second debt really due to them as due to some one else. Defts. attended the meeting, tendered proof of the second debt, which was admitted, took part on the discussion, opposed the resolution for a composition, &, when it was carried, declined to accept the amount of the composition :—*Held :* defts. were not bound by the resolution for composition as to that debt, because pltf. had not complied with s. 126, & there had been no waiver by defts.—OPPENHEIM *v.* JACKSON (1879), 49 L. J. Q. B. 216 : 42 L. T. 461, C. A.

Annotation :—**Refd.** Macdonald *v.* Chesney (1880), 50 L. J. Q. B. 87, C. A.

9304. —— —— ——.]—Under 1869 Act, s. 126, debtor must, in order to bind a non-assenting creditor by a composition, show in his statement the whole of every debt due to the creditor, so that if debtor states one & omits another of the debts the creditor is not bound in respect of the debt stated.—MACDONALD *v.* CHESNEY (1880), 50 L. J. Q. B. 87, C. A.

Annotation :—**Refd.** *Re* Sneyd, *Ex p.* Fewings (1883), 25 Ch. D. 338.

9305. —— **Amount of debt incorrectly stated.**]—Being indebted to pltf. for goods sold to the amount of £143 12*s.* 9*d.* defts. gave him bills of exchange for the sum, less discount, but adding interest, so that the amount of the bills was £142 7*s.* 3*d.* The bills were dishonoured. Defts. compounded with their creditors under 1869 Act, s. 126, & in the statement of debts, entered the amount of the debt due to pltf., a non-assenting creditor, as £142 7*s.* 3*d.*, *viz.*, the amount of the bills. Pltf. sued for £143 12*s.* 9*d.* the original debt. Defts. pleaded the composition :—*Held :* as the original cause of action was suspended but not satisfied by the bills, & revived when they were dishonoured, at the date of the composition the amount of the debt due to pltf. was £143 12*s.* 9*d.*, & as it was not correctly shown in the statement, the composition was no bar to his action.—BURLINER *v.* ROYLE (1880), 5 C. P. D. 354 ; 43 L. T. 254 ; 44 J. P. 831.

Annotation :—**Apprvd.** *Re* Engelhardt, *Ex p.* Engelhardt (1883), 23 Ch. D. 706, C. A.

9306. —— ——.]—A liquidating debtor in his statement of affairs by mistake inserted the amount of the debt due by him to one of his creditors as £17, the amount being really £17 15*s.* :—*Held :* (1) the creditor was not bound by composition resolutions which were passed by the statutory majority, but to which he did not assent ; (2) after a delay of four months from the time when debtor first became aware of the mistake, the ct. would not restrain the creditor from proceeding with an action for the debt, even for the purpose of enabling debtor to summon a general meeting of his creditors, in order to obtain their assent to the correction of the mistake in the statement of affairs.—*Re* ENGELHARDT, *Ex p.* ENGELHARDT (1883), 23 Ch. D. 706 ; *sub nom. Re* ENGLEHART, *Ex p.* ENGLEHART, 52 L. J. Ch. 748 ; 49 L. T. 281 ; 31 W. R. 802, C. A.

9307. —— **Conveyance to trustees for executing creditors—Deed executed by nearly all creditors.**]—A. conveyed all his property to three of his creditors, in trust to pay the debts due from him to themselves & to his other creditors who should execute the deed. The trustees & nearly all the other creditors executed the deed, but with notice that B. had a demand upon A. & was about to enforce it. On a bill being filed by B. against A. & the trustees to set aside the deed on the ground that it was a mere voluntary deed of agency :—*Held :* the bill must be dismissed with costs.—MACKINNON *v.* STEWART (1850), 1 Sim. N. S. 76 ; 20 L. J. Ch. 49 ; 61 E. R. 30.

9308. —— **Whether bound by certificate in Ireland.**]—The certificate issued by the Bkpcy Ct. in Ireland certifying a private composition made

m. —— *Joint creditors—Assignment limited to partnership assets.*]—Partners made an assignment expressed to be in pursuance of 1875 Act, but attempted to limit its operation by inserting after the general description of property in the statutory form the words, "of & belonging to the co-partnership." Each of the partners had separate estate, & separate creditors. M., a brother of one of insolvents, offered to purchase the partnership estate, & upon sufficient in number & value of the joint creditors signing a deed of composition & discharge, the assignee transferred the estate to him, without any authority from the creditors. At a subsequent meeting of the joint creditors, resolutions were passed approving of the deed of the sale to M. & of the action of the assignees :—*Held :* the deed was void as to dissentient joint creditors.—*Re* MCLAREN & CHALMERS (1876), 1 A. R. 68.—**CAN.**

n. —— *Separate creditors—Assignment limited to partnership debts.*]—When the members of an assigned firm have individual creditors, & the deed of assignment provides only for the payment of partnership debts, non-assenting creditors are not bound by the deed.—ALLAN *v.* GARRATT (1870), 30 U. C. R. 165.—**CAN.**

Sect. 10.—*Position of creditors: Sub-sect.* 3, *A.*]

between debtor & creditors in Ireland in the form of Irish 1872 Act, Sched. C., while operating, in pursuance of s. 64 thereof, to all intents & purposes as a certificate of discharge from all bkpcy. proceedings in Ireland, does not extend to operate as a discharge in the English cts., so as to bar the claim of an English creditor in respect of a debt incurred & payable in England, where he has not assented to the composition.—*Re* NELSON, *Ex p.* DARE & DOLPHIN, [1918] 1 K. B. 459; 87 L. J. K. B. 628; 118 L. T. 549; [1918-9] B. & C. R. 1; *sub nom. Re* DEBTOR (No. 333 of 1917), *Ex p.* DEBTOR, 34 T. L. R. 277; 62 Sol. Jo. 348, C. A.

9309. Right to pursue legal remedies—Not restrained without proper notice.]—The ct. will not, in the case of liquidation upon debtor's own petition, interfere to restrain creditors from pursuing their legal remedies without proper notice being given to them.—*Re* A DEBTOR'S PETITION (1870), 21 L. T. 685.

9310. Right to take proceedings at law—Creditor disputing validity of composition on ground of fraud—Action begun before petition.]—Where creditors had resolved to accept a composition under 1869 Act, s. 126, & had appointed a trustee "in the matter," the ct., at the trustee's instance, restrained a creditor, who disputed the validity of the composition on the ground of fraud, from further proceedings in an action at law commenced by him before the filing of debtor's petition.—*Re* THORPE, *Ex p.* HARTEL (1873), 8 Ch. App. 743; 42 L. J. Bcy. 34; 28 L. T. 530; 21 W. R. 428, L. J.

Annotations:—**Consd.** *Re* Glover, *Ex p.* Radcliffe Investment Co. (1873), 43 L. J. Bcy. 4. **Mentd.** *Re* Harper, *Ex p.* King (1873), L. R. 17 Eq. 332; Eyre *v.* Smith (1877), 2 C. P. D. 435, C. A.; *Re* Barnett, *Ex p.* Reynolds (1885), 15 Q. B. D. 169, C. A.

9311. —— Grounds of objection personal to creditor.]—Where a creditor objects to be bound by an arrangement with creditors on grounds personal to himself & not applicable to the rest of the creditors, he will not be restrained by the Ct. of Bkpcy. from trying the question in an action at law.—*Re* BISHOP, *Ex p.* PAPER STAINING CO. (1873), 8 Ch. App. 595; 37 J. P. 660, L. C. & L. J.

Annotations:—**Folld.** *Re* Watson, *Ex p.* Watson (1876), 2 Ch. D. 63, C. A. **Refd.** *Re* Harper, *Ex p.* King (1873), L. R. 17 Eq. 336, n.

Right to enforce trusts of deed—Deed not communicated to creditors.]—*See* Nos. 9533 *et seq.*, *post.*

9312. —— Creditor becoming such after execution of deed.]—The execution of a trust deed for the payment of creditors, does not constitute one of the creditors, who became so after the execution of the deed, & was not a party to it, a *cestui que trust*, entitled to call on the trustee to execute the trusts of the deed.

A. executed a trust deed, appointing B. trustee for certain purposes therein stated, one of which was for the payment of creditors, & another was to raise a sum of money by way of mtge., in order to satisfy a claim for rent due in respect of A.'s lands, then about to be enforced by ejectment. B. obtained from C. an advance of money with which he satisfied that claim. B. afterwards gave to C. a letter, written subsequently to, but dated before the day of the advance, in which, appearing to ask for the advance, he said, "I will consider such advance as raised by me under the power given me, & will, whenever you please, exercise that power by securing such advance in the best manner I am empowered by the deed." No security was ever executed by B.:—*Held:* C. did not stand in the situation of a *cestui que trust* under the deed, & could not maintain a bill in equity, calling on B. to execute the trust of the deed.—LA TOUCHE *v.* LUCAN (EARL) (1840), 7 Cl. & Fin. 772; West, 477; 7 E. R. 1262, H. L.

Annotation:—**Refd.** Synnot *v.* Simpson (1854), 5 H. L. Cas. 121, H. L.

See, further, TRUSTS & TRUSTEES.

9313. Whether entitled to interest.]—A debt by simple contract does not carry interest, because provision for its discharge is made by a deed of trust; such a deed *per se* does not import a contract or trust for the payment of interest, especially where the creditors have not signed the deed, & no agreement is made to charge the land & discharge the person.—HAMILTON *v.* HOUGHTON (1820), 2 Bli. 169; 4 E. R. 290, H. L.

o. *Right to take proceedings.*]—Where creditors do not execute a deed, there is nothing to prevent them suing debtor.—HAMILTON *v.* HAUGHTON (1820), 2 Bli. 169; 4 E. R. 290.—**IR.**

p. —— *Restraint of action.*]—An action against an arranging debtor in England was commenced by a creditor:—*Held:* the fact of arrangement prevented the creditor taking proceedings to recover his debt & the action should be restrained.—MALONE *v.* KEOGH (1873), 7 I. L. T. Jo. 355.—**IR.**

q. —— ——.]—Pltf. assigned for the benefit of his creditors. Deft. was a creditor for £70, due on a note, given before the deed of arrangement was executed, but which fell due after execution. Deft. did not sign the deed, nor did he prove against the estate, but pltf. had repeatedly promised to pay the debt. The deed did not contain a release, nor did it import one:—*Held:* the debt due on the promissory note was not extinguished by the deed, but an action on the note might be restrained under Debtors & Creditors Act 1876, ss. 133, 135.—PEACOCK *v.* ANDERSON, J. R. N. S. 67.—**N.Z.**

9312 i. *Right to enforce trusts of deed—Creditor becoming such after execution of deed.*]—A deed, conveying all debtor's estates to trustees upon trust for the payment of his creditors, to which no creditor is party or privy, is void against subsequent creditors.—DONOHUE *v.* FIRMAN (1835), 1 Jo. Ex. Ir. 508.—**IR.**

r. —— *After acting antagonistically.*]—A creditor is not debarred from participating in the benefits of an assignment in trust for the general benefit of creditors, by an unsuccessful attempt to have such deed set aside as defective.—KLOEPFER *v.* GARDNER (1886), 14 A. R. 60; GARDNER *v.* KLOEPFER (1888), 15 S. C. R. 390.—**CAN.**

s. —— ——.]—Creditors, with the concurrence of debtor, & after notice of an assignment by him, entered up judgment, seized goods covered by the assignment, & refused to execute or have anything to do with it. It having been subsequently decided that the assignment was valid as against their execution, they desired to rank as creditors under the deed. The trustee refused to consent, having divided most of the trust funds amongst the creditors, & the excluded creditors filed a bill to have the benefit of the deed, debtor being willing, & moved for payment into ct. of the balance in the trustee's hands unappropriated, the ct. refused the motion with costs.—MCKAY *v.* FARISH (1850), 1 Gr. 333.—**CAN.**

t. —— ——.]—An assignment was made for the benefit of such creditors as should execute within a time named in it. One creditor, instead of executing, sued debtors, & an interpleader issue was found against him. Thereupon after the time limited for signing, the trustees allowed him to execute the deed:—*Held:* the creditor who had tested the validity of the deed, had forfeited all right to participate in the benefit of the assignment.—JOSEPH *v.* BOSTWICK (1859), 7 Gr. 332.—**CAN.**

a. —— ——.]—When debtor enters into a deed of trust for the benefit of creditors it is not absolutely necessary that every creditor seeking for the benefits to be derived thereunder should actually subscribe the deed, but the ct., before it permits a creditor who has not executed to take a benefit under such deed, is bound to see that he has performed all the fair conditions of the deed, & if such creditor has taken any step inconsistent with the provisions of the deed he will be held deprived of all advantage arising therefrom.—FIELD *v.* DONOUGHMORE (LORD) (1841), 1 Dr. & Wal. 227.—**IR.**

b. —— ——.]—A creditor, who has not assented to a deed of assignment made by debtor for the benefit of his creditors, cannot claim a benefit under the deed after acting for two years in a manner antagonistic to it.—*Re* GRANT, HARRIS *v.* FINKER (1896), 15 N. Z. L. R. 557.—**N.Z.**

c. —— *Necessity of proof.*]—Under 1875 Act, ss. 10, 61, a non-assenting creditor need not have proved his claim to entitle him to the benefits of the deed.—LEWIS *v.* TUDHOPE (1877), 27 C. P. 505.—**CAN.**

Annotations :—**Mentd.** Colclough *v.* Sterwin (1821), 3 Bli. 181, H. L. ; White *v.* Parnther (1829), 1 Knapp, 179, P. C. ; Bateman *v.* Margerison (1853), 16 Beav. 477.

9314. Right to add costs down to date of confirmation of resolution.]—Circumstances (*see* No. 9310, *ante*) in which pltf. in the action was allowed to add to his debt his costs in the action up to the day when the confirmatory resolution accepting the composition was passed.—*Re* THORPE, *Ex p.* HÄRTEL (1873), 42 L. J. Bcy. 34 ; 27 L. T. 863 ; *affd.* on other points, 8 Ch. App. 743, L. J.

Annotations :—**Mentd.** *Re* Glover, *Ex p.* Radcliffe Investment Co. (1873), 43 L. J. Bcy. 4 ; *Re* Harper, *Ex p.* King (1873), L. R. 17 Eq. 332 ; Eyre *v.* Smith (1877), 2 C. P. D. 435, C. A. ; *Re* Barnett, *Ex p.* Reynolds (1885), 15 Q. B. D. 169, C. A.

9315. Right to enforce guarantee given in consideration of creditor signing petition for annulment of adjudication.]—The creditors of bkpt. having assented to a composition of 3*s.* 6*d.* in the pound, to which pltf., a creditor, was not a party, the same creditors afterwards signed a petition for annulling the adjudication of the bkpcy., which pltf. refused to sign, unless deft. would give him his guarantee for £167, in part payment of his debt. Deft., without the knowledge of the other creditors, gave pltf. the guarantee, whereupon the latter signed the petition :—*Held :* the guarantee was not in contravention of 1849 Act, s. 268, & was not fraudulent.—SMITH *v.* SALZMANN (1854), 9 Exch. 535 ; 23 L. J. Ex. 177 ; 156 E. R. 228.

Annotation :—**Apld.** *Re* McHenry, McDermott *v.* Boyd, Levita's Claim, [1894] 3 Ch. 365, C. A.

9316. Right to file petition for adjudication—Notwithstanding petition by debtor for liquidation by arrangement.]—A creditor is entitled to file a petition for an adjudication, although a petition of bkpt. for arrangement be pending, if the creditor has not acquiesced in or sanctioned the arrangement.—*Re* SAUNDERS, *Ex p.* TREHERNE (1860), 2 De G. F. & J. 656 ; 30 L. J. Bcy. 6 ; 3 L. T. 458 ; 6 Jur. N. S. 1317 ; 9 W. R. 133 ; 45 E. R. 775, C. A.

Annotation :—**Folld.** *Re* McMillan & Blackburn (1861), 4 L. T. 29.

9317. Right to oppose application by trustees to dismiss petition for adjudication.]—Upon an application by the trustees under 1861 Act, s. 199, to dismiss a petition for adjudication, a creditor cannot be heard in opposition.—*Re* WYATT, *Ex p.* WYATT (1864), 10 L. T. 311 ; *sub nom. Re* WYATT, *Ex p.* SMITH, 12 W. R. 692.

See, further, Parts III., V., *ante*.

9318. Right to have debtor examined—Concealment of property alleged—Jurisdiction of court.]—Debtor & his creditors in number & value required by 1861 Act, s. 192, executed a deed of composition, but a dissenting creditor, alleging that there was property belonging to debtor existing at the date of the deed unknown to the creditors, applied to the ct. for a sitting to examine bkpt. :—*Held :* the ct. had jurisdiction to appoint a meeting for the examination of debtor.—*Re* M. (AN ARRANGING DEBTOR) (1863), 8 L. T. 767.

9319. Right of joint creditors to object that deed not executed by necessary majority—Separate deeds of composition entered into after dissolution of partnership.] — A. & B., after trading as copartners, dissolved partnership, & subsequently executed separate deeds of composition :—*Held :* joint creditors of the partnership could not, in the absence of proof of the existence of joint estate, object to the deeds as not binding on them, on the ground of their not being executed by a proper majority of joint creditors.—*Re* SMITH & LAXTON, *Ex p.* COCKBURN (1863), 3 De G. J. & Sm. 175 ; 3 New Rep. 227 ; 33 L. J. Bcy. 17 ; 9 L. T. 464 ; 10 Jur. N. S. 573 ; 12 W. R. 184 ; 46 E. R. 604, L. C. ; *subsequent proceedings* (1864), 3 De G. J. & Sm. 175, 197, L. C.

Annotations :—**Refd.** Walker *v.* Nevill (1865), 3 H. & C. 403. **Mentd.** Benham *v.* Broadhurst (1864), 5 New Rep. 251, Ex. Ch. ; Hidson *v.* Barclay (1864), 3 H. & C. 361, Ex. Ch. ; Stone *v.* Jellicoe (1864), 3 H. & C. 263 ; Chesterfield & Midland Silkstone Colliery Co. *v.* Hawkins (1865), 3 H. & C. 677 ; Gurrin *v.* Kopera (1865), 3 H. & C. 694 ; Martin *v.* Gribble (1865), 3 H. & C. 631 ; Scott *v.* Berry (1865), 3 H. & C. 966 ; Gresty *v.* Gibson (1866), L. R. 1 Exch. 112 ; Kitchin *v.* Hawkins (1866), L. R. 2 C. P. 22 ; Reeves *v.* Watts (1866), L. R. 1 Q. B. 412 ; Isaacs *v.* Green (1867), L. R. 2 Exch. 352 ; M'Laren *v.* Baxter (1867), L. R. 2 C. P. 559 ; Cairncross *v.* Wills (1869), 20 L. T. 529.

9320. Adjudication annulled—Scheme providing for revesting of property in bankrupt.]—*Held :* under 1869 Act, where the ct. annulled the adjudication, & the scheme provided that debtor's property should revest in him, creditors, who had not assented to the scheme or proved in the bkpcy., were remitted to their original rights.—CREW *v.* TERRY (1877), 2 C. P. D. 403 ; 46 L. J. Q. B. 787.

9321. Right to set-off under mutual dealings section of 1883 Act.]—By a deed of assignment for the benefit of creditors it was provided that the trustee should apply the money received by him "in paying & discharging ratably, according to the law of bkpcy. & without prejudice or priority, & by such dividends as he shall think fit, the debts due or to become due from debtor to the creditors" :—*Held :* the words "according to the law of bkpcy." were only descriptive of a ratable payment without prejudice or priority, & by a series of dividends, & did not import into the distribution of the money the obligation to allow a set-off under the mutual dealings sect. of 1883 Act to a person who had not signified his assent to the deed.—BAKER *v.* ADAM (1910), 102 L. T. 248 ; 15 Com. Cas. 227 ; 11 Asp. M. L. C. 368.

See, generally, Part X., *ante*.

9322. Judgment obtained after assignment—Whether entitled to payment in full.]—A creditor, who obtains judgment after debtor has made a conveyance of his estate for payment of his debts, shall be paid only in average.—STEPHENSON *v.* HAYWARD (1710), Prec. Ch. 310 ; 24 E. R. 147.

9316 i. *Right to file petition for adjudication—Notwithstanding resolutions for assignment.*]—A creditor was present at a meeting, at which a resolution was passed, without dissent, that debtor should assign his estate to trustees, but did not vote at all, nor did he sign the deed of assignment :—*Held :* he had not disentitled himself to petition for a sequestration, treating the assignment as an act of insolvency.—*Re* WIEDEMAN (1879), 5 V. L. R. 32.—**AUS.**

d. *Right to recover on note given by purchaser of claim.*]—A., a creditor in an insolvent estate, refused to sign a deed of composition. Thereafter he sold his claim against the estate to B., another creditor, obtaining from B. a promissory note therefor. B. subsequently signed the deed of composition in respect not only of his own claim, but also of the one he had purchased. A. did not sign the deed, which was duly accepted by all the creditors :—*Held :* in the absence of proof of *mala fides*, A. was entitled to sue B. on the promissory note.—ELEPHANT TRADING CO. *v.* GETZ (1916), T. P. D. 180.—**S. AF.**

e. *Right to object to participation in assets by creditor taking secret advantage.*]—*Semble :* a dissentient creditor cannot for his own benefit & against the wishes of the majority of creditors, object under Assignments & Preferences Act, 1897, s. 9, to the participation, in the assignor's assets, of an assenting creditor who had taken a secret advantage in respect of assent.—SMALL *v.* HENDERSON (1901), 27 A. R. 492.—**CAN.**

f. *Right to recover debt out of surplus—Where assenting creditors receive composition.*]—A trust was created for the benefit of creditors *pro ratâ*, in consideration of their discharging debtor. All the creditors, except pltfs., accepted from two creditors who had become responsible for the fidelity of the trustee, 25 per cent. of their demands in full. The estate yielded more :—*Held :* pltfs. had no right to the whole of the difference.—BALDWIN *v.* THOMAS (1868), 15 Gr. 119.—**CAN.**

Sect. 10.—*Position of creditors: Sub-sect.* 3, *B.* (*a*) & (*b*).]

B. Composition Agreements binding on dissenting Creditors.

(*a*) *In General.*

9323. To whom made—All creditors.]—In order to render a composition after bkpcy. made under 1849 Act, s. 230, & accepted by nine-tenths in number & value of the creditors, binding on those creditors who have not executed it, the offer of composition must be made to all the creditors, & not to those only who execute the deed.—TAYLOR *v.* PEARSE (1857), 2 H. & N. 36; 26 L. J. Ex. 371; 3 Jur. N. S. 917; 157 E. R. 15.

See, now, 1914 Act, s. 21.

9324. Necessity for equality between assenting & non-assenting creditors.]—To render an assignment of debtor's estate binding under 1861 Act, s. 192, on the minority creditors who have not executed nor assented to it, nor approved of it, it is necessary that they should stand under the deed in the same situation & with the same advantages as the creditors forming the majority.—*Re* SMITH & LAXTON, *Ex p.* COCKBURN (1863), 3 De G. J. & Sm. 175; 3 New Rep. 227; 33 L. J. Bcy. 17; 9 L. T. 464; 10 Jur. N. S. 573; 12 W. R. 184; 46 E. R. 604, L. C.; *subsequent proceedings* (1864), 3 De G. J. & Sm. 175, 197, L. C.

Annotations:—**Consd.** Chesterfield & Midland Silkstone Colliery Co *v.* Hawkins (1865), 3 H. & C. 677; Gurrin *v.* Kopera (1865), 3 H. & C. 694; Martin *v.* Gribble (1865), 3 H. & C. 631. **Refd.** Benham *v.* Broadhurst (1864), 5 New. Rep. 251, Ex. Ch.; Hidson *v.* Barclay (1864), 3 H. & C. 361, Ex. Ch.; *Re* Johnson, *Ex p.* Johnson (1864), 10 L. T. 848; Stone *v.* Jellicoe (1864), 3 H. & C. 263; Walker *v.* Nevill (1865), 3 H. & C. 403; Gresty *v.* Gibson (1866), L. R. 1 Exch. 112; Reeves *v.* Watts (1866), L. R. 1 Q. B. 412; Cairncross *v.* Wills (1869), 20 L. T. 529. **Mentd.** Scott *v.* Berry (1865), 3 H. & C. 966; Kitchin *v.* Hawkins (1866), L. R. 2 C. P. 22; Isaacs *v.* Green (1867), L. R. 2 Ex. Ch. 352; M'Laren *v.* Baxter (1867), L. R. 2 C. P. 559; *Re* Trust-Deed, *Ex p.* Snibstone Colliery Co. (1867), 15 L. T. 545.

9325. —— Interference by court—Fraud.]—When there is no inequality as between creditors & no fraud, the ct. will not judge of the reasonableness of the arrangement as between debtor & his creditors.—*Re* RICHMOND HILL HOTEL CO., *Ex p.* KING (1867), 3 Ch. App. 10; 38 L. J. Ch. 541; 17 L. T. 188; 16 W. R. 57, L. J.

Annotations:—**Folld.** Bailey *v.* Bowen (1868), L. R. 3 Q. B. 133. **Mentd.** *Re* Bank of Hindustan, China & Japan, Mitchell's Case (1870), 5 Ch. App. 400, L. J.; *Re* Universal Banking Corpn., Mackreth's & Strang's Case (1870), 22 L. T. 85.

9326. —— —— Creditors exceeding their power.]—If a composition deed is within 1861 Act, s. 192, the ct. will not overrule the decision of a statutable majority of the creditors as to the reasonableness of its clauses, but where the creditors have stepped beyond the powers given by the Act, the deed will not be valid so as to bind non-assenting creditors.—WIGFIELD *v.* NICHOLSON (1868), L. R. 3 Q. B. 450; 9 B. & S. 261; 37 L. J. Q. B. 155; 18 L. T. 323.

9327. Whether must provide for payment in money—Whether by bill of exchange.]—*Semble:* in order to render a composition after bkpcy., made under 1849 Act, s. 230, & accepted by nine-tenths in number & value of the creditors, binding on those creditors who have not executed it, the offer of composition must be of a composition by a money payment, & not by bills of exchange.—TAYLOR *v.* PEARSE (1857), 2 H. & N. 36; 26 L. J. Ex. 371; 3 Jur. N. S. 917; 157 E. R. 15.

See, now, 1914 Act, s. 21.

9328. Must be reasonable—Not contrary to policy of bankruptcy laws.]—A certificate of registration of a deed of arrangement, under 1861 Act, s. 198, is no answer to an action by a non-executing creditor, if the deed contains covenants which are unreasonable or contrary to the general scope & policy of the bkpcy. laws.—LEIGH *v.* PENDLEBURY (1864), 15 C. B. N. S. 815; 3 New Rep. 475; 33 L. J. C. P. 172; 10 L. T. 30; 10 Jur. N. S. 296; 12 W. R. 468; 143 E. R. 1005.

Annotations:—**Consd.** Coles *v.* Turner (1865), 18 C. B. N. S. 736; Hickmott *v.* Simmonds (1866), L. R. 2 Eq. 462. **Refd.** Balden *v.* Pell (1864), 5 B. & S. 213; Turquand *v.* Moss (1864), 17 C. B. N. S. 15; Coles *v.* Turner (1866), L. R. 1 C. P. 373, Ex. Ch.; Ames *v.* Colnaghi (1868), L. R. 3 C. P. 359. **Mentd.** Lloyd *v.* Harrison (1865), 6 B. & S. 36; Skilton *v.* Symonds (1865), 18 C. B. N. S. 418; *Re* Trust-Deed, *Ex p.* Snibstone Colliery Co. (1867), 15 L. T. 545.

9329. —— Unreasonable provisions not affecting non-assenting creditors.]—To an action by a non-assenting creditor, debtor pleaded a deed under 1861 Act, containing an unreasonable provision. The plea averred facts showing that at the time of the registration of the deed, the unreasonable provision could have no operation against non-assenting creditors:—*Held:* a bad plea, notwithstanding the averment.—OLDIS *v.* ARMSTON (1867), L. R. 2 Exch. 406; 36 L. J. Ex. 181; 16 L. T. 601; 15 W. R. 965.

Annotation:—**Distd.** Poole *v.* Willats (1869), L. R. 4 Q. B. 630.

9330. —— Operation of clause confined to executing creditors.]—*Held:* a clause, which made provisions binding only upon assenting creditors, deprived them of their unreasonableness, & the deed, being executed *bonâ fide*, should be sustained.—*Re* TRESIDDER, *Ex p.* SOMERVILLE (1865), 1 Ch. App. 21; 35 L. J. Bcy. 1; 13 L. T. 350; 11 Jur. N. S. 1029; 14 W. R. 113, L. C.

Annotations:—**Mentd.** *Re* Trust-Deed, *Ex p.* Terrell (1866), 15 L. T. 302; Fitzpatrick *v.* Bourne (1868), 9 B. & S. 157, Ex. Ch.

9331. —— ——.]—By a composition deed purporting to be made under 1861 Act, s. 192, it was covenanted that "no creditor, who shall have executed or otherwise assented to these presents, shall negotiate any bills of exchange, or other negotiable instrument on which debtor is liable, without having first indorsed thereon a memorandum of the execution of or other accession to these presents by such creditor:"—*Held:* the first covenant was valid, as it applied to & bound

PART XXIII. SECT. 10, SUB-SECT. 3.—B. (a).

9327 i. *Whether must provide for cash payment—Whether by bill of exchange.*]—*Semble:* the offer must be of a composition by a money payment, & not by bills of exchange.—*Re* FAHY (1861), 14 Ir. Jur. 46.—IR.

9327 ii. —— *Cash in præsenti.*]—In a composition after bkpcy., made under 12 & 13 Vict. c. 106, s. 230, the offer of a money payment *in præsenti* is not requisite; a composition to be paid at postponed & definite periods, the postponed payments to be secured by bill or other securities, is sufficient.—R. *v.* KELLY (1861), 13 Ir. Jur. 258.—IR.

9328 i. *Must be reasonable.*]—An assignment in trust for creditors made to a person not a creditor, contained a provision empowering the assignee, without consulting the creditors, to carry on & wind up the business, no time being stated therefor, to pay all salaries, wages, etc., & advances made for conducting the business in the winding up thereof, which advances he was authorised to make, & also to sell the land as to him should seem meet, & to retain a reasonable compensation for the execution of the trusts:—*Held:* void, as containing provisions to which creditors could not reasonably be required to agree.—GALLAGHER *v.* GLASS (1882), 32 C. P. 641.—CAN.

9328 ii. ——.]—A deed of assignment for the benefit of creditors provided for payment of certain creditors in full & for a distribution of any remaining assets among unpreferred creditors in proportion to their claims. There was a further provision that all executing creditors should release the assignor from any claim of such creditors:—*Held:* the deed was void, as it imposed terms on unpreferred creditors to which it was unreasonable to expect them to assent.—WHITMAN *v.* UNION BANK OF HALIFAX (1888), 16 S. C. R. 410.—CAN.

k. —— *Delay.*]—A deed of assignment is void which may cause unreasonable or prejudicial delay to the

those creditors only who assented to it by executing or assenting to the deed, & did not bind non-assenting creditors.—HIDSON *v.* BARCLAY (1865), 3 H. & C. 361 ; 34 L. J. Ex. 217 ; 12 L. T. 352 ; 13 W. R. 583 ; 159 E. R. 571, Ex. Ch.

Annotations :—**Consd.** Lyne *v.* Wyatt (1865), 18 C. B. N. S. 593 ; Ray *v.* Jones (1865), 19 C. B. N. S. 416 ; Walker *v.* Nevill (1865), 3 H. & C. 403.

9332. —— Whether insufficiency of composition is unreasonable.] — *Qu. :* whether a registered deed can be treated as void against a non-assenting creditor for unreasonableness, because the amount of composition is too small.—*Re* ROOTS, *Ex p.* ROOTS (1867), 2 Ch. App. 559 ; 36 L. J. Bcy. 38 ; 15 W. R. 728, L. JJ.

9333. —— —— Deed granted out of kindness to debtor.]—The power given by 1861 Act, s. 192, enabling the majority of creditors assenting to a deed of arrangement to bind the non-assenting minority, is a statutory power, & must be exercised *bonâ fide* for the benefit of all the creditors. If the majority of creditors are induced by friendly feelings towards debtor to accept a composition greatly disproportioned to the assets, the ct. will hold the deed not to be binding on a non-assenting creditor, & will give him leave to issue execution on his debt under s. 198 ; but if the assenting majority appear to have exercised their discretion *bonâ fide* for the benefit of the creditors, the ct. will not sit in review on the *quantum* of the composition. —*Re* COWEN, *Ex p.* COWEN (1867), 2 Ch. App. 563 ; 16 L. T. 469 ; 15 W. R. 859, L. JJ.

Annotations :—**Apld.** Osborne *v.* Swan Bank Brick & Coal Co. (1867), 17 L. T. 96 ; *Re* Composition Deed, *Ex p.* D. (1868), 19 L. T. 367. **Consd.** *Re* Deacon, *Ex p.* Deacon (1868), 4 Ch. App. 87, L. JJ. **Apld.** Hart *v.* Smith (1868), L. R. 4 Q. B. 61 ; *Re* Wilde (1868), 19 L. T. 752 ; *Re* Pullen, *Ex p.* Williams (1870), L. R. 10 Eq. 57. **Refd.** *Re* Sedley, *Ex p.* Cobb (1873), 8 Ch. App. 727, L. JJ. ; *Re* Burrs, *Ex p.* Fore St. Warehouse Co. (1874), 30 L. T. 624, L. J. ; *Re* Wedgwood Coal & Iron Co. (1877), 6 Ch. D. 627.

9334. —— —— ——.]—An officer in the army, who was under an engagement with a judgment creditor to pay the debt out of the money to arise from the sale or exchange of his commission, retired on half-pay, &, on being arrested by the judgment creditor, executed an arrangement deed, assented to by the requisite majority of his creditors, by which he bound himself to pay them a composition of 10*s.* in the pound. At that time he had money in hand a little more than sufficient to pay the composition on his debts, which debts amounted to about £3,000, & his half-pay was, at least, £150 a year. No meeting of creditors was held, nor was it shown that the assenting creditors had investigated debtor's affairs :—*Held :* it was to be inferred that the assenting creditors had not exercised a discretion, with a view to their own pecuniary interests, as to whether the composition was fair, but had acted from some motive leading them to favour debtor, & the deed was invalid as against a dissenting creditor.—*Re* DEACON, *Ex p.* DEACON (1868), 4 Ch. App. 87 ; 38 L. J. Bcy. 3 ; 19 L. T. 438 ; 17 W. R. 129, L. JJ.

9335. —— —— ——.]—To a declaration on certain bills of exchange, by non-assentin creditors, deft. pleaded a composition deed under 1861 Act, s. 192. Pltfs. replied that when the deed was made deft. was in possession of available assets sufficient for the payment to the creditors of a much larger composition than that secured, & that the deed was not entered into for the equal benefit of all deft.'s creditors, but solely from motives of benevolence & kindness to & for deft., & without any just regard to the rights & interests of the creditors :—*Held :* the replication was good. —HART *v.* SMITH (1868), L. R. 4 Q. B. 61 ; 9 B. & S. 543 ; 38 L. J. Q. B. 25 ; 19 L. T. 419 ; 17 W. R. 158.

Annotations :—**Folld.** *Re* Pullen, *Ex p.* Williams (1870), L. R. 10 Eq. 57. **Distd.** *Re* Harper, *Ex p.* Linsley (1873), 42 L. J. Bcy. 109.

9336. —— —— Period over which payment to be made considered.]—In considering the validity of a composition deed under 1861 Act, s. 192, the ct. will have regard to the amount of the composition & the period over which it is payable, & the nature & value of debtor's property.

A deed had the effect of withholding from the creditors the great part of the assets of debtor :—*Held :* the deed was unreasonable, & a dissenting creditor was entitled to issue execution.—*Re* HODDER, *Ex p.* LANE (1869), 17 W. R. 992.

9337. —— Postponement of payment of debts.]—A deed under 1861 Act, s. 192, is not to be deemed unreasonable, on the ground that it postpones the payment of the debts for two years, although it gives no benefit to the creditors except the covenant of debtor.—*Re* RICHMOND HILL HOTEL CO., *Ex p.* KING (1867), 3 Ch. App. 10 ; 38 L. J. Ch. 541 ; 17 L. T. 188 ; 16 W. R. 57, L. J.

Annotations :—**Refd.** Bailey *v.* Bowen (1868), L. R. 3 Q. B. 133. **Mentd.** *Re* Bank of Hindustan, China & Japan, Mitchell's Case (1870), 5 Ch. App. 400, L. J. ; *Re* Universal Banking Corpn., Mackreth's & Strang's Case (1870), 22 L. T. 85.

9338. Whether provision reasonable—When court will decide.]—Where there is no inequality between the creditors, the ct. will not decide upon the reasonableness of a provision in a deed under 1861 Act, s. 192.—BAILEY *v.* BOWEN (1868), L. R. 3 Q. B. 133 ; 8 B. & S. 734 ; 37 L. J. Q. B. 61 ; 17 L. T. 470 ; 16 W. R. 396.

Annotation :—**Refd.** Wigfield *v.* Nicholson (1868), L. R. Q. B. 450.

(b) Omissions invalidating Agreement.

9339. No provision for distribution of whole estate.]—*Qu. :* whether if a deed of arrangement had been dated & executed by six-sevenths in number & value of the creditors after 1849 Act, came into operation, it would be void as a deed of arrangement within s. 224 by reason of its not providing for the distribution of the whole estate of debtor.—LARPENT *v.* BIBBY (1855), 5 H. L. Cas. 481 ; 24 L. J. Q. B. 301 ; 25 L. T. O. S. 289 ; 3 W. R. 622 ; 3 C. L. R. 1057 ; 10 E. R. 988, H. L.

Annotations :—**Folld.** Noble *v.* Gadban (1855), 5 H. L. Cas. 504, H. L. **Consd.** Tabor *v.* Edwards (1858), 4 C. B. N. S. 1. **Refd.** McNaught *v.* Russell (1857), 5 W. R. 360 ; Taylor *v.* Pearse (1857), 2 H. & N. 36 ; Irving *v.* Gray (1858), 3 H. & N. 34 ; Legg *v.* Cheesebrough (1859), 5 C. B. N. S. 741 ; Walter *v.* Adcock (1862), 7 H. & N. 541 ; Ilderton *v.* Jewell (1864), 16 C. B. N. S. 142. **Mentd.** *Re* Athlumney, *Ex p.* Wilson, [1898] 2 Q. B. 547.

9340. —— Provision for distribution as if debtor had become bankrupt.]—A deed of arrangement under 1849 Act, s. 224, which provides for the distribution of debtor's estate in the same manner " as if he had become bkpt." on a certain day, is

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creditors.—METCALF *v.* KEEFER (1860), 8 Gr. 392.—**CAN.**

l. —— *Postponement of sale of land until after collection of debts.*]—An assignment provided that the assignee, as soon as conveniently might be, should collect the debts, & sell so much of the goods as should not be required to wind up the business, & afterwards should sell the lands on such terms as he might think best. The debts to be collected amounted to $2,877, & were due by about one hundred & sixty debtors, & the lands formed the most valuable portion of the assets :—*Held :* the assignment was void, the chief objection being that the sale of the land was postponed till after collection of the debts.—CORNWALL *v.* GAULT (1863), 23 U. C. R. 46.—**CAN.**

PART XXIII. SECT. 10, SUB-SECT. 3. —B. (b).

m. *No execution by insolvents.*]—A composition deed, not executed by insolvents, is invalid.—*Re* GARRATT (1869), 28 U. C. R. 266 **CAN.**

Sect. 10.—*Position of creditors: Sub-sect.* 3, *B.* (*b*).]

void, since a deed of arrangement must provide for the distribution of all debtor's estate, but bkpt. is entitled to retain certain excepted articles.—SNODIN *v.* BOYCE (1859), 4 H. & N. 391; 28 L. J. Ex. 245; 33 L. T. O. S. 164; 157 E. R. 891.

Annotations:—**Apld.** Dunlop *v.* Crüger (1861), 32 L. J. Ex. 42, Ex. Ch. **Refd.** Spitzer *v.* Chaffers (1863), 14 C. B. N. S. 686.

9341. ——.]—A deed of arrangement between an insolvent trader & his creditors:—*Held:* not, under 1849 Act, s. 224, obligatory on the creditors who had not executed it, unless it provided for the entire distribution of the trader's estate amongst his creditors.—DREW *v.* COLLINS (1851), 6 Exch. 670; 20 L. J. Ex. 369; 17 L. T. O. S. 158; 15 Jur. 584; 155 E. R. 712.

Annotations:—**N.F.** Tetley *v.* Taylor (1851), 1 E. & B. 521. **Folld.** Fisher *v.* Bell (1852), 12 C. B. 363. **Consd.** Irving *v.* Gray (1858), 3 H. & N. 34; Walter *v.* Adcock (1862), 7 H. & N. 541. **Refd.** March *v.* Warwick (1856), 1 H. & N. 158; Legg *v.* Cheesebrough (1859), 5 Jur. N. S. 795.

9342. *S. P.* TETLEY *v.* TAYLOR (1852), 1 E. & B. 521; 21 L. J. Q. B. 346; 19 L. T. O. S. 258; 17 Jur. 130; 118 E. R. 530, Ex. Ch.

Annotations:—**Folld.** Bibby *v.* Larpent (1852), 20 L. T. O. S. 64; Fisher *v.* Bell (1852), 12 C. B. 363. **Consd.** Larpent *v.* Bibby (1855), 5 H. L. Cas. 481, H. L.; Irving *v.* Gray (1858), 3 H. & N. 34; Spitzer *v.* Chaffers (1863), 14 C. B. N. S. 686; *Re* Woodhouse, *Ex p.* Morgan (1863), 1 De G. J. & Sm. 288, L. C.; Clapham *v.* Atkinson (1864), 4 B. & S. 722; Giddings *v.* Penning (1866), 4 H. & C. 498. **Refd.** Cooper *v.* Thornton (1852), 1 E. & B. 544; March *v.* Warwick (1856), 1 H. & N. 158; McNaught *v.* Russell (1857), 5 W. R. 360; Tabor *v.* Edwards (1858), 4 C. B. N. S. 1; Legg *v.* Cheesebrough (1859), 5 C. B. N. S. 741; Walter *v.* Adcock (1862), 7 H. & N. 541. **Mentd.** Hickman *v.* Cox (1856), 18 C. B. 617; Keyes *v.* Elkins (1864), 5 B. & S. 240; Whitehead *v.* Porter (1864), 12 W. R. 742.

9343. ——.]—A deed of inspectorship, containing a covenant by debtor for payment of his debts in full by instalments, & a covenant on the part of the creditors executing the deed not to sue in the meantime, but not providing, except in certain events, for the assignment of all debtor's estate:—*Held:* not to be a deed of arrangement within the provisions of 1849 Act respecting arrangements by deed.—*Re* WILKES, *Ex p.* WILKES (1855), 5 De G. M. & G. 418; 24 L. J. Bcy. 6; 25 L. T. O. S. 49; 3 W. R. 197; 43 E. R. 932, L. JJ.

Annotations:—**Consd.** Irving *v.* Gray (1858), 3 H. & N. 34; *Re* Calvert, *Ex p.* Calvert (1858), 3 De G. & J. 95, L. JJ. **Folld.** Walter *v.* Adcock (1862), 7 H. & N. 541.

9344. No assignment of all debtor's property—Covenant to assign when required.]—A deed of arrangement under 1849 Act, s. 224, is not invalid, because it does not contain an express assignment by debtor of his estate, but only a covenant to assign it when required by the inspectors.—IRVING *v.* GRAY (1858), 3 H. & N. 34; 27 L. J. Ex. 273; 31 L. T. O. S. 152; 4 Jur. N. S. 380; 157 E. R. 377.

Annotations:—**Mentd.** *Re* Calvert, *Ex p.* Calvert (1858), 3 De G. & J. 95, L. JJ.; Legg *v.* Cheesebrough (1859), 5 C. B. N. S. 741; Leonard *v.* Sheard (1859), 28 L. J. Q. B. 183; Cruger *v.* Dunlop (1861), 7 H. & N. 525, Ex. Ch.; Walter *v.* Adcock (1862), 10 W. R. 542; Copeman *v.* Hart (1863), 14 C. B. N. S. 91; Spitzer *v.* Chaffers (1863), 14 C. B. N. S. 686.

9345. —— **Deed invalid under 1849 Act, s. 224.**]—A deed of arrangement under the above sect. must contain an absolute assignment of all debtor's property for distribution amongst his creditors.—TABOR *v.* EDWARDS (1858), 4 C. B. N. S. 1; 27 L. J. C. P. 183; 31 L. T. O. S 100; 4 Jur. N. S. 339; 140 E. R. 978.

Annotations:—**Mentd.** Eyre *v.* Archer (1864), 10 Jur. N. S. 802; Garrod *v.* Simpson (1864), 3 H. & C. 395; Whitehead *v.* Porter (1864), 5 B. & S. 193; Corner *v.* Sweet (1866), L. R. 1 C. P. 456; Ellis *v.* Saxon (1875), 44 L. J. C. P. 193.

9346. —— **Deed invalid under 1861 Act.**]—A deed of composition which did not convey any part of the property of debtor:—*Held:* not valid under 1861 Act.—WALTER *v.* ADCOCK (1862), 7 H. & N. 541; 31 L. J. Ex. 380; 6 L. T. 583; 10 W. R. 542; 158 E. R. 586.

Annotations:—**Refd.** *Re* Anon. (1862), 6 L. T. 695; Clapham *v.* Atkinson (1864), 4 New Rep. 379, Ex. Ch. **Mentd.** *Re* Rawlings (1862), 11 W. R. 157, L. JJ.; *Re* Shettle, *Ex p.* Godden (1862), 32 L. J. Bcy. 37; Hodgson *v.* Wightman (1863), 7 L. T. 832; Ilderton *v.* Castrique (1863), 14 C. B. N. S. 99; Woods *v.* Foote (1863), 11 W. R. 383, Ex. Ch.; Hidson *v.* Barclay (1864), 3 H. & C. 361, Ex. Ch.; Ilderton *v.* Jewell (1864), 3 New Rep. 516, Ex. Ch.; Ipstones Park Iron Ore Co. *v.* Pattinson (1864), 33 L. J. Ex. 193; Whitehead *v.* Porter (1864), 10 L. T. 410; Martin *v.* Gribble (1865), 3 H. & C. 631; Brooks *v.* Jennings (1866), L. R. 1 C. P. 476.

9347. —— **Deed valid under 1861 Act, s. 192.**]—An assignment or surrender of debtor's estate is not necessary for the validity of a deed of composition or release, under the above sect.—*Re* SMITH & LAXTON, *Ex p.* COCKBURN (1863), 3 De G. J. & Sm. 175; 3 New Rep. 227; 33 L. J. Bcy. 17; 9 L. T. 464; 10 Jur. N. S. 573; 12 W. R. 184; 46 E. R. 604, L. C.; *subsequent proceedings* (1864), 3 De G. J. & Sm. 175, 197, L. C.

Annotations:—**Mentd.** Benham *v.* Broadhurst (1864), 5 New Rep. 251, Ex. Ch.; Hidson *v.* Barclay (1864), 3 H. & C. 36, Ex. Ch.; *Re* Johnson, *Ex p.* Johnson (1864), 10 L. T. 848; Stone *v.* Jellicoe (1864), 3 H. & C. 263; Chesterfield & Midland Silkstone Colliery Co. *v.* Hawkins (1865), 3 H. & C. 677; Gurrin *v.* Kopera (1865), 3 H. & C. 694; Martin *v.* Gribble (1865), 3 H. & C. 631; Scott *v.* Berry (1865), 3 H. & C. 966; Walker *v.* Nevill (1865), 3 H. & C. 403; Gresty *v.* Gibson (1866), L. R. 1 Exch. 112; Kitchin *v.* Hawkins (1866), L. R. 2 C. P. 22; Reeves *v.* Watts (1866), L. R. 1 Q. B. 412; *Re* A Trust-Deed, *Ex p.* Snibstone Colliery Co. (1867), 15 L. T. 545; Isaacs *v.* Green (1867), L. R. 2 Exch. 352; M'Laren *v.* Baxter (1867), L. R. 2 C. P. 559; Cairncross *v.* Wills (1869), 20 L. T. 529.

9348. —— **Assignment with certain exceptions—Agreement to assign excepted property on request.**]—A deed of arrangement under 1849 Act, s. 224, is not rendered void by an exception out of the assignment to the trustees of "the necessary wearing apparel of debtor, his wife, & family," or of a leasehold house held by debtor at a rack-rent, & recited to be of no value, the deed containing a covenant by debtor to assign it to the trustees when he should be required to do so.—SPITZER *v.* CHAFFERS (1863), 14 C. B. N. S. 686; 2 New Rep. 326; 33 L. J. C. P. 7; 8 L. T. 665; 10 Jur. N. S. 258; 11 W. R. 914; 143 E. R. 615.

Annotations: **Mentd.** Ilderton *v.* Jewell (1864), 16 C. B. N. S. 142; Ipstone Park Iron Ore Co. *v.* Pattinson (1864), 9 L. T. 806; Strick *v.* De Mattos (1864), 3 H. & C. 22; Lyne *v.* Wyatt (1865), 18 C. B. N. S. 593.

9349. —— **Assignment of part of future income.**]—Declaration by drawee against acceptor of a bill of exchange. Plea, a composition deed made between deft. of the first part, a trustee of the second part, & the executing or assenting creditors on behalf of themselves & all the creditors of deft.

9344 i. *No assignment of all debtor's property.*]—The omission of some part of the assignor's estate from the assignment does not invalidate it.—NELLES *v.* MALTBY (1883), 5 O. R. 263.—**CAN.**

n. —— *Correction of schedule.*]—Debtor conveyed his lands to a trustee for his creditors, & a sched. annexed purported to contain the whole thereof, but either designedly or by mistake, some of the lands had been omitted:—*Held:* a bill would lie to correct the sched.—GILLESPIE *v.* GROVER (1852), 3 Gr. 558.—**CAN.**

o. —— ——.]—All reference to real estate having been struck out from the form used for making an assignment, the omission is not a "mistake, defect, or imperfection" capable of amendment under 1887 Act, s. 10.—BLAIN *v.* PEAKER (1889), 18 O. R. 109.—**CAN.**

9348 i. —— *Assignment with certain exceptions.*]—On an issue to try the validity of an assignment in trust for creditors:—*Held:* fraudulent to assign on the understanding that assignor should keep his household furniture.—WILSON *v.* KERR (1860), 18 U. C. R. 470.—**CAN.**

of the third part, by which deft. covenanted with the trustee to appropriate half of his future net income from his profession of attorney, until 5*s.* in the pound should be realised & paid to his creditors, the amount of such income to be ascertained & paid at certain times therein mentioned: —*Held:* the deed was a valid deed within 1861 Act, s. 192, as the covenant by deft. was not unreasonable.—KEYES *v.* ELKINS (1864), 5 B. & S. 240; 5 New Rep. 218; 34 L. J. Q. B. 25; 11 L. T. 474; 11 Jur. N. S. 111; 13 W. R. 180; 122 E. R. 820.

Annotations:—**Mentd.** Ray *v.* Jones (1865), 19 C. B. N. S. 416; Thompson *v.* Knight (1866), L. R. 2 Exch. 42; Hatch *v.* Hatch (1872), 28 L. T. 506.

9350. —— Assignment subject to condition—That debtor remain in possession until default.]—A deed under 1861 Act, s. 192, is valid, although it contains an assignment of debtor's property coupled with a condition that debtor shall remain in possession with the power of disposing of the property, until default is made in payment of the composition.—JOHNSON *v.* BARRATT (1865), L. R. 1 Exch. 65; 4 H. & C. 16; 35 L. J. Ex. 15; 13 L. T. 597; 11 Jur. N. S. 1023; 14 W. R. 194.

Annotations:—**Mentd.** Greenberg *v.* Ward (1866), 12 Jur. N. S. 524; Gresty *v.* Gibson (1866), L. R. 1 Exch. 112; Poole *v.* Willats (1869), L. R. 4 Q. B. 630.

9351. No cessio bonorum.]—To an action on a promissory note, deft. pleaded, by way of equitable defence, that, after the accruing of pltf.'s claim, he was indebted to pltf. & other persons, & that a deed was made & entered into by & between deft. of the one part, & the several persons being creditors of deft. who should execute same of the other part, relating to the debts & liabilities of deft. & his release therefrom. The deed was set out in the plea, & after reciting that deft., being unable to pay his debts in full, had applied to his several creditors to receive a composition of 2*s.* 6*d.* in the pound, it went on as follows: "which we, the several creditors signing these presents, have agreed to do, & being a majority in number representing three-fourths in value of the creditors of [deft.] whose debts respectively amount to £10 & upwards, have agreed to accept such composition as aforesaid, & in consideration thereof, & on payment thereof, or whenever thereafter called upon for the purpose, hereby severally undertake & agree to execute to [deft.] a good & sufficient release in the law of our several & respective claims & demands upon him." The plea then averred that a majority representing three-fourths in value of the creditors of deft., whose debts respectively amounted to £10 & upwards, did in writing assent to & approve of the execution of the deed, that the deed was duly registered, & that pltf. was bound thereby as if he had been a party thereto, & had duly executed same:—*Held:* pltf., though a non-assenting creditor, was barred by the deed from maintaining his action, as the deed was a valid deed within 1861 Act, s. 192, & it was not necessary to the validity of a composition deed that there should be any *cessio bonorum.*—CLAPHAM *v.* ATKINSON (1864), 4 B. & S. 730; 4 New Rep. 379; 34 L. J. Q. B. 49; 10 L. T. 908; 11 Jur. N. S. 217; 12 W. R. 1062; 122 E. R. 634, Ex. Ch.

Annotations:—**Expld.** Benham *v.* Broadhurst (1864), 3 H. & C. 472, Ex. Ch. **Consd.** Hidson *v.* Barclay (1864), 3 H. & C. 9; Keyes *v.* Elkins (1864), 5 B. & S. 240. **Apld.** Stone *v.* Jellicoe (1864), 3 H. & C. 263; Walker *v.* Nevill (1864), 3 H. & C. 403. **Distd.** Buvelot *v.* Mills (1865), 6 B. & S. 986. **Consd.** Gurrin *v.* Kopera (1865), 3 H. & C. 694; Sowry *v.* Law (1868), L. R. 3 Q. B. 281. **Distd.** Cairncross *v.* Wills (1869), 20 L. T. 529. **Refd.** Broadhurst *v.* Benham (1864), 11 Jur. N. S. 20, Ex. Ch.; Dewhirst *v.* Jones (1864), 3 H. & C. 60; Dingwall *v.* Edwards (1864), 4 B. & S. 738; Garrod *v.* Simpson (1864), 3 H. & C. 395; Wells *v.* Hacon (1864), 12 W. R. 790; Whitehead *v.* Porter (1864), 5 B. & S. 193; *Re* Williams, *Ex p.* Williams (1864), 10 L. T. 243; Fessard *v.* Mugnier (1865), 18 C. B. N. S. 286; Scott *v.* Berry (1865), 6 New Rep. 265; Corner *v.* Sweet (1866), L. R. 1 C. P. 456; Giddings *v.* Penning (1866), 4 H. & C. 498; Latham *v.* Lafone (1867), 36 L. J. Ex. 97; M'Laren *v.* Baxter (1867), L. R. 2 C. P. 559. **Mentd.** Naylor *v.* Mortimore (1864), 17 C. B. N. S. 207; Strick *v.* De Mattos (1864), 3 H. & C. 22; Union Bank of Manchester *v.* Beech (1865), 12 L. T. 499.

9352. No trustee appointed.]—A deed between debtor of the one part, & the several other persons whose names & seals are subscribed & set, being severally creditors of debtor, of the other part, whereby a composition is paid in cash to the creditors upon their executing the deed, is within the protection of 1861 Act, s. 192; & also, upon being duly registered & the certificate of registration obtained, of s. 198.—*Re* COMPOSITION DEED, *Ex p.* SHETTLE (1862), 7 L. T. 366; 11 W. R. 45; *revsd.* on other points, *Re* SHETTLE, *Ex p.* GODDEN, 1 De G. J. & Sm. 260, L. JJ.

Annotations:—**Mentd.** *Re* Bryant (1862), 7 L. T. 442; *Re* Llewellyn (1862), 1 New Rep. 230; *Re* T. W. (1862), 7 L. T. 475; Berridge *v.* Abbott (1863), 13 C. B. N. S. 507; Dewhurst *v.* Kershaw (1863), 1 H. & C. 726; Hodgson *v.* Wightman (1863), 1 H. & C. 810; Ilderton *v.* Castrique (1863), 14 C. B. N. S. 99; King *v.* Randall (1863), 14 C. B. N. S. 721; *Re* Smith, *Ex p.* Smith (1864), 3 De G. J. & Sm. 218, L. C.; Turquand *v.* Moss (1864), 17 C. B. N. S. 15; *Re* Wardell & Rolls, *Ex p.* Watts (1864), 10 L. T. 74; Whittaker *v.* Lowe (1865), L. R. 1 Exch. 74, Ex. Ch.; Gregory *v.* Baillon (1865), 4 F. & F. 1069, N. P.; Brooks *v.* Jennings (1866), Har. & Ruth 414; *Re* Johnson, *Ex p.* Johnson (1866), 15 L. T. 163; Reeves *v.* Watts (1866), 35 L. J. Q. B. 171.

9353. ——.]—A composition deed under 1861 Act, s. 192, is good without the appointment of a trustee.—DEWHIRST *v.* JONES (1864), 3 H. & C. 60; 4 New Rep. 343; 33 L. J. Ex. 294; 10 L. T. 538; 12 W. R. 885; 10 Jur. N. S. 753; 159 E. R. 447.

Annotations:—**Mentd.** Stone *v.* Jellicoe (1864), 11 L. T. 140; Strick *v.* De Mattos (1864), 10 L. T. 590.

9354. No provision for avoidance of deed on default.]—A deed of arrangement under 1849 Act, s. 224, is not invalid, because it does not contain a provision rendering it absolutely void, if debtor does not perform the covenants contained in it.—IRVING *v.* GRAY (1858), 3 H. & N. 34; 27 L. J. Ex. 273; 31 L. T. O. S. 152; 4 Jur. N. S. 380; 157 E. R. 377.

Annotations:—**Mentd.** *Re* Calvert, *Ex p.* Calvert (1858), 3 De G. & J. 95, L. JJ.; Negg *v.* Cheesebrough (1859), 5 C. B. N. S. 741; Leonard *v.* Sheard (1859), 28 L. J. Q. B. 183; Cruger *v.* Dunlop (1862), 7 H. & N. 525, Ex. Ch.; Walter *v.* Adcock (1862), 10 W. R. 542; Copeman *v.* Hart (1863), 14 C. B. N. S. 91; Spitzer *v.* Chaffers (1863), 14 C. B. N. S. 686.

9355. No covenant between non-assenting creditors & debtor or trustee.]—A deed under 1861 Act, s. 192, is not invalid as against non-assenting creditors, because it contains no covenant with

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q. —— *Concealment of right of action.*]—Debtor made an arrangement with his creditors. Among his list of assets a right of action did not appear: —*Held:* not such culpable negligence as would justify the ct. in setting the deed aside.—*Re* YOUNG (1881), 1 N. Z. L. R. 94.—**N.Z.**

9350 i. —— *Assignment subject to condition.*]—An assignment, for the benefit of all creditors, did not completely divest the assignor's title to the property assigned, & preferred certain creditors over others, unless such others agreed to do something to which no one had a right to ask them to agree:—*Held:* void as against non-assenting creditors.—LUMBER MANUFACTURERS YARDS *v.* WESTERN JOBBERS CLEARING HOUSE (1916), 34 W. L. R. 234; 10 W. W. R. 421.—**CAN.**

9352 i. *No trustee appointed.*]—A deed of composition made without an assignee being appointed is not a bar to non-assenting creditors.—GREEN *v.* SWAN (1872), 22 C. P. 307.—**CAN.**

r. *No acceptance by trustee.*]—A voluntary assignment to an official assignee under 1864 Act, s. 2, is not valid unless accepted by the assignee. —YARRINGTON *v.* LYON (1866), 12 Gr. 308.—**CAN.**

s. *Whether creditors essential parties.*]—It is not essential to the validity of a trust assignment for the benefit of creditors, that the creditors should be parties to the deed.—HAYWARD *v.* WHITE (1843), 2 Kerr, 304.—**CAN.**

Sect. 10.—*Position of creditors: Sub-sect.* 3, *B.* (*b*) & (*c*) *i.*]

them by debtor or the trustee.—STONE *v.* JELLICOE (1864), 3 H. & C. 263 ; 34 L. J. Ex. 11 ; 11 L. T. 140 ; 10 Jur. N. S. 976 ; 12 W. R. 922 ; 159 E. R. 531.

Annotations :—**Refd.** *Re* Trust-Deed, *Ex p.* Snibstone Colliery Co. (1867), 15 L. T. 545. **Mentd.** Latham *v.* Lafone (1867), 15 L. T. 627 ; *Re* Richmond Hill Hotel Co., *Ex p.* King (1867), L. R. 4 Eq. 566.

9356. No compulsory clause directing debtor to pay composition.]—To an action on a promissory note, deft. pleaded a composition deed :—*Held :* pltf., though a non-assenting creditor, was barred by the deed from maintaining his action as the deed was a valid deed within 1861 Act, s. 192, although there was no compulsory clause directing debtor to pay the composition.—CLAPHAM *v.* ATKINSON (1864), 4 B. & S. 730 ; 4 New Rep. 379 ; 34 L. J. Q. B. 49 ; 10 L. T. 908 ; 11 Jur. N. S. 217 ; 12 W. R. 1062 ; 122 E. R. 634, Ex. Ch.

Annotations :—**Consd.** Hidson *v.* Barclay (1864), 3 H. & C. 9 ; *Re* Williams, *Ex p.* Williams (1864), 10 L. T. 243. **Distd.** Cairncross *v.* Wills (1869), 20 L. T. 529. **Refd.** Dingwall *v.* Edwards (1864), 4 B. & S. 738 ; Gurrin *v.* Kopera (1865), 3 H. & C. 694 ; Scott *v.* Berry (1865), 6 New Rep. 265 ; Latham *v.* Lafone (1867), 36 L. J. Ex. 97 ; M'Laren *v.* Baxter (1867), L. R. 2 C. P. 559 ; Sowry *v.* Law (1868), L. R. 3 Q. B. 281. **Mentd.** Benham *v.* Broadhurst (1864), 3 H. & C. 472, Ex. Ch. ; Dewhirst *v.* Jones (1864), 3 H. & C. 60 ; Garrod *v.* Simpson (1864), 3 H. & C. 395 ; Keyes *v.* Elkins (1864), 5 B. & S. 240 ; Naylor *v.* Mortimore (1864), 17 C. B. N. S. 207 ; Stone *v.* Jellicoe (1864), 3 H. & C. 263 ; Strick *v.* De Mattos (1864), 3 H. & C. 22 ; Wells *v.* Hacon (1864), 12 W. R. 790 ; Whitehead *v.* Porter (1864), 5 B. & S. 193 ; Buvelot *v.* Mills (1865), 6 B. & S. 986 ; Fessard *v.* Mugnier (1865), 18 C. B. N. S. 286 ; Union Bank of Manchester *v.* Beech (1865), 12 L. T. 499 ; Walker *v.* Nevill (1865), 3 H. & C. 403 ; Corner *v.* Sweet (1866), L. R. 1 C. P. 456 ; Giddings *v.* Penning (1868), 4 H. & C. 498.

9357. No actual release in terms.]—To a declaration by indorsee against drawer & indorser of a bill of exchange, deft. pleaded a plea setting out a composition deed, whereby a majority in number & three-fourths in value of his creditors, in consideration of the payment of the composition agreed upon before Apr. 10 then next, agreed to accept a composition of 2*s.* 6*d.* in the pound in discharge of their respective debts, so far as they were able to do so without the consent or permission of, & without prejudice to the rights of third parties or sureties, but no further. The plea also alleged compliance with 1861 Act, s. 192, & a tender to pltf. of the composition in respect of his debt :—*Held :* the deed, although containing no actual release in terms, was good under 1861 Act, so as to bind pltf., as if he had executed it, & the plea alleging a tender of the composition showed a good defence to the action.—GARROD *v.* SIMPSON (1865), 3 H. & C. 395 ; 34 L. J. Ex. 70 ; 11 L. T. 777 ; 11 Jur. N. S. 227 ; 13 W. R. 460 ; 159 E. R. 584.

Annotations :—**Mentd.** Johnson *v.* Barratt (1865), 4 H. & C. 16 ; Scott *v.* Berry (1865), 3 H. & C. 966 ; Latter *v.* White (1870), L. R. 5 Q. B. 622.

9358. No reservation of rights against sureties—No creditor secured by sureties.]—A deed under 1861 Act, s. 192, is valid, although it has no clause reserving rights against sureties, unless it is shown that there are creditors secured by sureties.—JOHNSON *v.* BARRATT (1865), L. R. 1 Exch. 65 ; 4 H. & C. 16 ; 35 L. J. Ex. 15 ; 13 L. T. 597 ; 11 Jur. N. S. 1023 ; 14 W. R. 194.

Annotations :—**Refd.** Poole *v.* Willats (1869), L. R. 4 Q. B. 630. **Mentd.** Greenberg *v.* Ward (1866), 12 Jur. N. S. 524 ; Gresty *v.* Gibson (1866), L. R. 1 Exch. 112.

9359. —— Sureties agreeing to creditor executing & becoming bound.]—Action by indorsee against acceptor of a bill of exchange. Plea, a composition deed registered under 1861 Act. The deed contained no reservation of rights against sureties. Replication, that the bill was accepted for value & indorsed to pltf. for value, & that if he had assented to the deed he would have discharged the drawers. Rejoinder, that before the registration of the deed the drawers consented to pltf. executing & becoming bound by the deed. The issue upon the rejoinder having been found for deft. :—*Held :* as by reason of such consent pltf. might have come in for the composition & have held the drawers liable for the balance, he was in the same position as if the right to have recourse to the drawers had been reserved to him in the deed, & was bound by it.—POOLE *v.* WILLATS (1869), L. R. 4 Q. B. 630 ; 9 B. & S. 957 ; 38 L. J. Q. B. 255 ; 20 L. T. 1006 ; 17 W. R. 1009.

9360. No schedule of creditors.]—By a composition deed under 1861 Act, s. 192, a debtor covenanted with a trustee for his creditors to pay his debts by small quarterly instalments to be administered as in bkpcy. The deed also contained a release by the creditors of debtor, a reservation of their rights against third parties, & a proviso avoiding the deed, if the instalments were not paid within seven days after they became due :—*Held :* the deed, when perfected under the Act, was binding on non-assenting creditors, & it was not essential to the validity of such deed that it should contain a schedule of the creditors.—STONE *v.* JELLICOE (1864), 3 H. & C. 263 ; 34 L. J. Ex. 11 ; 11 L. T. 140 ; 10 Jur. N. S. 976 ; 12 W. R. 922 ; 159 E. R. 531.

Annotations :—**Folld.** *Re* Richmond Hill Hotel Co., *Ex p.* King (1867), L. R. 4 Eq. 566 ; *Re* Trust-Deed, *Ex p.* Snibstone Colliery Co. (1867), 15 L. T. 545. **Refd.** Latham *v.* Lafone (1867), 15 L. T. 627.

9361. Debt omitted.]—The omission of a debt from the schedule is not a ground on which the Ct. of Chancery can hold a deed to be invalid, if the requirements of 1861 Act, s. 192, are satisfied.—*Re* RICHMOND HILL HOTEL CO., *Ex p.* KING (1867), L. R. 4 Eq. 566 ; 36 L. J. Ch. 718 ; 16 L. T. 785 ; *affd.* on this point, 3 Ch. App. 10, L. J.

Annotations :—**Refd.** Mitchell's Case (1870), 5 Ch. App. 400, L.J. **Mentd.** Bailey *v.* Bowen (1868), L. R. 3 Q. B. 133 ; *Re* Universal Banking Corpn., Mackreth's & Strang's Case (1870), 22 L. T. 85.

t. ——.]—The mere fact of non-executing creditors not being so favourably placed as those who executed would not be sufficient to avoid a deed made under Insolvent Act, 1864, s. 9, nor a ground for refusing confirmation thereof.—*Re* LAWSON (1869), 5 C. L. J. 232.—**CAN.**

9360 i. *No schedule of creditors.*]—A composition deed recited that the grantor was indebted to certain persons in the sums set opposite their names in a sched. annexed :—*Held :* the omission of a sched, did not vitiate the deed.—THURGAR *v.* TRAVIS (1851), 2 All. 272.—**CAN.**

u. *Creditor's name omitted.*]—A creditor's deed may provide for creditors who are not enumerated in the sched. to it, & the omission of some creditors from the sched., unless wilful & material, does not invalidate the deed.—*Re* VON DER HEYDE (1865), 2 W. W. & A'B. 128.—**AUS.**

w. ——.]—Insolvent made an assignment for the benefit of his creditors, for the purpose of satisfying all creditors named in a sched. to the deed. There was a small creditor, whose name was not on the sched. :—*Held :* the assignee was not bound to confine the distribution of assets to the creditors named in the sched.—MCLEAN *v.* GARLAND (1885), 13 S. C. R. 366.—**CAN.**

9361 i. *Debt omitted.*]—To an action on a mtge. deft. pleaded a discharge under a deed of composition, to which pltf. was no party. Neither pltf.'s name nor debt was mentioned in the sworn statement exhibited at the first meeting of creditors, nor was there any supplementary statement, but it was urged that a couple of lists containing very indefinite references thereto, from which the sworn statement was made, might be deemed such supplementary statements :—*Held :* they could not so be considered.—SANDERSON *v.* DIXON (1878), 29 C. P. 377.—**CAN.**

(c) *Provisions invalidating Agreement.*

i. *In General.*

9362. Reservation of rights against some sureties.]—It is competent for creditors executing a deed of composition with the principal debtor & certain of his sureties to reserve their remedies against other sureties.—*Re* SLADE & SLADE, *Ex p.* CARSTAIRS (1820), Buck, 560, L. C.

9363. Trustee authorised to carry on business—Subscribing creditors becoming partners.]—An assignment to trustees for the benefit of all creditors, who may execute the deed, is not valid, as against creditors, who do not execute, if it authorise the trustees to carry on debtor's trade & contain such terms that the creditors subscribing would become partners in the business.—OWEN *v.* BODY (1836), 5 Ad. & El. 28; 2 Har. & W. 31; 6 Nev. & M. K. B. 448; 5 L. J. K. B. 191; 111 E. R. 1077.

Annotations:—**Distd.** Janes *v.* Whitbread (1851), 11 C. B. 406; Coates *v.* Williams (1852), 7 Exch. 205. **Expld.** *Re* Stanton Iron Co., & *Re* Winding-up Acts (1855), 21 Beav. 164. **Folld.** Hickman *v.* Cox (1856), 18 C. B. 617. **Expld. & Distd.** Hickman *v.* Cox (1857), 3 C. B. N. S. 523, Ex. Ch. **Expld.** Cox *v.* Hickman (1860), 8 H. L. Cas. 268, H. L.; Evans *v.* Jones (1864), 3 H. & C. 423. **Distd.** Mason *v.* Briton Medical & General Life Assocn. (1888), 4 T. L. R. 755, C. A. **Refd.** Hidson *v.* Barclay (1864), 3 H. & C. 361, Ex. Ch. **Mentd.** Siggers *v.* Evans (1855), 5 E. & B. 367; Gooch *v.* Deakin (1862), 1 New Rep. 95; Greenberg *v.* Ward (1866), 12 Jur. N. S. 524.

See, further, Nos. 9448, 9449, *post.*

9364. Trustee authorised to carry on hotel business—No licence at time of assignment.]—Where an assignment to trustees for the benefit of all creditors, who may execute the deed, authorises the trustees to carry on the debtor's trade, the trade in question being that of an hotel keeper, it is no objection to such an assignment that debtor, when it was executed, had not a licence for retailing exciseable liquors, there being no evidence that the trustees contemplated selling, or in fact sold, any liquors without such licence, & a licence having been procured two days after the execution of the deed.—OWEN *v.* BODY (1836), 5 Ad. & El. 28; 2 Har. & W. 31; 6 Nev. & M. K. B. 448; 5 L. J. K. B. 191; 111 E. R. 1077.

Annotations:—**Distd.** Coates *v.* Williams (1851), 18 L. T. O. S. 228. **Expld. & Distd.** Janes *v.* Whitbread (1851), 11 C. B. 406. **Expld.** *Re* Stanton Iron Co. and *Re* Winding-up Acts (1855), 21 Beav. 164. **Folld.** Hickman *v.* Cox (1856), 18 C. B. 617. **Consd. & Distd.** Hickman *v.* Cox (1857), 3 C. B. N. S. 523, Ex. Ch. **Expld.** Cox *v.* Hickman (1860), 8 H. L. Cas. 268, H. L. **Consd.** Gooch *v.* Deakin (1862), 1 New Rep. 95. **Expld.** Evans *v.* Jones (1864), 3 H. & C. 423. **Expld. & Distd.** Mason *v.* Briton Medical & General Life Assocn. (1888), 4 T. L. R. 755, C. A. **Refd.** Coates *v.* Williams (1852), 7 Exch. 205; Siggers *v.* Evans (1855), 5 E. & B. 367; Hidson *v.* Barclay (1864), 3 H. & C. 361, Ex. Ch.; Greenberg *v.* Ward (1866), 12 Jur. N. S. 524.

9365. Letter of licence absolute & not conditional.]—A deed of arrangement under 1849 Act, s. 224, is not invalid, because it contains a letter of licence which is absolute & not conditional.—IRVING *v.* GRAY (1858), 3 H. & N. 34; 27 L. J. Ex. 273; 31 L. T. O. S. 152; 4 Jur. N. S. 380; 157 E. R. 377.

Annotations:—**Mentd.** *Re* Calvert, *Ex p.* Calvert (1858), 3 De G. & J. 95, L. JJ.; Legg *v.* Cheesebrough (1859), 5 C. B. N. S. 741; Leonard *v.* Sheard (1859), 28 L. J. Q. B. 183; Cruger *v.* Dunlop (1862), 7 H. & N. 525, Ex. Ch.; Walter *v.* Adcock (1862), 10 W. R. 542; Copeman *v.* Hart (1863), 14 C. B. N. S. 91; Spitzer *v.* Chaffers (1863), 14 C. B. N. S. 686.

9366. Power to debtor to wind up business—To employ others & remunerate them.]—An assignment of all a trader's effects, *bonâ fide* executed, to a trustee for the general benefit of all his creditors, is not void, though it contains a clause impowering the trustee to employ the grantor "or any other person or persons, in winding up the affairs of the grantor, & in collecting & getting in his estate & effects thereby assigned, & in carrying on his trade, if thought expedient by him," if it appears from the whole scope of the deed, that the carrying on the trade was merely subsidiary to the general purpose of sale & distribution.—JANES *v.* WHITBREAD (1851), 11 C. B. 406; 20 L. J. C. P. 217; 17 L. T. O. S. 155; 15 Jur. 612; 138 E. R. 530.

Annotations:—**Folld.** Coates *v.* Williams (1852), 7 Exch. 205. **Consd.** Hickman *v.* Cox (1857), 3 C. B. N. S. 523, Ex. Ch.; Cox *v.* Hickman (1860), 8 H. L. Cas. 268, H. L. **Refd.** Hidson *v.* Barclay (1864), 3 H. & C. 361, Ex. Ch. **Mentd.** Hickman *v.* Cox (1856), 18 C. B. 617; Mason *v.* Briton Medical & General Life Assocn. (1888), 4 T. L. R. 755, C. A.

9367. —— ——.]—*Semble:* an assignment by deed to a trustee, for the benefit of creditors, which empowers the trustee to employ debtor or other person "in winding up his affairs & collecting & getting in his estate, & carrying on his trade," is not void as against creditors, if it appears upon the instrument that the main object of the parties to it was to wind up debtor's business for the benefit of the creditors, & not to carry on the business with a view to future profits.—COATES *v.* WILLIAMS (1852), 7 Exch. 205; 21 L. J. Ex. 116; 18 L. T. O. S. 245; 155 E. R. 918.

Annotation:—**Mentd.** Hickman *v.* Cox (1857), 3 C. B. N. S. 523, Ex. Ch.

9368. —— ——.]—A deed of arrangement under 1849 Act, s. 224, is not invalid, because it contains a power to employ debtor in winding up his affairs under the directions of the inspectors, & for debtor to employ persons under him with the sanction of the inspectors & to pay those persons such reasonable remuneration as the inspectors may think fit.—IRVING *v.* GRAY (1858), 3 H. & N. 34; 27 L. J.

PART XXIII. SECT. 10, SUB-SECT. 3.—B. (c) i.

9363 i. *Trustee authorised to carry on business—Creditors becoming partners.*]—A provision for carrying on the business so as to render the creditors partners with the trustees *quoad* third persons, renders the deed void.—METCALF *v.* KEEFER (1860), 8 Gr. 392.—**CAN.**

a. —— *Where ancillary to realisation.*]—A provision for carrying on the business of debtor by the assignee, as subsidiary to winding up same, does not invalidate the assignment.—ONTARIO BANK *v.* LAMONT (1883), 6 O. R. 147.—**CAN.**

b. *S. P.*—STEPHENSON *v.* BAUMGARTNER, BAUMGARTNER *v.* STEPHENSON (1868), 3 Agra 104, 321.—**IND.**

c. *S. P.*—BANK OF NEW SOUTH WALES *v.* STEVENS, Mac. 379.—**N.Z.**

d. —— *Employment of agents.*]—A deed of assignment for the benefit of creditors gave the trustee power to carry on the business, employing any persons as his agents for such purpose, paying them reasonable allowance therefor, & to supply the agents with such merchandise as might be requisite for such purpose:—*Held:* the provision did not invalidate the deed under 1877 Act.—ALEXANDER *v.* WAVELL (1884), 10 A. R. 135.—**CAN.**

9366 i. *Power to debtor to wind up business.*]—Under a deed of assignment for the benefit of creditors the trustees may be empowered to employ debtor at a salary or fair remuneration for supervising the carrying out the trusts of the deed.—BEESTON *v.* DONALDSON, RIGGALL CLAIMANT (1892), 18 V. L. R. 208.—**AUS.**

9366 ii. —— *Trustee's control nominal.*]—Where power is given to an assignee to employ debtor in carrying out the objects of the assignment in such a way as would give the actual control of the business to the assignor, & the control to be exercised by the assignee is of a purely nominal character, the deed is ineffective.—CULTON *v.* HARRIS (1897), 30 N. S. R. 112.—**CAN.**

9366 iii. —— *To employ others & remunerate them.*]—By a deed of assignment for the benefit of creditors it was provided that the assignee should have power to employ insolvent or any other person in winding up the affairs of the estate:—*Held:* the provision did not invalidate the deed.—JENNINGS *v.* MOSS (1884), 10 A. R. 696.—**CAN.**

9366 iv. —— ——.]—The trustees of a deed of arrangement were authorised thereby to employ debtor or any other person in winding up his business, & realising the property comprised in the deed, & to pay such person a salary:—*Held:* the clause did not invalidate the deed against a non-assenting creditor.—RUSSELL *v.* MURPHY (1865), 16 I. Ch. R. 54.—**IR.**

Sect. 10.—*Position of creditors: Sub-sect.* 3, *B.* (*c*) *i.*]

Ex. 273; 31 L. T. O. S. 152; 4 Jur. N. S. 380; 157 E. R. 377.

Annotations:—**Consd.** Cruger *v.* Dunlop (1862), 7 H. & N. 525, Ex. Ch. **Mentd.** *Re* Calvert, *Ex p.* Calvert (1858), 3 De G. & J. 95, L.JJ.; Legg *v.* Cheesebrough (1859), 5 C. B. N. S. 741; Leonard *v.* Sheard (1859), 28 L. J. Q. B. 183; Walter *v.* Adcock (1862), 10 W. R. 542; Copeman *v.* Hart (1863), 14 C. B. N. S. 91; Spitzer *v.* Chaffers (1863), 14 C. B. N. S. 686.

9369. —— ——.]—A deed of arrangement, under 1849 Act, s. 224, which provided for the winding up of a trader's estate by him under the superintendence of inspectors, contained a clause that the estate, with the exception of such allowances & payments of effects or money to debtor as the inspectors or inspector for the time being might, in their or his discretion, authorise & direct, but not exceeding in quantity or amount the allowance which might have been made to debtor out of his estate & effects under the stat. relating to bkpts. in case a petition for adjudication of bkpcy. had been filed against him on a certain day & he had been thereunder adjudicated bkpt., & which allowances & payments to the quantity & amount aforesaid, or to any less quantity or amount the inspectors or inspector for the time being may direct & authorise, shall be administered as nearly as circumstances will admit, having regard to the provisions hereof, upon the principles & according to the rules & practice of the bkpcy. law, & as if such petition for adjudication of bkpcy. had been filed, & such adjudication made as aforesaid:—*Held:* the deed was void.—CRUGER *v.* DUNLOP (1862), 7 H. & N. 525; 7 L. T. 132; 10 W. R. 801; 158 E. R. 580; *sub nom.* DUNLOP *v.* CRÜGER, 32 L. J. Ex. 42, Ex. Ch.

Annotations:—**Mentd.** Berridge *v.* Abbott (1863), 13 C. B. N. S. 507; Spitzer *v.* Chaffers (1863), 14 C. B. N. S. 686.

9370. Power to inspectors to advance money for mercantile purposes.]—A deed of arrangement under 1849 Act, s. 224, is not invalid, because it contains an authority to the inspectors to make advances to debtor in respect of any mercantile operations which may have been undertaken by him.—IRVING *v.* GRAY (1858), 3 H. & N. 34; 27 L. J. Ex. 273; 31 L. T. O. S. 152; 4 Jur. N. S. 380; 157 E. R. 377.

Annotations:—**Consd.** Cruger *v.* Dunlop (1861), 7 H. & N. 525, Ex. Ch. **Mentd.** *Re* Calvert, *Ex p.* Calvert (1858), 3 De G. & J. 95, L. JJ.: Legg *v.* Cheesebrough (1859), 5 C. B. N. S. 741; Leonard *v.* Sheard (1859), 28 L. J. Q. B. 183; Walter *v.* Adcock (1862), 10 W. R. 542; Copeman *v.* Hart (1863), 14 C. B. N. S. 91; Spitzer *v.* Chaffers (1863), 14 C. B. N. S. 686.

9371. ——.]—A deed of inspectorship is a valid deed within 1861 Act, s. 192, though it contains an authority to the inspectors to advance money in hand belonging to debtor's estate for the purpose of carrying out such new contracts as debtor may undertake at the request of the inspectors.—BAILEY *v.* BOWEN (1868), L. R. 3 Q. B. 133; 8 B. & S. 734; 37 L. J. Q. B. 61; 17 L. T. 470; 16 W. R. 396.

Annotation:—**Consd.** Wigfield *v.* Nicholson (1868), L. R. 3 Q. B. 450.

9372. Provision for payment of costs & expenses.]—A deed of arrangement under 1849 Act, s. 224, is not invalid, because it contains a provision for the payment of costs & expenses of attending the preparation of the deed & the perusal thereof, & the management of debtor's affairs between the meeting of the creditors & the execution of the deed, or relating or preparatory to the meeting of creditors & incident thereto, & to the investigation of affairs since debtor stopped payment.—IRVING *v.* GRAY (1858), 3 H. & N. 34; 27 L. J. Ex. 273; 31 L. T. O. S. 152; 4 Jur. N. S. 380; 157 E. R. 377.

Annotations:—**Folld.** Spitzer *v.* Chaffers (1863), 14 C. B. N. S. 686. **Mentd.** *Re* Calvert, *Ex p.* Calvert (1858), 3 De G. & J. 95, L. JJ.; Legg *v.* Cheesebrough (1859), 5 C. B. N. S. 741; Leonard *v.* Sheard (1859), 28 L. J. Q. B. 183; Cruger *v.* Dunlop (1861), 7 H. & N. 525, Ex. Ch.; Walter *v.* Adcock (1862), 10 W. R. 542; Copeman *v.* Hart (1863), 14 C. B. N. S. 91.

9373. ——.]—A deed of arrangement under 1849 Act, s. 224, is not rendered void by a provision enabling the trustees to pay "all costs & expenses which they may have been or may be put to, or which debtor has sustained in or about & also preparatory & preliminary to the preparing & engrossing of these presents, & procuring the execution of same, or in or about the negotiations & preparations for this present arrangement, or any negotiations, preparations or matters in reference to the winding up of the estate of debtor, & also all costs, etc., attending the investigation which has already taken place, & any future or subsequent investigation, & the arrangement of the affairs of debtor, & the obtaining the consent of the creditors thereto & to join in & execute these presents, & all disbursements incident thereto, & also all the costs, charges, & expenses of & attending the perusing & approving of these presents on behalf of the general body of creditors."—SPITZER *v.* CHAFFERS (1863), 14 C. B. N. S. 686; 2 New Rep. 326; 33 L. J. C. P. 7; 8 L. T. 665; 10 Jur. N. S. 258; 11 W. R. 914; 143 E. R. 615.

Annotations:—**Folld.** Strick *v.* De Mattos (1864), 3 H. & C. 22. **Mentd.** Ilderton *v.* Jewell (1864), 16 C. B. N. S. 142; Ipstone Park Iron Ore Co. *v.* Pattison (1864), 9 L. T. 806; Lyne *v.* Wyatt (1865), 18 C. B. N. S. 593.

9374. ——.]—*Semble:* a provision in a deed, directing the administration of the property comprised in the deed to be subject to the usual costs, charges & expenses of investigating the accounts & position of debtors, & of & incidental to the preparation of the deed, is bad, as interfering with the equal distribution of the estate amongst the creditors.—*Re* WARDELL & ROLLS, *Ex p.* WATTS (1864), 10 L. T. 74.

9375. ——.]—A deed of inspectorship, under 1861 Act, is not invalid, because it contains a provision that the proceeds of the estate shall be applied, first, in paying the costs incurred or to be incurred or relating to the suspension of payment of debtor.—STRICK *v.* DE MATTOS (1864), 3 H. & C. 22; 4 New Rep. 368; 33 L. J. Ex. 276; 10 L. T. 590; 10 Jur. N. S. 753; 12 W. R. 963; 159 E. R. 432; *subsequent proceedings, sub nom.* WOOD *v.* DE MATTOS (1865), L. R. 1 Exch. 91, Ex. Ch.

Annotations:—**Mentd.** Hernulewicz *v.* Jay (1865), 6 B. & S. 697; Lay *v.* Mottram (1865), 19 C. B. N. S. 479; Coles *v.* Turner (1866), L. R. 1 C. P. 373, Ex. Ch.; Hickmott *v.* Simmonds (1866), L. R. 2 Eq. 462; Bailey *v.* Bowen (1868), L. R. 3 Q. B. 133.

9376. ——.]—A composition deed appearing to be *bonâ fide*, & containing provision for some small extra costs for verification of debts, is binding on non-assenting creditors.—*Re* TRESIDDER, *Ex p.* SOMERVILLE (1865), 1 Ch. App. 21; 35 L. J. Bcy. 1; 13 L. T. 350; 11 Jur. N. S. 1029; 14 W. R. 113, L. C.

Annotation:—**Refd.** Fitzpatrick *v.* Bourne (1868), 9 B. & S. 157.

9377. ——.]—A deed under 1861 Act, s. 192, whereby debtor assigned his whole property to trustees for the benefit of his creditors, contained a clause charging his property in the trustee's hands primarily with the expenses of obtaining the creditors' assents to the deed:—*Held:* such provision was reasonable.—JACOBSON *v.* LAMERT (1867), L. R. 2 Exch. 394; 36 L. J. Ex. 221; 16 L. T. 569.

9378. ——.]—By a deed of Jan., 1867, for the arrangement & distribution of debtor's estate, after reciting that by a deed of Dec., 1865, debtor's creditors had granted him a letter of licence to

carry on his business of a colliery proprietor under the direction of inspectors, & that the inspectors might retain or require payment out of the estate of all costs, charges, & expenses in anywise relating thereto, & might raise any sum of money by way of mtge. of the colliery, & apply the money in paying the costs, charges, & expenses incurred in carrying on the business & in raising the money, debtor assigned his estate to a trustee to get in & realise same, & after payment of the costs of the arrangement of 1865, & all costs, charges, & expenses thereinbefore recited or referred to as having been incurred by the inspectors or with their sanction for the benefit of debtor's estate, to pay the residue rateably amongst debtor's creditors :—*Held :* the provision for the payment of the costs incidental to carrying on the business, & all expenses incurred under the deed of 1865, in priority to the debts of the other creditors, did not render the deed of 1867 invalid, for they were all reasonable provisions, & such as the creditors at large ought themselves to have assented to.—FITZPATRICK *v.* BOURNE (1868), L. R. 3 Q. B. 446 ; 9 B. & S. 157 ; 37 L. J. Q. B. 265 ; 18 L. T. 731 ; 16 W. R. 766, Ex. Ch.

9379. Provision for payment of contingent claims—Whether objectionable.]—The following clause in a deed of composition : " Deferred, contingent or other debts or claims which would have been provable against the estate of debtor in bkpcy., shall be deemed debts within these presents, & the composition dividend shall be payable & the promissory notes shall be made in respect of such amount as would have been provable " :—*Held :* unobjectionable.—HORSFALL *v.* SWAN BANK & BRICK WORKS CO., LTD. (1868), 18 L. T. 409 ; 16 W. R. 934.

9380. Power to inspectors to retain sum to meet losses costs, etc.—If debtor commits act of bankruptcy.]—A deed of arrangement under 1849 Act, s. 224, is not invalid, because it contains a power, in case debtor should commit an act of bkpcy., for the inspectors to retain £500 for a certain period as an indemnity against losses, costs & expenses.—IRVING *v.* GRAY (1858), 3 H. & N. 34 ; 27 L. J. Ex. 273 ; 31 L. T. O. S. 152 ; 4 Jur. N. S. 380 ; 157 E. R. 377.

Annotations :—**Mentd.** *Re* Calvert, *Ex p.* Calvert (1858), 3 De G. & J. 95, L. JJ. ; Legg *v.* Cheesebrough (1859), 5 C. B. N. S. 741 ; Leonard *v.* Sheard (1859), 28 L. J. Q. B. 183 ; Cruger *v.* Dunlop (1861), 7 H. & N. 525, Ex. Ch. ; Walter *v.* Adcock (1862), 10 W. R. 542 ; Copeman *v.* Hart (1863), 14 C. B. N. S. 91 ; Spitzer *v.* Chaffers (1863), 14 C. B. N. S. 686.

9381. Power to inspectors to retain dividends for non-acceding creditors—Right to non-acceding creditors to prove but not to disturb dividends.]—A deed of arrangement under 1849 Act, s. 224, is not invalid, because it contains a discretionary power in the inspectors to retain the dividend which would be payable to a creditor, who at the declaration of the dividend has not acceded to the deed, such creditor being at liberty to prove so as to have a dividend out of existing or future funds, but so as not to disturb the former dividend.—IRVING *v.* GRAY (1858), 3 H. & N. 34 ; 27 L. J. Ex. 273 ; 31 L. T. O. S. 152 ; 4 Jur. N. S. 380 ; 157 E. R. 377.

Annotations :—**Mentd.** *Re* Calvert, *Ex p.* Calvert (1858), 3 De G. & J. 95, L. JJ. ; Legg *v.* Cheesebrough (1859), 5 C. B. N. S. 741 ; Leonard *v.* Sheard (1859), 28 L. J. Q. B. 183 ; Cruger *v.* Dunlop (1861), 7 H. & N. 525, Ex. Ch. ; Walter *v.* Adcock (1862), 10 W. R. 542 ; Copeman *v.* Hart (1863), 14 C. B. N. S. 91 ; Spitzer *v.* Chaffers (1863), 14 C. B. N. S. 686.

9382. —— Right to pay such dividends before any subsequent dividends to other creditors.]—A deed of inspectorship, under 1861 Act, is not invalid, because it contains a provision that, in case any dividend shall be made before all the creditors shall have executed or assented to the deed, the inspectors may set apart a sufficient sum for the purpose of paying like rateable dividends to such last-mentioned creditors, & also to creditors, the dividend on whose debt has not been ascertained, & in case no such sum be so set apart, they may direct that out of the first money applicable to a dividend, the dividend payable to the last-mentioned creditors shall be paid or set apart for them, before any further dividend be made among the creditors who have executed or assented to the deed.—STRICK *v.* DE MATTOS (1864), 3 H. & C. 22 ; 4 New Rep. 368 ; 33 L. J. Ex. 276 ; 10 L. T. 590 ; 10 Jur. N. S. 753 ; 12 W. R. 963 ; 159 E. R. 432 ; *subsequent proceedings, sub nom.* WOOD *v.* DE MATTOS (1865), L. R. 1 Exch. 91, Ex. Ch.

Annotations :—**Consd.** Bailey *v.* Bowen (1868), L. R. 3 Q. B. 133. **Refd.** Hernulewicz *v.* Jay (1865), 6 B. & S. 697. **Mentd.** Lay *v.* Mottram (1865), 19 C. B. N. S. 479 ; Coles *v.* Turner (1866), L. R. 1 C. P. 373, Ex. Ch. ; Hickmott *v.* Simmonds (1866), L. R. 2 Eq. 462.

9383. —— Right to pay such dividends on written request.]—A deed of inspectorship, purporting to be made under 1861 Act, s. 192, contained the following clause :—" Provided always that in case any dividend shall be declared before all the creditors shall have executed or assented to these presents, or before the amount of dividends payable on all their respective debts shall have been ascertained, the inspectors shall retain sufficient sums for the purpose of paying a like rateable dividend to any creditor or creditors who shall not have assented to or executed same, or the amount of dividend payable on whose debts shall not have been ascertained, & shall afterwards pay or cause to be paid such dividend to such creditor or creditors, upon his or their request in writing," etc. By the deed the dividends were made payable unconditionally, & no necessity was imposed upon assenting creditors of making a demand in writing for the payment of their dividends :—*Held :* no such inequality was created by the above clause between the two classes of creditors as would make the deed invalid.—HERNULEWICZ *v.* JAY (1865), 6 B. & S. 697 ; 6 New Rep. 257 ; 34 L. J. Q. B. 201 ; 12 L. T. 494 ; 11 Jur. N. S. 581 ; 13 W. R. 807 ; 122 E. R. 1352.

Annotation :—**Folld.** Bailey *v.* Bowen (1868), L. R. 3 Q. B. 133.

9384. —— —— No such request as regards other creditors.]—Where to an action on a bill of exchange deft. pleaded a deed of inspectorship which contained provisions enabling the inspectors to retain a sufficient sum out of the estate to pay a rateable dividend to non-executing creditors on their request in writing, no such request being provided for in the case of other creditors :—*Held :* no such inequality was shown as to render the deed invalid.—BAILEY *v.* BOWEN (1868), L. R. 3 Q. B. 133 ; 8 B. & S. 734 ; 37 L. J. Q. B. 61 ; 17 L. T. 470 ; 16 W. R. 396.

Annotation :—**Mentd.** Wigfield *v.* Nicholson (1868), L. R. 3 Q. B. 450.

9385. Power to trustee to determine amount of dividends.]—A deed of assignment under 1861 Act, contained a clause giving power to the trustee to determine the amount of dividends, & to pay them at such place & in such manner as the trustee might think fit :—*Held :* the provision was a reasonable one.—COLES *v.* TURNER (1866), L. R. 1 C. P. 373 ; Har. & Ruth. 386 ; 35 L. J. C. P. 169 ; 12 Jur. N. S. 688 ; 14 W. R. 402, Ex. Ch. ; *revsg.* S. C. (1865), 18 C. B. N. S. 736.

Annotations :—**Mentd.** Brompton Waterworks Co. *v.* Jennings (1865), 19 C. B. N. S. 149 ; Giddings *v.* Penning (1866), L. R. 1 Exch. 325 ; Greenberg *v.* Ward (1866), L. R. 1 C. P. 585 ; Hickmott *v.* Simmonds (1866), L. R. 2 Eq. 462 ; *Re* Roots, *Ex p.* Roots (1867), 2 Ch. App. 559, L. JJ.

Sect 10.—*Position of creditors: Sub-sect.* 3, *B.* (*c*) *i.*]

9386. Provision for avoidance of deed—If sufficient creditors did not sign within given time.]—By a composition deed, reciting that the insolvent was indebted in certain sums to J. for rent, to the Crown for duties, to A. & B. upon judgment, & to the other creditors in the sums of money set opposite their names in the schedule, the insolvent bargained & sold to trustees all his leasehold messuages, subject to certain mtges., & all his personal estate whatsoever, upon trust to carry on a brewing & malting business for the benefit of the creditors, & to collect outstanding debts, & to sell his farming stock, & out of the money arising from the sale of any part of the estate that should be mortgaged, to satisfy the mtge., & to stand possessed of the residue upon trust to pay J. the rent due to him, the duties due to the Crown, the rent which was, or thereafter should become due for any of the premises assigned, the interest upon the mtges., then the judgment debt due to A. & B., then to pay all the creditors whose debts did not amount to £10 in full, & at the expiration of nine months to pay all the other creditors the amount of 5*s.* in the pound. There was a covenant by the creditors that they would release their respective claims to the insolvent. The indenture contained a proviso that, in case any creditor whose debt should amount to £100, or any two creditors whose debts should amount to £150 should not execute within three calendar months, the deed should be void. A. & B., the judgment creditors, whose debt exceeded £150, did not execute the deed within the time required:—*Held:* the deed was not thereby rendered void, the intention manifestly being that those creditors only who were to receive a composition under the deed were to execute it.—WELLS *v.* GREENHILL (1822), 5 B. & Ald. 869; 1 Dow. & Ry. K. B. 493; 106 E. R. 1409.

9387. —— ——.]—A deed provided that it should "cease, determine & be void," if all the creditors to a certain amount did not execute it within six months. The deed was executed by debtor, who received a certificate:—*Held:* the deed was not void, but voidable only.—DUNN *v.* WYMAN (1881), 51 L. J. Q. B. 623.

9388. —— **Power given to inspectors—Power to grant certificate of conformity.**]—A deed of arrangement under 1849 Act, s. 224, is not invalid, because it contains a power to the inspectors to avoid the deed in certain events at the end of three months from its date, excepting from the avoidance all acts, proceedings, conveyances, assurances, assignments, matters & things done under & by virtue of it, there being also a power to the inspectors at any time after the date of the deed to grant a certificate of conformity as in bkpcy. to all or either of several debtors.—IRVING *v.* GRAY (1858), 3 H. & N. 34; 27 L. J. Ex. 273; 31 L. T. O. S. 152; 4 Jur. N. S. 380; 157 E. R. 377.

Annotations:—**Mentd.** *Re* Calvert, *Ex p.* Calvert (1858), 3 De G. & J. 95, L. JJ.; Legg *v.* Cheesebrough (1859), 5 C. B. N. S. 741; Leonard *v.* Sheard (1859), 28 L. J. Q. B. 183; Cruger *v.* Dunlop (1861), 7 H. & N. 525, Ex. Ch.; Walter *v.* Adcock (1862), 10 W. R. 542; Copeman *v.* Hart (1863), 14 C. B. N. S. 91; Spitzer *v.* Chaffers (1863), 14 C. B. N. S. 686.

9389. Power to trustee to postpone sale—To grant lease of unsold property—To sell on credit.]—A deed of assignment under 1861 Act, contained a clause giving the trustee a discretion to postpone the sale of all or any part of the real estate of debtor, & to lease such unsold portion from year to year or for a term for such rent as he might think fit, & to give credit for the whole or any part of the purchase money, either with or without taking security for same:—*Held:* the provision was a reasonable one.—COLES *v.* TURNER (1866), L. R. 1 C. P. 373; Har. & Ruth. 386; 35 L. J. C. P. 169; 12 Jur. N. S. 688; 14 W. R. 402, Ex. Ch.; *revsg.* S. C. (1865), 18 C. B. N. S. 736.

Annotations:—**Folld.** Greenberg *v.* Ward (1866), L. R. 1 C. P. 585. **Mentd.** Brompton Waterworks Co. *v.* Jennings (1865), 19 C. B. N. S. 149; Giddings *v.* Penning (1866), L. R. 1 Exch. 325; Hickmott *v.* Simmonds (1866), L. R. 2 Eq. 462; *Re* Roots, *Ex p.* Roots (1867), 2 Ch. App. 559, L. JJ.

9390. Provision enabling creditors to bring actions with consent of inspectors—To receive dividends on amount recovered.]—A composition deed made in alleged pursuance of 1849 Act, s. 224, contained a clause enabling any creditor, by leave of the inspectors, to bring an action, & in case of success to receive dividends upon the amount recovered:—*Held:* inequality was produced in respect of the possible misapplication of the assets in payment of the costs of such creditors as might by leave of the inspectors bring actions & recover judgment, & the deed was not valid.—GARDNER *v.* CHAPMAN (1860), 8 C. B. N. S. 317; 29 L. J. C. P. 281; 6 Jur. N. S. 1254; 141 E. R. 1189.

Annotations:—**Refd.** Cruger *v.* Dunlop (1861), 7 H. & N. 525, Ex. Ch. **Mentd.** Spitzer *v.* Chaffers (1863), 14 C. B. N. S. 686.

9391. Provision of forfeiture of claim if action brought against debtor.]—To an action against them as the acceptors of a bill of exchange, defts. pleaded a plea founded upon a deed of arrangement made by defts. with their creditors, under 1849 Act, s. 224, which had not been signed by pltf., but which was said on the part of defts. to be nevertheless binding on him by reason of its being executed by six-sevenths in number & value of their creditors. The instrument was not a composition-deed, but it contained a clause by which each of the creditors parties to or bound by the deed covenanted not to sue, impede, or molest defts. & then followed another clause, to the effect, that, if any creditor by whom or on whose behalf the deed should have been actually executed, should act contrary to that covenant, defts. should be absolutely discharged from all claims & demands both at law & in equity, by such creditor:—*Held:* this latter clause was not binding upon pltf. it being in its nature merely personal to the individual creditors who chose to sign the deed, & inapplicable to the creditors in general.—LEGG *v.* CHEESEBROUGH (1859), 5 C. B. N. S. 741; 28 L. J. C. P. 209; 5 Jur. N. S. 795; 141 E. R. 298.

Annotations:—**Distd.** Wells *v.* Hacon (1864), 5 B. & S. 196. **Consd.** *Re* Wyatt, *Ex p.* Smith (1864), 12 W. R. 692. **Refd.** Gardner *v.* Chapman (1860), 6 Jur. N. S. 1254; Oppenheimer *v.* Grieves (1862), 7 H. & N. 533; Ilderton *v.* Castrique (1863), 14 C. B. N. S. 99; Spitzer *v.* Chaffers (1863), 33 L. J. C. P. 7; Lyne *v.* Wyatt (1865), 18 C. B. N. S. 593. **Mentd.** Copeman *v.* Hart (1863), 14 C. B. N. S. 91.

9392. ——.] A composition deed made in alleged pursuance of 1849 Act, s. 224, contained a clause which was to operate to defeat any action brought by a creditor, whether one who had executed the deed or not, by making the bringing of such action *ipso facto* a release & forfeiture of the debt:—*Held:* the operation of the clause was to establish inequality.—GARDNER *v.* CHAPMAN (1860), 8 C. B. N. S. 317; 29 L. J. C. P. 281; 6 Jur. N. S. 1254; 141 E. R. 1189.

9386 i. *Provision for abandonment of assignment.*]—A creditor's deed provided that if the assignment should become inoperative, or if any property thereby conveyed, or intended so to be, should not have been effectually assigned thereby, the parties might abandon it. An attempted sale in execution of the trusts failed, from inability of the trustees to make out title:—*Held:* the proviso contemplated an act by some stranger thereafter, & not a defect inherent in the deed itself.—DUDGEON *v.* O'CONNELL (1849), 12 I. Eq. R. 566.—IR.

Annotations :—**Refd.** Cruger *v.* Dunlop (1861), 7 H. & N. 525, Ex. Ch. ; Spitzer *v.* Chaffers (1863), 14 C. B. N. S. 686.

9393. ——.]—A deed of composition, under 1861 Act, contained a covenant that, if any creditor should sue debtor, unless & until default should be made in meeting at maturity bills of exchange & promissory notes given as a security for the composition, debtor's estate & effects should be thenceforth absolutely released & discharged from the debt :—*Held :* the covenant was unreasonable & void, & the deed was not binding on creditors who did not assent to it.—DELL *v.* KING (1863), 2 H. & C. 84 ; 3 New Rep. 436 ; 33 L. J. Ex. 47 ; 9 L. T. 576 ; 10 Jur. N. S. 427 ; 12 W. R. 280 ; 159 E. R. 36.

Annotations :—**Consd.** Hidson *v.* Barclay (1864), 3 H. & C. 361, Ex. Ch. **Folld.** Lyne *v.* Wyatt (1865), 18 C. B. N. S. 593. **Distd.** Walker *v.* Nevill (1865), 3 H. & C. 403. **Refd.** Ipstones Park Iron Ore Co. *v.* Pattinson (1864), 3 New Rep. 514 ; Jenney *v.* Bell (1876), 45 L. J. Ch. 369. **Mentd.** *Re* Roots, *Ex p.* Roots (1867), 2 Ch. App. 559, L. JJ.

9394. ——.]—A covenant, by the parties to a deed of assignment for the benefit of creditors, not to sue, with a proviso that should any of them do so contrary to the instrument, debtor should be discharged :—*Held :* binding on those creditors only who executed the deed.—*Re* WYATT, *Ex p.* WYATT (1864), 10 L. T. 311 ; *sub nom. Re* WYATT, *Ex p.* SMITH, 12 W. R. 692.

9395. ——.]—A covenant not to sue, under penalty of losing the debt, renders a deed under 1861 Act, s. 198, void.—LEIGH *v.* PENDLEBURY (1864), 15 C. B. N. S. 815 ; 3 New Rep. 475 ; 33 L. J. C. P. 172 ; 10 L. T. 30 ; 12 W. R. 468 ; 143 E. R. 1005.

Annotations :—**Mentd.** Balden *v.* Pell (1864), 5 B. & S. 213 ; Turquand *v.* Moss (1864), 17 C. B. N. S. 15 ; Lloyd *v.* Harrison (1865), 6 B. & S. 36 ; Skilton *v.* Symonds (1865), 18 C. B. N. S. 418 ; Coles *v.* Turner (1866), L. R. 1 C. P. 373, Ex. Ch. ; Hickmott *v.* Simmonds (1866), L. R. 2 Eq. 462 ; Ames *v.* Colnaghi (1868), L. R. 3 C. P. 359.

9396. ——.]—A composition deed under 1861 Act, s. 192, contained a covenant by the creditors, parties of the third part, not to sue debtor, & that, if any of them should do so, debtor should be & he was thereby " acquitted, exonerated, & for ever discharged of & from all actions, suits, debts, & demands whatsoever, of the creditor by whom he should be so sued, & those presents might be pleaded in bar thereto as effectually as a release under the hands & seals of the creditors might or could be : "—*Held :* if such clause applied to non-assenting creditors, it was unreasonable, &, if it did not, there was no release by them, &, in either view, it could not be pleaded in bar to an action by a non-assenting creditor.—LYNE *v.* WYATT (1865), 18 C. B. N. S. 593 ; 6 New Rep. 68 ; 34 L. J. C. P. 179 ; 12 L. T. 383 ; 11 Jur. N. S. 446 ; 13 W. R. 688 ; 144 E. R. 575.

Annotations :—**Consd.** *Re* Roots, *Ex p.* Roots (1867), 2 Ch. App. 559, L. JJ. **Refd.** *Re* Hughes (1866), 15 L. T. 304.

9397. ——.]—A deed of composition under 1861 Act, s. 192, contained a covenant by debtor with trustees for the creditors to pay the full amount of his debts by certain instalments, with the usual clause of release. It also contained a covenant that if any creditor should " act or do contrary to the covenant, [debtor] shall be & is hereby for ever acquitted & released of & from all sums of money, bonds, accounts & demands whatsoever due, owing, or belonging to, or which may or might be asked, claimed, or demanded by such of the creditors respectively, so acting or doing contrary to the covenant " :—*Held :* a non-assenting creditor was not barred from bringing an action, for the covenant vitiated the deed as regarded such creditor.—THOMPSON *v.* GUNTHORPE (1865), 11 L. T. 708.

9398. Discretion to trustee to give time for payment of debts—Or to abandon.]—A deed of assignment under 1861 Act, contained a clause giving the trustee a discretion to give time for the payment of debts, or to compound for or abandon such as he might consider bad :—*Held :* the provision was a reasonable one.—COLES *v.* TURNER (1866), L. R. 1 C. P. 373 ; Har. & Ruth. 386 ; 35 L. J. C. P. 169 ; 12 Jur. N. S. 688 ; 14 W. R. 402, Ex. Ch. ; *revsg.* S. C. (1865), 18 C. B. N. S. 736.

Annotations :—**Mentd.** Brompton Waterworks Co. *v.* Jennings (1865), 19 C. B. N. S. 149 ; Giddings *v.* Penning (1866), L. R. 1 Exch. 325 ; Greenberg *v.* Ward (1866), L. R. 1 C. P. 585 ; Hickmott *v.* Simmonds (1866), L. R. 2 Eq. 462 ; *Re* Roots, *Ex p.* Roots (1867), 2 Ch. App. 559, L. JJ.

9399. Power to trustees to make such arrangement with creditors as are thought fit.]—A power in a deed of assignment for the benefit of creditors, enabling the trustees to make such arrangements with the creditors as they may deem expedient, is inconsistent with 1861 Act.—*Re* JOSEPHS' ASSIGNMENT, *Ex p.* SPYER (1863), 1 De G. J. & Sm. 318 ; 2 New Rep. 560 ; 32 L. J. Bcy. 62 ; 8 L. T. 743 ; 9 Jur. N. S. 949 ; 11 W. R. 1008 ; 46 E. R. 128, L. C.

Annotations :—**Consd.** Leigh *v.* Pendlebury (1864), 15 C. B. N. S. 815 ; Durant *v.* Robinson (1876), 34 L. T. 617. **Refd.** Turquand *v.* Moss (1864), 17 C. B. N. S. 15 ; Pearson *v.* Pearson (1866), L. R. 1 Exch. 308.

9400. Provision for indemnification—For bills not retired by creditor.]—A deed of composition, which purported to be made between debtor & the several persons, creditors, whose names & seals were subscribed & affixed thereto, contained the following covenant : " Each of them, the creditors parties hereto doth hereby for himself, his exors., etc., covenant with N. [debtor], his exors., etc,, to retire & deliver up to him & them, cancelled & discharged, all bills of exchange or promissory notes given to the creditors or any or either of them before the date hereof for any debt due to him or them from N., or for which N. is liable, & to hold him & them harmless against all costs, charges, damages, & expenses to which they or he may be put in consequence of or in default of the non-retirement of same " :—*Held :* not a valid deed within 1861 Act, s. 192.—INGELBACH *v.* NICHOLS (1863), 14 C. B. N. S. 85 ; 2 New Rep. 75 ; 8 L. T. 318 ; 9 Jur. N. S. 1015 ; 11 W. R. 697 ; 143 E. R. 376.

Annotations :—**Consd.** Balden *v.* Pell (1864), 5 B. & S. 213 ; Oldis *v.* Armston (1867), L. R. 2 Exch. 406.

9401. —— ——.]—Declaration on the common counts. Plea, a deed dated Dec. 14, 1861, made between deft. of the first part, J. of the second part, & certain persons who were then creditors of deft., & who would then have been entitled to prove under an adjudication of bkpcy. against deft., founded on a petition filed on the day & year last aforesaid, of the third part, by which debtor, besides conveying all his real estate to J., his heirs & assigns, assigned his personal estate & effects unto J., his exors., administrators & assigns, in trust for his creditors, & which contained the following clause : " That all creditors to whom bills or other negotiable instruments might have

f. *Provision for arbitration as to disputed claims.*]—The fact that a creditor's deed contains an arbn. clause as to disputed debts does not invalidate the deed.—*Re* VON DER HEYDE (1865), 2 W. W. & A'B. 128.—**A US.**

g. *S. P.* HART *v.* MAGUIRE (1896), 29 N. S. R. 181 ; *affd.* (1897), 28 S. C. R. 272.—**CAN.**

h. *Provision for bail of debtor by trustee —Indemnification of trustee.*]—A clause whereby the trustees agree to become bail for the assignors in case they are arrested for debts existing at the time of the assignment, & for the indemnification of the trustees out of the trust property, is not fraudulent.—BURNHAM *v.* WHITE (1844), 2 Kerr, 571.—**CAN.**

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been given by deft. for the debts due to such creditors, or any of them, or any part thereof, should indemnify deft. & his estate against all claims or demands by other persons than themselves in respect of such bills or instruments, & all losses, damages & costs by reason or in respect thereof, & should, if any such bills had been indorsed or transferred to any other persons, take same up & retire same before or when they should become due, & so as to prevent any claim or demand in respect thereof being made upon deft. or his estate " :—*Held:* the clause imposed upon creditors who had received bills or other negotiable instruments an unreasonable obligation, & was not binding upon non-assenting creditors of that class, & the deed was void, as not fulfilling the conditions required by 1861 Act, s. 192.—BALDEN *v.* PELL (1864), 5 B. & S. 213; 4 New Rep. 186; 33 L. J. Q. B. 200; 10 L. T. 493; 10 Jur. N. S. 916; 12 W. R. 1004; 122 E. R. 811.

Annotations:—**Distd.** Johnson *v.* Barratt (1865), L. R. 1 Exch. 65. **Refd.** Hidson *v.* Barclay (1865), 34 L. J. Ex. 217, Ex. Ch.

9402. —— ——.]—A deed of arrangement with creditors under 1861 Act, s. 192, made between debtor & certain of his creditors, & which deed was not to be binding unless executed & assented to by three-fourths in value of his creditors whose debts amounted to £10 & upwards, contained the following covenant: " The several creditors, parties to the indenture, do severally for themselves, & for their several heirs, etc., but not one for the other of them, covenant with debtor, his, etc., that they shall & will protect, save harmless & keep indemnified deft. from all manner of actions & suits which may be brought against him for or on account of any bills of exchange or promissory notes, accepted, drawn, or indorsed by debtor, or given to the several creditors, or any of them by him, & shall & will retire & pay such bills at maturity " :—*Held:* the covenant was an unreasonable one, & not binding on a creditor who had not executed or assented to the deed.—NICHOLSON *v.* POTTS (1864), 4 New Rep. 70; 10 L. T. 192; 12 W. R. 440, Ex. Ch.

9403. —— **On negotiable instruments.**]—A composition deed, under 1861 Act, made between debtor of the one part & his creditors, whose names were thereunto subscribed & seals affixed, of the other part, contained a clause that each of the creditors, covenanting for his acts only, should at all times thereafter indemnify debtor from & against every bill of exchange, promissory note, & other negotiable instrument on which debtor might have incurred any liability, or which might have been indorsed or put into circulation by any or either of the creditors :—*Held:* such a covenant was unreasonable, & the deed was not binding on a creditor who had not executed or assented to it.—WOODS *v.* FOOTE (1863), 1 H. & C. 841; 32 L. J. Ex. 199; 7 L. T. 836; 11 W. R. 383; 158 E. R. 1123; *sub nom.* FOOTE *v.* WOOD, 9 Jur. N. S. 178, Ex. Ch.

Annotations:—**Follid.** Hidson *v.* Barclay (1864), 10 L. T. 587; Leigh *v.* Pendlebury (1864), 15 C. B. N. S. 815; Nicholson *v.* Potts (1864), 10 L. T. 192, Ex. Ch. **Refd.** Balden *v.* Pell (1864), 5 B. & S. 213; Turquand *v.* Moss (1864), 12 W. R. 960; Oldis *v.* Armston (1867), L. R. 2 Exch. 406; Wigfield *v.* Nicholson (1868), 37 L. J. Q. B. 155.

9404. —— **Beyond funds of estate.**]—A composition deed between partners, who carried on business as engineers, & their creditors, assigned the partnership & their separate estates to trustees for the benefit of the creditors, with power to them to postpone the sale & conversion of the premises assigned, & to employ all or any part of the joint estate, & to carry on the business for such period as they should think fit, & to make advances out of the joint estate or the proceeds thereof, & to employ the partners, or either of them, to assist in carrying on the business, & it was declared that the trustees should be indemnified out of the joint & separate estate of the creditors, in proportion to the amount of their respective debts, against all transactions & personal engagements, matters & things which they should lawfully do, enter into, or order in or concerning the management or conduct of the business :—*Held:* the indemnity clause imposed a personal liability on non-assenting creditors beyond the funds of the estate, & the deed was not within 1861 Act, s. 192.—WIGFIELD *v.* NICHOLSON (1868), L. R. 3 Q. B. 450; 9 B. & S. 261; 37 L. J. Q. B. 155; 18 L. T. 323.

9405. Releasing parties described as creditors who have executed deed—Deed executed by statutory number.]—A deed of arrangement under 1849 Act, s. 224, is not rendered void by the circumstances that the releasing parties are described to be " the parties hereto of the third part," *viz.*, such of the creditors who have executed the deed, the deed appearing to have been executed by the statutory number required to make it a deed binding upon non-assenting creditors.—SPITZER *v.* CHAFFERS (1863), 14 C. B. N. S. 686; 2 New Rep. 326; 33 L. J. C. P. 7; 8 L. T. 665; 10 Jur. N. S. 258; 11 W. R. 914; 143 E. R. 615.

Annotations:—**Distd.** Lyne *v.* Wyatt (1865), 18 C. B. N. S. 593. **Refd.** Ilderton *v.* Jewell (1864), 16 C. B. N. S. 142; Ipstone Park Iron Ore Co. *v.* Pattison (1864), 9 L. T. 806. **Mentd.** Strick *v.* De Mattos (1864), 3 H. & C. 22.

9406. Covenant not to sue.]—A deed of arrangement, which contained a covenant not to sue on the part of the creditors parties to it, was executed by the requisite majority of creditors under 1849 Act, s. 224. In an action brought by a non-assenting creditor against debtor, who pleaded the deed :—*Held:* the pltf. could not object that the covenant not to sue was unreasonable, as he was not party to it.—MACNAUGHT *v.* RUSSELL (1857), 1 H. & N. 611; 26 L. J. Ex. 192; 28 L. T. O. S. 308; 5 W. R. 360; 156 E. R. 1346.

Annotations:—**Apld.** Hidson *v.* Barclay (1864), 3 H. & C. 361, Ex. Ch. **Mentd.** Irving *v.* Gray (1858), 3 H. & N. 34; Legg *v.* Cheesebrough (1859), 5 C. B. N. S. 741; Leonard *v.* Sheard (1859), 1 E. & E. 667; Gardner *v.* Chapman (1860), 8 C. B. N. S. 317; Morgan *v.* Harding (1862), 11 W. R. 65; Copeman *v.* Hart (1863), 14 C. B. N. S. 91; Spitzer *v.* Chaffers (1863), 14 C. B. N. S. 686; *Re* Wyatt, *Ex p.* Wyatt (1864), 10 L. T. 311.

j. *Provision for determination of debtor's life interest in assigned property.*]—By a deed between A. & some of his execution creditors, A.'s life interest in funds was assigned, upon trust for A. himself until bkpt. or insolvent, or until he should attempt to assign his interest, or until any creditor should endeavour to have the dividends or interest of the funds applied in satisfaction of his debt, but in any such event, on trusts for the benefit of the creditors. B., a judgment creditor of A., not a party to such arrangement, afterwards obtained a charging order on A.'s interest in such funds, & filed a petition praying that the proviso for determining A.'s life interest might be declared void as against B. :—*Held:* the proviso was void as against B.—SYNGE *v.* SYNGE (1855), 4 I. Ch. R. 337; 7 Ir. Jur. 271. —**IR.**

9406 i. *Covenant not to sue.*]—The payee of a dishonoured note sued the indorser. The maker of the note was indebted to pltf. in a sum larger than the amount of the note. After dishonour the maker, on the suggestion of pltf., assigned for his creditors. The deed, which was not executed by pltf., did not reserve any rights against sureties, but provided that if the assets were not sufficient for payment of debts in full, the assignor should pay any balance due, & contained a clause " that nothing herein contained or implied shall operate as a discharge of the debts or any of them unless & until same shall be respectively paid in full " :—*Held:* the deed prevented pltf. from taking action against the assignor until realisation of the estate. —HATRICK *v.* NICOL (1910), 30 N. Z. L. R. 257.—**N.Z.**

9407. —— Power to revoke letter of licence.]—A covenant in a composition deed not to sue debtor for a limited time is not unreasonable, neither is a power to revoke a letter of licence.—WALKER *v.* NEVILL (1865), 3 H. & C. 403 ; 34 L. J. Ex. 73 ; 11 L. T. 774 ; 11 Jur. N. S. 246 ; 13 W. R. 523 ; 159 E. R. 588.

Annotations :—**Refd.** Ray *v.* Jones (1865), 19 C. B. N. S. 416 ; Slater *v.* Jones, Capes *v.* Ball (1873), 29 L. T. 56. **Mentd.** Newton *v.* Hallett (1868), 19 L. T. 471.

9408. —— Provision that if creditors sue deed may be pleaded in bar.]—A covenant in a composition deed purporting to be made under 1861 Act, s. 192, was in the following terms : " In consideration of the premises, it is hereby declared & agreed, but each of the creditors who shall have executed or otherwise acceded to or be bound by these presents, agreeing & declaring for himself & his partners, & his & their respective heirs, exors., & administrators, & so far as relates to his & their respective acts & defaults, that if the trustees shall, within the time aforesaid, certify under their hands to the effect hereinbefore mentioned, the creditors of the debtor who shall have executed or acceded to or be bound by these presents shall not, nor shall any of them, nor shall their respective heirs, exors., or administrators, or partners or assignees, at any time, except in respect of the covenant or agreements herein contained, or any of them, or in respect of the aforesaid promissory notes, or except so far as may be necessary in order to enforce any mtge., lien or security, or any rights or remedies against any persons other than debtor, commence or prosecute any action or suit at law or in equity, or other proceeding, or obtain any act or adjudication of bkpcy. against debtor or his heirs, exors. or administrators, or make or sue out any attachment or requisition of or upon him or them, or his or their property, credits or effects, for or on account of all or any part of the debts now due from debtor to the creditors who shall have executed or otherwise acceded to or be bound by these presents, or any of such creditors, or for or on account of all or any claim of such creditors provable under these presents, & that this present agreement may be pleaded to any action brought contrary to this agreement, as if the same were an actual release " : —*Held :* the covenant was a reasonable & proper covenant.—HIDSON *v.* BARCLAY (1865), 3 H. & C. 361 ; 34 L. J. Ex. 217 ; 12 L. T. 352 ; 13 W. R. 583 ; 159 E. R. 571, Ex. Ch.

Annotations :—**Consd.** Lyne *v.* Wyatt (1865), 18 C. B. N. S. 593. **Distd.** Ray *v.* Jones (1865), 19 C. B. N. S. 416. **Folld.** Walker *v.* Nevill (1865), 3 H. & C. 403.

9409. —— ——.]—A covenant in a composition deed that the creditors will not sue for their debts, & that, if they do, the deed may be pleaded as an accord & satisfaction & in bar of the suit or other proceeding, does not render the deed void.—ELLIS *v.* M'HENRY (1871), L. R. 6 C. P. 228 ; 40 L. J. C. P. 109 ; 23 L. T. 861 ; 19 W. R. 503.

Annotations :—**Mentd.** New Zealand Loan & Mercantile Agency Co. *v.* Morrison, [1898] A. C. 349, P. C. ; *Re* Nelson, *Ex p.* Dare & Dolphin, [1918] 1 K. B. 459, C. A.

9410. Provision for paying rent & charges for which there might be distress—Paying rateably debts of creditors with interest.] — A deed of inspectorship, under 1861 Act, is not invalid, because it contains a provision for paying rent, for which debtor's estate could be distrained, wages, or salaries, or for paying rateably the debts of creditors, with interest.—STRICK *v.* DE MATTOS (1864), 3 H. & C. 22 ; 4 New Rep. 368 ; 33 L. J. Ex. 276 ; 10 L. T. 590 ; 10 Jur. N. S. 753 ; 12 W. R. 963 ; 159 E. R. 432 ; *subsequent proceedings, sub nom.* WOOD *v.* DE MATTOS (1865), L. R. 1 Exch. 91, Ex. Ch.

Annotations :—**Mentd.** Hernulewicz *v.* Jay (1865), 6 B. & S. 697 ; Lay *v.* Mottram (1865), 19 C. B. N. S. 479 ; Coles *v.* Turner (1866), L. R. 1 C. P. 373, Ex. Ch. ; Hickmott *v.* Simmonds (1866), L. R. 2 Eq. 462 ; Bailey *v.* Bowen (1868), L. R. 3 Q. B. 133.

9411. Provision for verification of debt—By statement in writing or solemn declaration.]—A deed of inspectorship, under 1861 Act, is not invalid, because it contains a provision that each creditor, before becoming entitled to any dividend, shall, if required by the inspectors, deliver to them a statement in writing, signed by him, of his debt & verify it by solemn declaration.—STRICK *v.* DE MATTOS (1864), 3 H. & C. 22 ; 4 New Rep. 368 ; 33 L. J. Ex. 276 ; 10 L. T. 590 ; 10 Jur. N. S. 753 ; 12 W. R. 963 ; 159 E. R. 432 ; *subsequent proceedings, sub nom.* WOOD *v.* DE MATTOS (1865), L. R. 1 Exch. 91, Ex. Ch.

Annotations :—**Refd.** Hernulewicz *v.* Jay (1865), 6 B. & S. 697 ; Lay *v.* Mottram (1865), 19 C. B. N. S. 479 ; Coles *v.* Turner (1866), L. R. 1 C. P. 373, Ex. Ch. ; Hickmott *v.* Simmonds (1866), L. R. 2 Eq. 462 ; Bailey *v.* Bowen (1868), L. R. 3 Q. B. 133.

9412. —— By statutory declaration—Or as provided by bankruptcy laws.]—A proviso, in a deed of assignment for the benefit of creditors, that the trustees might, " if they should think fit, require any person claiming to be a creditor to prove his debt by statutory declaration, or otherwise in such manner as is required by the law of bkpcy. " :—*Held :* a fair & reasonable provision.—*Re* WYATT, *Ex p.* WYATT (1864), 10 L. T. 311 ; *sub nom. Re* WYATT, *Ex p.* SMITH, 12 W. R. 692.

9413. —— —— Or as trustee should think fit.]—A stipulation in a composition deed under 1861 Act, s. 192, that it shall be lawful for the trustees to require any person or persons claiming to be a creditor or creditors of debtor to verify the nature & amount of such debt or claim, with full particulars showing the consideration thereof, by statutory declaration before the comrs., or otherwise as the trustee or trustees may think fit, is unreasonable, & renders the deed inoperative as against a non-assenting creditor.—BROMPTON WATERWORKS CO. *v.* JENNINGS (1865), 19 C. B. N. S. 149 ; 144 E. R. 743.

9414. —— —— ——.]—A deed of assignment under 1861 Act, contained a clause giving power to the trustee to require persons claiming to be creditors to verify their debts or claims " by statutory declaration proved before the comrs., or otherwise as the trustee might think fit " :—*Held :* there was nothing unreasonable in the provision, as the trustee must in some way or other ascertain whether or not the party claiming was really a creditor, & claimant might appeal to a ct. of equity or to the Ct. of Bkpcy. if his claim was improperly rejected.—COLES *v.* TURNER (1866), L. R. 1 C. P. 373 ; Har. & Ruth. 386 ; 35 L. J. C. P. 169 ; 12 Jur. N. S. 688 ; 14 W. R. 402, Ex. Ch. ; *revsg.* S. C. (1865), 18 C. B. N. S. 736.

Annotations :—**Consd.** Giddings *v.* Penning (1866), L. R. 1 Exch. 325 ; Hickmott *v.* Simmonds (1866), L. R. 2 Eq.

k. *Provision for remuneration of trustee.*]—A provision in a creditor's deed authorising the trustees to retain a commission not exceeding 5 per cent. does not invalidate the deed.—*Re* VON DER HEYDE (1865), 2 W. W. & A'B. 128.—**AUS.**

l. ——.]—A provision, for a commission or allowance of a reasonable remuneration to the trustees, though they may be creditors of the estate, does not render the deed void as creating a preference of creditors ; such provision merely provides a recompense for the trustees' trouble—METCALF *v.* KEEFER (1860), 8 Gr. 392. —**CAN.**

m. *Provision limiting trustee's liability.*]—A clause whereby the responsibility of each trustee is confined to his own acts or defaults, is neither unusual nor improper.—BURNHAM *v.* WHITE (1844), 2 Kerr, 571.—**CAN.**

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462. **Refd.** Brompton Waterworks Co. *v.* Jennings (1865), 19 C. B. N. S. 149. **Mentd.** Greenberg *v.* Ward (1866), L. R. 1 C. P. 585; *Re* Roots, *Ex p.* Roots (1867), 2 Ch. App. 559, L. JJ.

9415. —— By solemn declaration—Or to satisfaction of trustee.]—A stipulation that creditors shall verify their debts by solemn declaration, or otherwise to the satisfaction of the trustee, renders a deed under 1861 Act, s. 198, void.—LEIGH *v.* PENDLEBURY (1864), 15 C. B. N. S. 815; 3 New Rep. 475; 33 L. J. C. P. 172; 10 L. T. 30; 10 Jur. N. S. 296; 12 W. R. 468; 143 E. R. 1005.

Annotations:—**Consd.** Coles *v.* Turner (1865), 18 C. B. N. S. 736; Hickmott *v.* Simmonds (1866), L. R. 2 Eq. 462. **Refd.** Balden *v.* Pell (1864), 5 B. & S. 213; Coles *v.* Turner (1866), L. R. 1 C. P. 373, Ex. Ch. **Mentd.** Turquand *v.* Moss (1864), 17 C. B. N. S. 15; Lloyd *v.* Harrison (1865), 6 B. & S. 36; Skilton *v.* Symonds (1865), 18 C. B. N. S. 418; Ames *v.* Colnaghi (1868), L. R. 3 C. P. 359.

9416. —— —— ——.]—A deed of assignment of property to trustees for the benefit of creditors provided that it should be lawful for the trustees to require the amount of any debt to be verified by solemn declaration, or in such manner as to them should seem expedient:—*Held:* such provision rendered the deed void against a non-assenting creditor.—HICKMOTT *v.* SIMMONDS (1866), L. R. 2 Eq. 462; 35 L. J. Ch. 580; 14 L. T. 614; *sub nom. Re* SIMMONDS' ESTATE, THICKMOTT *v.* SIMMONDS, 14 W. R. 882.

Annotation:—**Mentd.** Tetley *v.* Wanless (1867), 15 W. R. 932.

9417. —— —— Forfeiture of claim on default.]—A deed under 1861 Act, s. 192, absolutely releasing debtor, empowered the trustees to require any creditor to verify his debt by solemn declaration, & provided that, in the event of any creditor, if in Great Britain or Ireland, failing to verify his debt for two calendar months after such requisition, he should lose all benefit under the deed, & his dividends should fall into the general estate for the benefit of creditors not making similar default:—*Held:* the provisions as to forfeiture was unreasonable, & the deed bad.—GIDDINGS *v.* PENNING (1866), L. R. 1 Exch. 325; 4 H. & C. 498; 35 L. J. Ex. 191; 14 L. T. 667; 12 Jur. N. S. 634; 14 W. R. 940.

9418. Provision placing joint & separate creditors on same footing.]—A deed of composition, under 1861 Act, s. 192, is not invalid as against non-assenting creditors, because there are joint & separate creditors & joint & separate estates, & the deed places both classes of creditors on the same footing as regards the composition.—WALKER *v.* NEVILL (1865), 3 H. & C. 403; 34 L. J. Ex. 73; 11 L. T. 774; 11 Jur. N. S. 246; 13 W. R. 523; 159 E. R. 588.

Annotations:—**Refd.** Ray *v.* Jones (1865), 19 C. B. N. S. 416; Newton *v.* Hallett (1868), 19 L. T. 471; Slater *v.* Jones, Capes *v.* Ball (1873), 29 L. T. 56.

9419. ——.]—The trustees of a deed of assignment made by two partners contracted with certain of the creditors to deal with both the joint & separate estate of debtors in such a manner as to pay all the creditors, both joint & separate, 5*s.* in the pound; & creditors were induced by the prospect so held out to them to assent to the deed. From the accounts annexed to the deed, it appeared that if the contract were carried into effect the joint creditors would gain an advantage over the separate creditors of both partners, & the separate creditors of one partner an advantage against those of the other:—*Held:* such a deed could not be sustained against an adjudication in bkpcy. against debtors.—*Re* EVANS & EVANS (1869), 21 L. T. 112.

9420. Power to sell estate on credit without security.]—*Held:* a power to the trustees under a deed of assignment for the benefit of creditors, to sell the estate of bkpt. on credit without security, did not render the deed bad as against a dissentient creditor.—*Re* WYATT, *Ex p.* WYATT (1864), 10 L. T. 311; *sub nom. Re* WYATT, *Ex p.* SMITH, 12 W. R. 692.

9421. ——.]—A provision in a deed, under 1861 Act, that the trustees should be at liberty to sell any of the property to debtors on credit, with or

n. *Provision for payment of joint & separate debts according to law.*]—Under an assignment by a firm in trust for creditors, the assignee was directed to distribute the proceeds of the property assigned "ratably & proportionably among all the creditors of the assignors in payment & satisfaction of their just debts, having due regard to the rights of partnership & private creditors, & distributing the same as between them according to law":—*Held:* the assignment was valid.—NELLES *v.* MALTBY (1883), 5 O. R. 263.—**CAN.**

9418 i. *Provision placing joint & separate creditors on same footing.*]—Two partners assigned their joint & separate estates together, for the benefit of their joint & separate creditors, *pari passu*. Both the separate estates were solvent, & the equality was an advantage to the joint creditors:—*Held:* the assignment was valid.—MCDONALD *v.* MCCALLUM (1865), 11 Gr. 469.—**CAN.**

o. *Power to prefer some creditors.*]—A deed of assignment which gives the trustees a power of preferring some creditors, is not a deed for the benefit of the creditors generally within 1871 Act, s. 37.—*Re* RITCHIE (1882), 8 V. L. R. 1.—**AUS.**

p. —— *Others besides execution creditors.*]—B., made a deed of his stock-in-trade & lands, in trust to convert same into money & pay execution & other privileged creditors, if any, according to priority, next to divide the balance *pari passu* amongst all other creditors, & to pay the surplus, if any, to B.:—*Held:* the deed was void as it did not provide for paying ratably & proportionably, & without preference or priority, all the creditors, but gave a preference to others besides execution creditors.—ANDREW *v.* STUART (1881), 6 A. R. 495.—**CAN.**

q. *Provision authorising purchase of stock.*]—An assignment provided that the trustee should have authority, if he should deem it expedient, from time to time to purchase goods & stock for the purpose of enabling him to sell off the assigned stock, but that the purchase should not be made with a view of continuing the business beyond a reasonable time:—*Held:* the assignment was not, by reason of such clause, void.—ROBINSON *v.* HUSTON (1887), 4 Man. L. R. 71.—**CAN.**

r. ——.]—An assignment gave the trustees power from time to time, as they should deem expedient, "to purchase stock for the purpose of enabling them to assort & sell off the present stock to the best advantage, for the benefit of the estate":—*Held:* the clause was not objectionable.—MAULSON *v.* PECK (1859), 18 U. C. R. 113.—**CAN.**

s. ——.]—Discretionary power, given to an assignee to expend money in connection with the sale of the assignor's goods by purchasing additional stock, invalidates the deed.—CULTON *v.* HARRIS (1897), 30 N. S. R. 112.—**CAN.**

t. *Power to sell—At trustees' discretion.*]—A provision that real estate shall be sold, as the trustees deem most advantageous, does not invalidate the deed.—GOODEVE *v.* MANNERS (1855), 5 Gr. 114.—**CAN.**

u. —— *By lottery.*]—Debtor conveyed his real estate to trustees for the benefit of his creditors, to be disposed of by the trustees by lottery:—*Held:* the deed was void.—GOODEVE *v.* MANNERS (1855), 5 Gr. 114.—**CAN.**

9420 i. —— *On credit.*]—An assignment in trust for creditors, authorised the trustees to sell on credit, with or without security for the balance of purchase-money remaining unpaid:—*Held:* the introduction into the trust deed of power to sell on credit, did not invalidate the assignment.—O'BRIEN *v.* CLARKSON (1884), 10 A. R. 603.—**CAN.**

9420 ii. *S. P.*—JENNINGS *v.* MOSS (1884), 10 A. R. 696.—**CAN.**

9420 iii. *S. P.*—SLATER *v.* BADENACH (1884), 10 S. C. R. 296.—**CAN.**

a. *Provision for payment of claims at trustee's convenience.*]—A provision that the assignee must pay claims at such times only & by such instalments as he may find convenient does not invalidate the deed.—HART *v.* MAGUIRE (1896), 29 N. S. R. 181; *affd.* (1897), 28 S. C. R. 272.—**CAN.**

b. *Provision for payment of interest.*]—A provision for payment of creditors' claims either with or without interest does not render a deed of assignment void.—EWART *v.* STUART (1885), 12 A. R. 99.—**CAN.**

c. *Provision for payment of other creditors—After majority have signed deed.*]—A provision in a creditor's deed that, after three-fourths in number & value of the creditors have signed, other creditors may be paid is no more objectionable than if a provision were

without security :—*Held :* reasonable.—GREENBERG *v.* WARD (1866), L. R. 1 C. P. 585 ; 35 L. J. C. P. 316 ; 14 L. T. 760 ; 12 Jur. N. S. 524 ; 14 W. R. 795.

Annotation :—**Mentd.** Bailey *v.* Bowen (1868), 37 L. J. Q. B. 61.

9422. Provision for absolute release of debts.]—A composition deed under 1861 Act, s. 192, may contain an absolute release of debts.—DEWHIRST *v.* JONES (1864), 3 H. & C. 60 ; 4 New Rep. 343 ; 33 L. J. Ex. 294 ; 10 L. T. 538 ; 10 Jur. N. S. 753 ; 12 W. R. 885 ; 159 E. R. 447.

9423. —— In consideration of partly secured composition.]—A deed under 1861 Act, s. 192, is valid, although it unconditionally releases debtor, in consideration only of a covenant to pay a composition partly secured by suretyship.—JOHNSON *v.* BARRATT (1865), L. R. 1 Exch. 65 ; 4 H. & C. 16 ; 35 L. J. Ex. 15 ; 13 L. T. 597 ; 11 Jur. N. S. 1023 ; 14 W. R. 194.

Annotations :—**Refd.** Poole *v.* Willats (1869), L. R. 4 Q. B. 630. **Mentd.** Greenberg *v.* Ward (1866), 12 Jur. N. S. 524 ; Gresty *v.* Gibson (1866), L. R. 1 Exch. 112.

9424. Provision for conditional release.] — The release contained in a deed of inspectorship was conditional in its form, it being stipulated that if & when the inspectors should give a certificate of their having wound up the estate or of debtor's having made a conveyance or assignment of his estate according to a covenant in the deed, then debtor should be absolutely released :—*Held :* the deed was good, as no such inequality was shown as to render the deed invalid.—BAILEY *v.* BOWEN (1868), L. R. 3 Q. B. 133 ; 8 B. & S. 734 ; 37 L. J. Q. B. 61 ; 17 L. T. 470 ; 16 W. R. 396.

Annotation :—**Mentd.** Wigfield *v.* Nicholson (1868), L. R. 3 Q. B. 450.

9425. Provision for ascertaining value of securities.]—A deed of assignment under 1861 Act, contained a clause for ascertaining the value of securities held by creditors by a valuer to be appointed by either party, or an umpire :—*Held :* the clause was a reasonable one.—COLES *v.* TURNER (1866), L. R. 1 C. P. 373 ; Har. & Ruth. 386 ; 35 L. J. C. P. 169 ; 12 Jur. N. S. 688 ; 14 W. R. 402, Ex. Ch. ; *revsg.* S. C. (1865), 18 C. B. N. S. 736.

Annotations :—**Mentd.** Brompton Waterworks Co. *v.* Jennings (1865), 19 C. B. N. S. 149 ; Giddings *v.* Penning (1866), L. R. 1 Exch. 325 ; Greenberg *v.* Ward (1866), L. R. 1 C. P. 585 ; Hickmott *v.* Simmonds (1866), L. R. 2 Eq. 462 ; *Re* Roots, *Ex p.* Roots (1867), 2 Ch. App. 559, L. JJ.

9426. Provision for payment of small creditors —In full.]—A covenant that the trustee may pay all creditors in full, whose debts shall not amount to £10, renders a deed under 1861 Act, s. 198, void. —LEIGH *v.* PENDLEBURY (1864), 15 C. B. N. S. 815 ; 3 New Rep. 475 ; 33 L. J. C. P. 172 ; 10 L. T. 30 ; 10 Jur. N. S. 296 ; 12 W. R. 468 ; 143 E. R. 1005.

Annotations :—**Mentd.** Balden *v.* Pell (1864), 5 B. & S. 213 ; Turquand *v.* Moss (1864), 17 C. B. N. S. 15 ; Lloyd *v.* Harrison (1865), 6 B. & S. 36 ; Skilton *v.* Symonds (1865), 18 C. B. N. S. 418 ; Coles *v.* Turner (1866), L. R. 1 C. P. 373, Ex. Ch. ; Hickmott *v.* Simmonds (1866), L. R. 2 Eq. 462 ; Ames *v.* Colnaghi (1868), L. R. 3 C. P. 359.

9427. —— In one instalment.]—A deed of arrangement entered into under 1861 Act, s. 192, between debtor, his creditors, & a trustee, provided that the creditors should be paid their composition by instalments at two, four & six months from the date of the deed. It also contained a clause conferring on the trustee a discretionary power to pay to all creditors, whose debts did not exceed £20, the full amount of their composition in one sum at such time or times as he should think fit :—*Held :* such clause made the deed unequal.—THOMPSON *v.*

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made for the payment of insolvent himself in similar circumstances, & does not invalidate the deeds.—*Re* VON DER HEYDE (1865), 2 W. W. & A'B. 128.—**AUS.**

d. *Provision for payment in full of debts constituting lien.*]—An assignment in trust for creditors, authorised the trustees to pay in full any debts which constituted a lien on the assets, where deemed advisable in the interests of the trust :—*Held :* the discretion vested in the trustee to pay such liens in full did not invalidate the deed.—O'BRIEN *v.* CLARKSON (1884), 10 A. R. 603.—**CAN.**

e. *S. P.*—KERR *v.* CANADIAN BANK OF COMMERCE (1884), 4 O. R. 652.—**CAN.**

9422 i. *Provision for absolute release of debts.*]—A provision in a creditor's deed that each creditor who signed thereupon released his debt, does not invalidate the deed.—*Re* VON DER HEYDE (1865), 2 W. W. & A'B. 128.—**AUS.**

9422 ii. ——.]—Debtor, by deed, executed by two of his creditors, conveyed all his estate to trustees for payment of his debts, stipulating that the creditors should release debtor from all future liability. Two creditors only executed, & subsequently debtor made another deed to the same trustees, containing a similar release from his creditors who should become parties to it :—*Held :* the stipulation for release did not invalidate the deeds.—MULHOLLAND *v.* HAMILTON (1862), 10 Gr. 45.—**CAN.**

9422 iii. ——.]—A deed of assignment for the benefit of creditors is not bad because it requires creditors who become parties to the deed to release all claims against the assignor.—HART *v.* MAGUIRE (1896), 29 N. S. R. 181 ; *affd.* (1897), 28 S. C. R. 272.—**CAN.**

9422 iv. *S. P.*—STEPHENSON *v.* BAUMGARTNER, BAUMGARTNER *v.* STEPHENSON (1868), 3 Agra, 104, 321. —**IND.**

g. —— *By some creditors.*]—M. executed a deed of assignment to a trustee for his creditors, containing a release of debts, which was executed by some of the creditors, but not by a majority :—*Held :* the release by some of the creditors was good.—AARONS *v.* BOARD OF LAND & WORKS (1868), 5 W. W. & A'B. 107.—**AUS.**

h. —— *Deed not executed by majority of creditors.*]—A deed of assignment of all the estate of debtor for the benefit of all his creditors, contained a covenant to release debtor, but was not executed by a majority of his creditors :—*Held :* the provision rendered the deed invalid, within 5 Vict. No. 9, s. 35, notwithstanding the insertion of a proviso, that such release should be void in the event of the deed not being executed by the majority of the creditors.—MANSON *v.* LEVY (1868), 8 N. S. W. S. C. R. 39.—**AUS.**

k. —— *By creditors expected to sign deed.*]—A deed of assignment containing a release of debts on the part of the creditors who were expected to sign such deed, has no effect until executed by one, at least, or more of the creditors.—BEESTON *v.* DONALDSON, RIGGALL CLAIMANT (1892), 18 V. L. R. 208.—**AUS.**

l. —— *Under 22 Vict. c. 96, s. 19.*]—A provision for an absolute release by creditors executing the deed invalidates the assignment.—WILSON *v.* KERR (1858), 17 U. C. R. 168 ; *affd.* (1860), 18 U. C. R. 470.—**CAN.**

m. *S. P.*—MAULSON *v.* TOPPING (1858), 17 U. C. R. 183.—**CAN.**

n. *S. P.*—DARLING *v.* MCINTYRE (1860), 19 U. C. R. 154.—**CAN.**

o. *S. P.*—CRAPPER *v.* PATERSON (1860), 19 U. C. R. 160.—**CAN.**

p. *Provision for trustees as attorneys of creditors to grant release.*]—An agreement by the creditors, parties to a deed of assignment, that the trustees as their attorneys shall have power to grant a release to the assignor, is valuable consideration for the assignment.—PETER *v.* SHIPWAY (1908), 7 C. L. R. 232.—**AUS.**

9424 i. *Provision for conditional release.*]—An assignment for the general benefit of creditors containing a release clause, except where those executing should add the words, "without release," is valid.—FEEHAN *v.* LEE (1861), 10 C. P. 385.—**CAN.**

9424 ii. —— *On concurrence of statutory number of creditors.*]—The concurrence of four-fifths of the creditors to a statutory deed of assignment in trust for creditors is necessary to make the release operative, but the concurrence of a majority is sufficient for the validity of the deed.—*Re* HALL (1863), 2 W. & W. 87.—**AUS.**

9424 iii. —— *On payment of composition.*]—All but two of the creditors of insolvent agreed to accept 50 cents in full of their claims :—*Held :* that amounted to a condition that any creditor receiving the 50 cents in the dollar of his claim, should release debtor, & invalidated the deed under R. S. O. 1877, c. 118, s. 2.—JENNINGS *v.* HYMAN (1886), 11 O. R. 65.—**CAN.**

9424 iv. —— —— *Reconveyance of estate to assignor.*]—A deed of composition made by one of two insolvents provided for his release on payment of a composition by him to the creditors, & directed a retransfer to him of the estate :—*Held :* invalid.—*Re* WALKER (1878), 2 A. R. 265.—**CAN.**

r. *Provision for retention of furniture by debtor.*]—A deed of assignment

Sect. 10.—*Position of creditors: Sub-sect.* 3, *B.* (*c*) *i.*]

KNIGHT (1866), L. R. 2 Exch. 42 ; 4 H. & C. 629 ; 36 L. J. Ex. 30 ; 15 L. T. 285 ; 15 W. R. 283.

9428. Provision for assenting creditors only releasing debts.]—A deed of composition was made between debtor of the first part, the creditors executing the deed of the second part, & all other creditors, if any, of debtor of the third part, whereby the parties of the second part, in consideration of the payment of 3*d.* in the pound on their debts, released same, & debtor covenanted with the parties of the second & third parts to pay to all his creditors the like composition :—*Held :* there was an inequality between the positions of the executing & non-executing creditors which was fatal to the validity of the deed, under 1861 Act, s. 192.—*Re* SMITH & LAXTON, *Ex p.* COCKBURN (1864), 3 De G. J. & Sm. 175 ; 4 New Rep. 1 ; 33 L. J. Bcy. 17 ; 10 L. T. 252 ; 10 Jur. N. S. 573 ; 12 W. R. 673 ; 46 E. R. 604, L. C.

Annotations :—**Folld.** Chesterfield, etc., Colliery Co. *v.* Hawkins (1865), 3 H. & C. 677 ; Gurrin *v.* Kopera (1865), 3 H. & C. 694 ; Martin *v.* Gribble (1865), 3 H. & C. 631. **Distd.** Scott *v.* Berry (1865), 3 H. & C. 966. **Refd.** Benham *v.* Broadhurst (1864), 11 L. T. 537, Ex. Ch. ; Hidson *v.* Barclay (1864), 3 H. & C. 361, Ex. Ch. ; Stone *v.* Jellicoe (1864), 3 H. & C. 263 ; Walker *v.* Nevill (1864), 3 H. & C. 403 ; Gresty *v.* Gibson (1866), L. R. 1. Exch. 112 ; Reeves *v.* Watts (1866), L. R. 1 Q. B. 412 ; Kitchin *v.* Hawkins (1866), L. R. 2 C. P. 22 ; M'Laren *v.* Baxter (1867), L. R. 2 C. P. 559 ; Cairncross *v.* Wills (1869), 20 L. T. 529. **Mentd.** Walker *v.* Nevill (1865), 34 L. J. Ex. 73 ; Isaacs *v.* Green (1867), L. R. 2 Exch. 352.

9429. Provision giving surety certain advantages.]—A deed made between deft. of the first part, E. of the second part, & L. of the third part, E. & the several other persons whose names & seals were thereunto set, or who in writing had assented to or approved of the deed, of the fourth part, & the several persons named in the second schedule of the fifth part, after reciting that deft. was possessed of or entitled to certain personal property, & was indebted to E. & the several other persons parties thereto of the fourth part, & to the persons parties thereto of the fifth part, in the sums mentioned & set opposite to their names in the first & second schedules respectively, that an arrangement had been made that all the creditors should take in full discharge of their respective debts a composition of 10*s.* in the pound by two instalments of 7*s.* 6*d.* in the pound & 2*s.* 6*d.* in the pound, that it was, at the request of E., agreed that the personal estate should remain under the control & disposal of deft., that E., at the request of deft., in consideration, etc., agreed to enter into the covenants thereinafter contained, & that it was agreed that the deed should contain the release & other provisos thereinafter appearing, witnessed that, in consideration of the premises, deft. & E. covenanted with L. to pay him, on registration of the deed, such sum as should be sufficient to pay to all the creditors 7*s.* 6*d.* in the pound on the amount of their respective debts, provided that as regarded the liabilities under the covenants, the separate liability of E. should be treated as being in priority to the joint & several liabilities of him & deft., & also to the separate liability of deft., & deft. & E. covenanted with L. that they would, before the expiration of twelve months from the date of the deed, pay to L. such sum as should be sufficient to pay the remaining instalment of 2*s.* 6*d.* in the pound to all the creditors, other than E., & deft. covenanted with E. to pay him on the registration of the deed, & on or before the expiration of the twelve months from the date, the instalments of 7*s.* 6*d.* in the pound & 2*s.* 6*d.* in the pound respectively, & it was declared that L. should stand possessed of the sums to be paid in respect of the instalments upon trust, after the registration of the deed, upon demand in writing by E. & the other persons creditors of deft., to pay E. & the other persons the instalment of 7*s.* 6*d.* in the pound & after the expiration of twelve months after the date of the deed upon such demand, to pay the creditors the remaining instalment of 2*s.* 6*d.* in the pound, & E. & the persons parties thereto of the fourth part released deft. from all debts & demands which the parties of the second & fourth parts had against him. The plea setting out the deed as above then averred that a majority in number representing three-fourths in value of the creditors of deft., whose debts respectively amounted to £10 & upwards, had in writing assented to & approved of the deed :—*Held :* the deed was a valid deed within 1861 Act, s. 192, as (1) it did not enable E. to receive a larger dividend than the other creditors ; (2) (COCKBURN, C.J., *dub.*), it did not give such an advantage to E. in respect of the recovery of his instalment as to make the deed void.—WELLS *v.* HACON (1864), 5 B. & S. 196 ; 4 New Rep. 99 ; 33 L. J. Q. B. 204 ; 10 L. T. 411 ; 10 Jur. N. S. 862 ; 12 W. R. 790 ; 122 E. R. 804.

Annotations :—**Expld.** Hernulewicz *v.* Jay (1865), 6 New Rep. 257. **Folld.** Bissell *v.* Jones (1868), L. R. 4 Q. B. 49. **Refd.** Garrod *v.* Simpson (1864), 3 H. & C. 395.

9430. —— Purchase of suretyship—Right to recover compositions paid in advance.]—By a deed with the requisite consents, etc., under 1861 Act, between debtor of the first part, P., a creditor, of the second part, & the other creditors of the third part, debtor covenanted to pay P. a composition of 5*s.* in the pound by two equal instalments at four & twelve months, & debtor & P., as surety, each covenanted with the other creditors to pay them a composition of 5*s.* in the pound on their respective debts by two instalments as above. Debtor assigned all his effects to P., upon trust to apply the proceeds towards the payment of the above composition, & afterwards towards payment of the remaining 15*s.* in the pound of P.'s debt, it being stipulated that P. should have the advantage of such security for the remainder of his debt in consideration of his undertaking the liability of suretyship, & should stand possessed of the surplus, if any, in trust for debtor. It was also agreed that if P., as such surety, should arrange with any creditor to make an immediate payment of the composition payable to him with a deduction by way of discount, P. should be at liberty to repay himself out of the trust money the whole amount of the composition payable to such creditor. In consideration of the premises, the parties of the second & third parts released their respective debts :—*Held :* the deed was valid & binding on non-assenting creditors under s. 192, for there was no such inequality in favour of P. as vitiated the deed, as the purchase of his suretyship must be taken to be an advantageous bargain for the creditors at large, & the clause as to payment in advance was not objectionable, as it must be assumed that P. would only avail himself of it when he could do so consistently with carrying out the trusts.—BISSELL *v.* JONES (1868), L. R. 4 Q. B. 49 ;

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for benefit of creditors is not invalid, if it empowers the trustees to permit debtor to retain such portion of his furniture, linen etc., as they may think fit.—STEPHENSON *v.* BAUMGARTNER, BAUMGARTNER *v.* STEPHENSON (1868), 3 Agra, 104, 321.—**IND.**

s. —— *Various allowances.*]—A provision in a creditor's deed that after the deed has been signed by three-fourths in number & value, the majority of the creditors may allow his furniture to debtor & make him allowances for trouble & payments of

9 B. & S. 884 ; 38 L. J. Q. B. 2 ; 19 L. T. 262 ; 17 W. R. 49.

Annotations :—**Consd.** *Re* Nicholson, *Ex p.* Nicholson (1870), 5 Ch. App. 332, L.J. **Mentd.** Johnson *v.* Osenton (1869), 19 L. T. 793.

9431. —— Absolute assignment to surety.]—By a deed expressed to be made between N. of the first part, D., a creditor of N., of the second part, & all N.'s creditors of the third part, & registered under 1861 Act, s. 192, N. & D. covenanted with all the other creditors for payment to them of a composition of 4*s.* in the pound on their debts, & all the creditors released N. from the original debts, subject to a proviso making the deed void on default in payment of the composition, & N. assigned over his property to D. absolutely :—*Held :* the deed was not on its face void as giving an undue advantage to D.—*Re* NICHOLSON, *Ex p.* NICHOLSON (1870), 5 Ch. App. 332 ; 22 L. T. 286 ; 18 W. R. 411, L. J.

9432. Provision that majority of executing creditors should discharge trustees.]—A covenant that the decision of a majority of the executing creditors to discharge the trustee from the trusts of the deed shall bind all the rest of the creditors, renders a deed under 1861 Act, s. 198, void.—LEIGH *v.* PENDLEBURY (1864), 15 C. B. N. S. 815 ; 3 New Rep. 475 ; 33 L. J. C. P. 172 ; 10 L. T. 30 ; 12 W. R. 468 ; 143 E. R. 1005.

Annotations :—**Mentd.** Balden *v.* Pell (1864), 5 B. & S. 213 ; Turquand *v.* Moss (1864), 17 C. B. N. S. 15 ; Lloyd *v.* Harrison (1865), 6 B. & S. 36 ; Skilton *v.* Symonds (1865), 18 C. B. N. S. 418 ; Coles *v.* Turner (1866), L. R. 1 C. P. 373, Ex. Ch. ; Hickmott *v.* Simmonds (1866), L. R. 2 Eq. 462 ; Ames *v.* Colnaghi (1868), L. R. 3 C. P. 359.

9433. —— & pass their accounts.]—A deed of inspectorship made between debtor & his creditors under 1861 Act, contained a clause " that a resolution signed by the majority in number & value of the creditors, parties to the deed, or bound by it, should be effectual for the allowances & passing of the accounts of the trustees, & for discharging them from the trusts of the deed " :—*Held :* the clause was not unreasonable, & the deed was binding on the non-assenting creditors.—BOND *v.* WESTON (1865), L. R. 1 Q. B. 169 ; 35 L. J. Q. B. 7.

9434. Provision that majority of assenting creditors should appoint new trustee.]—A deed of inspectorship made between debtor & his creditors under 1861 Act, contained a clause : That in case any trustee appointed by the deed should die, or refuse, or become incapable to act in the trust, a majority of the creditors present at a meeting of the creditors of the debtor convened for that purpose should choose a person to be trustee :—*Held :* the clause was not unreasonable, & the deed was binding on the non-assenting creditors.—BOND *v.* WESTON (1865), L. R. 1 Q. B. 169 ; 35 L. J. Q. B. 7.

9435. Provision for payment of composition—On trustees' certificate that deed assented to.]—In a trust deed under 1861 Act, s. 192, a provision, which makes the composition payable on the trustees' certificate that the deed has been assented to by the statutory number of creditors, is unreasonable.—BOULNOIS *v.* MANN (1865), L. R. 1 Exch. 28 ; 4 H. & C. 9 ; 35 L. J. Ex. 58 ; 13 L. T. 531 ; 11 Jur. N. S. 1006 ; 14 W. R. 181.

Annotation :—**Mentd.** Giddings *v.* Penning (1866), 12 Jur. N. S. 634.

9436. —— Before expiration of period allowed for registration.] — It is no objection to a deed of composition under 1861 Act, s. 192, that the composition is payable before the expiration of the twenty-eight days allowed by s. 194, for registering the deed.—BROOKS *v.* JENNINGS (1866), L. R. 1 C. P. 476 ; Har. & Ruth, 414 ; 14 L. T. 19, 12 Jur. N. S. 341 ; 14 W. R. 440.

Annotations :—**Mentd.** Kitchen *v.* Hawkins (1866), L. R. 2 C. P. 22 ; Tetley *v.* Wanless (1866), 15 L. T. 255 ; Isaacs *v.* Green (1867), L. R. 2 Exch. 352 ; McLaren *v.* Baxter (1867), L. R. 2 C. P. 559.

9437. —— Without disturbing former dividends—Payment by trustees without notice of debt.]—A provision in a composition deed, under 1861 Act, that no former dividend should be disturbed, & no liability in consequence of such dividend incurred by the trustees, by reason of any debt due to any creditor, whereof the trustees should not have had notice before such dividend should have begun to be paid :—*Held :* reasonable.—GREENBERG *v.* WARD (1866), L. R. 1 C. P. 585 ; 35 L. J. C. P. 316 ; 14 L. T. 760 ; 12 Jur. N. S. 524 ; 14 W. R. 795.

Annotation :—**Expld.** Bailey *v.* Bowen (1868), 37 L. J. Q. B. 61. In *Greenberg* v. *Ward* the provision was rather for the purpose of enabling the trustees to realise the estate (MELLOR, J.).

9438. —— At such place & in such manner as trustees think fit.]—A clause in a deed under 1861 Act, s. 192, whereby debtor assigned his whole property to trustees for the benefit of his creditors, empowering the trustees from time to time to determine the dividends payable to the creditors, & to pay same " at such place & in such manner, as they should think fit " :—*Held :* reasonable.—JACOBSON *v.* LAMERT (1867), L. R. 2 Exch. 394 ; 36 L. J. Ex. 221 ; 16 L. T. 569.

9439. —— To trustee on behalf of creditors.]—By a deed made between debtor, a trustee for creditors not executing the deed, & the persons whose names were subscribed in the schedule thereunder, creditors of debtor, debtor covenanted with the named creditors to pay them a composition of 5*s.* in the pound, & he also covenanted with the trustee to pay to all his other creditors, or to him on behalf of such creditors, the like composition. Then followed a release by the named creditors & all other the creditors of debtor :—*Held :* the inequality was not so great as to be unreasonable, & an application for leave to issue execution notwithstanding the deed must be refused.—*Re* A TRUST-DEED, *Ex p.* SNIBSTONE COLLIERY CO. (1867), 15 L. T. 545 ; *sub nom. Re* BAKER, *Ex p.* SNIBSTONE COLLIERY CO., 15 W. R. 365.

9440. —— On creditors applying for same.]—There is nothing unreasonable in a proviso that the creditors shall personally or otherwise apply for the notes agreed to be given by debtor.—SOLOMON *v.* LAVERICK (1868), 17 L. T. 545.

9441. Provision enabling debtor to enter into new contracts at request of inspectors.]—A deed of inspectorship is a valid deed within 1861 Act, s. 192, though it contains provisions enabling debtor, at the request of the inspectors, to enter into new contracts in the way of his trade, for the words of the sect. include the " inspection & management " of debtor's estate as well as the winding up of it.—BAILEY *v.* BOWEN (1868), L. R. 3 Q. B. 133 ; 8 B. & S. 734 ; 37 L. J. Q. B. 61 ; 17 L. T. 470 ; 16 W. R. 396.

Annotation :—**Mentd.** Wigfield *v.* Nicholson (1868), L. R. 3 Q. B. 450.

9442. Provision avoiding contract not to sue on default of tender.]—By a deed under 1861 Act, s. 192, it was agreed that a composition should be

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various kinds, does not invalidate the deed.—*Re* VON DER HEYDE (1865), 2 W. W. & A'B. 128.—**AUS.**

t. —— ——.]—A statutory deed of assignment contained a clause empowering any duly convened meeting of creditors to give directions respecting the household effects of the assignor & also to give directions respecting any allowance to the assignor out of his property or business :—*Held :* the clause might cause difficulties but it did not invalidate the deed.—LEVY *v.* KATZENSTEIN (1866), 3 W. W. & A'B. 80.—**AUS.**

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accepted by the creditors of 7*s.* 6*d.* in the pound, in full satisfaction of their respective debts, the composition to be payable by three equal instalments at four, eight, & twelve months from the registration of the deed, the payment to be secured by promissory notes of debtor & a surety, & there was a covenant by debtor with the creditors executing the deed to give them promissory notes accordingly, & a similar covenant with a trustee on behalf of the non-executing creditors; & in consideration of the premises the creditors covenanted not to sue for their original debt, this provision to be pleadable in bar as a release if they did, provided that if the promissory notes should not be duly tendered to any creditor, the provision as to not suing should be void as against such creditor:—*Held:* the deed was neither unequal nor illusory, but was valid under s. 192.—SOWRY *v.* LAW (1868), L. R. 3 Q. B. 281; 18 L. T. 145; 16 W. R. 725; *sub nom.* SOURY *v.* LAW, 37 L. J. Q. B. 96.

9443. Provision of ultimate trust to debtor.]—An assignment to a trustee for the benefit of creditors is not necessarily fraudulent, because it contains an ultimate trust in favour of debtor himself (KELLY, C.B).—JOHNSON *v.* OSENTON (1869), L. R. 4 Exch. 107; 38 L. J. Ex. 76; 19 L. T. 793; 17 W. R. 675.

Annotation:—**Mentd.** *Re* Prior, *Ex p.* Osenton (1869), 4 Ch. App. 690, L. JJ.

9444. Provision reserving benefit to debtor.]—A deed of arrangement with creditors, which is intended to give effect to a *bonâ fide* scheme of arrangement for their benefit, is not void merely because it reserves a benefit to debtor.—MASKELYNE & COOKE *v.* SMITH, [1903] 1 K. B. 671; 72 L. J. K. B. 237; 88 L. T. 148; 51 W. R. 372; 19 T. L. R. 270; 47 Sol. Jo. 317; 10 Mans. 121, C. A.

9445. Provision excluding 1890 Act, s. 23.]—It is competent for debtor, in carrying in a scheme of arrangement under 1890 Act, s. 3, with the consent of his creditors & the approval of the ct., to exclude the application of s. 23 of the Act.—*Re* NEPEAN, *Ex p.* RAMCHUNA, [1903] 1 K. B. 794; 72 L. J. K. B. 407; 88 L. T. 477; 51 W. R. 559; 47 Sol. Jo. 387; 10 Mans. 156.

9446. Provision that stipulations inconsistent with bankruptcy laws shall be held expunged.]—A deed of inspectorship, under 1861 Act, contained a provision that the estate & effects of debtor should be administered on the principles of the bkpcy. law, & if there was anything in the deed inconsistent with those principles, it should be read as if such inconsistent matter were expunged:—*Held:* the provision was not unreasonable, & the requisites of the Act, having been complied with, the deed was binding on non-assenting creditors.—STRICK *v.* DE MATTOS (1864), 3 H. & C. 22; 4 New Rep. 368; 33 L. J. Ex. 276; 10 L. T. 590; 10 Jur. N. S. 753; 12 W. R. 963; 159 E. R. 432; *subsequent proceedings, sub nom.* WOOD *v.* DE MATTOS (1865), L. R. 1 Exch. 91, Ex. Ch.

Annotations:—**Refd.** Hernulewicz *v.* Jay (1865), 6 B. & S. 697; Coles *v.* Turner (1866), L. R. 1 C. P. 373, Ex. Ch.; Bailey *v.* Bowen (1868), L. R. 3 Q. B. 133. **Mentd.** Lay *v.* Mottram (1865), 19 C. B. N. S. 479; Hickmott *v.* Simmonds (1866), L. R. 2 Eq. 462.

9447. Provision that unreasonable conditions shall bind assenting creditors only.]—A deed of inspectorship, under 1861 Act, is not invalid, because it contains a provision that these presents are intended to be a deed of inspectorship within the Act, 1861, but in case they cannot so operate, they shall be binding on creditors executing or assenting to them.—STRICK *v.* DE MATTOS (1864), 3 H. & C. 22; 4 New Rep. 368; 33 L. J. Ex. 276; 10 L. T. 590; 10 Jur. N. S. 753; 12 W. R. 963; 159 E. R. 432; *subsequent proceedings, sub nom.* WOOD *v.* DE MATTOS (1865), L. R. 1 Exch. 91, Ex. Ch.

Annotations:—**Mentd.** Hernulewicz *v.* Jay (1865), 6 B. & S. 697; Lay *v.* Mottram (1865), 19 C. B. N. S. 479; Coles *v.* Turner (1866), L. R. 1 C. P. 373 Ex. Ch.; Hickmott *v.* Simmonds (1866), L. R. 2 Eq. 462; Bailey *v.* Bowen (1868), L. R. 3 Q. B. 133.

ii. *Provisions excluding certain Creditors or leaving them without Means of enforcing Agreement.*

9448. No provision for creditors becoming so between day of meeting & date of deed—No such creditors.]—A deed of arrangement under 1849 Act, s. 224, is not invalid, because it makes no provision for creditors who may have become so between the day of the meeting of creditors & the date of the deed, it not appearing there were any creditors who became so between those times.—IRVING *v.* GRAY (1858), 3 H. & N. 34; 27 L. J. Ex. 273; 31 L. T. O. S. 152; 4 Jur. N. S. 380; 157 E. R. 377.

Annotations:—**Apprvd.** Legg *v.* Cheesebrough (1859), 5 C. B. N. S. 741. **Refd.** *Ex p.* Calvert (1858), 3 De G. & J. 95, L. JJ.; Leonard *v.* Sheard (1859), 28 L. J. Q. B. 183; Cruger *v.* Dunlop (1862), 7 H. & N. 525, Ex. Ch.; Walter *v.* Adcock (1862), 10 W. R. 542; Copeman *v.* Hart (1863), 14 C. B. N. S. 91; Spitzer *v.* Chaffers (1863), 14 C. B. N. S. 686.

9449. Non-executing creditor excluded—Expressly or impliedly.]—A deed of composition, which purports to be made between debtor & such of his creditors as shall execute same, & which either expressly or impliedly excludes from its benefits & provisions non-executing creditors is not a valid deed within 1861 Act, s. 192.—ILDERTON *v.* CASTRIQUE (1863), 14 C. B. N. S. 99; 2 New Rep. 167; 32 L. J. C. P. 206; 8 L. T. 537; 9 Jur. N. S. 993; 11 W. R. 755; 143 E. R. 382; *subsequent proceedings, sub nom.* ILDERTON *v.* JEWELL (1864), 16 C. B. N. S. 142, Ex. Ch.

Annotations:—**Consd.** Clapham *v.* Atkinson (1864), 4 B. & S. 730, Ex. Ch. **Distd.** Raphael *v.* Davies (1864), 11 L. T.

9443 i. *Provision of ultimate trust to debtor.*]—An assignment for benefit of creditors provided that any balance, remaining after distribution of the assets among different classes of creditors in varying proportions, should be paid to the assignor:—*Held:* the deed was void.—WHITMAN *v.* UNION BANK OF HALIFAX (1888), 16 S. C. R. 410.—CAN.

9443 ii. ——.]—A resulting trust in favour of debtor, after all his creditors have been paid in full, contained in a creditor's deed, does not render it fraudulent & void.—TRUEMAN *v.* WOODWORTH (1894), 1 N. B. Eq. Rep. 83.—CAN.

9443 iii. ——.]—A deed of assignment for benefit of creditors is not invalid if it declares a resulting trust in favour of debtor:—*Semble:* the ct. might order such resulting trust to be executed for the benefit of judgment creditors who decline to assent to the assignment.—STEPHENSON *v.* BAUMGARTNER, BAUMGARTNER *v.* STEPHENSON (1868), 3 Agra, 104, 321.—IND.

PART XXIII. SECT. 10, SUB-SECT. 3. —B. (c) ii.

a. *Intention to exclude.*]—The declared intention to exclude any creditor or class of creditors will not render an assignment invalid.—TARRATT *v.* SAWYER, 1 Thom. 1st ed. 20.—CAN.

9449 i. *Non-executing creditor excluded —Expressly or impliedly.*]—The fact of a deed of composition purporting to be made, not with all the creditors, but only with those executing the deed, would prevent it affecting a non-executing creditor.—PIDGEON *v.* MARTIN (1875), 25 C. P. 233.—CAN.

9449 ii. —— ——.]—Under 22 Vict. c. 96, an assignment is invalid, if made only for the benefit of creditors who execute it.—BURRITT *v.* ROBERTSON (1859), 18 U. C. R. 555.—CAN.

9449 iii. —— ——.]—A deed of assignment provided that, in the first place all executions should be paid & thereafter all debts due to persons named in the sched. & to all unnamed creditors who should come into the assignment. It also provided that if, after the executions were satisfied, there did

539, Ex. Ch. **Refd.** Clapham *v.* Atkinson (1864), 4 B. & S. 722; Dingwall *v.* Edwards (1864), 4 B. & S. 738; Lloyd *v.* Harrison (1865), 6 B. & S. 36. **Mentd.** Spitzer *v.* Chaffers (1863), 14 C. B. N. S. 686.

See, also, Nos. 9362, 9363, *ante.*

9450. Creditor not executing within given time excluded.]—A deed of composition, which in terms excludes all creditors who do not execute within a given time, is not a valid deed within 1861 Act, s. 192.—COPEMAN *v.* HART (1863), 14 C. B. N. S. 91; 2 New Rep. 126; 143 E. R. 379.

9451. ——.]—The deed of arrangement contemplated by 1861 Act, s. 192, is one which is made for the benefit of all the creditors of debtor, & to which all may become parties, & a deed which in terms excludes all creditors who do not execute within a given time, affords no defence to an action by a creditor not a party thereto.—BERRIDGE *v.* ABBOTT (1863), 13 C. B. N. S. 507; 1 New Rep. 437; 143 E. R. 201.

9452. Non-assenting creditor without power to enforce deed.]—By a composition deed between debtor of the one part, & the several creditors who signed the deed respectively of the other part, after reciting that debtor was unable to pay his debts in full, the latter covenanted with the several persons, parties thereto of the second part, to pay to all his present creditors a composition of 5*s.* in the pound on their respective debts:—*Held:* the deed was not valid, since the non-assenting creditors were not in an equally advantageous position with the executing creditors, for the deed gave to each individual creditor who had executed the deed the right of action for the composition on his individual debt, while a non-assenting creditor had no power of suing either personally or by means of any one as trustee on his behalf.—BENHAM *v.* BROADHURST (1864), 3 H. & C. 472; 5 New Rep. 251; 34 L. J. Ex. 61; 11 L. T. 537; 11 Jur. N. S. 20; 13 W. R. 183; 159 E. R. 615, Ex. Ch.

Annotations:—**Distd.** Scott *v.* Berry (1865), 6 New Rep. 265; Sowry *v.* Law (1868), L. R. 3 Q. B. 281. **Refd.** Chesterfield, Midland & Silkstone Co. *v.* Hawkins (1865), 11 Jur. N. S. 468; Gresty *v.* Gibson (1865), 4 H. & C. 28; Gurrin *v.* Ropera (1865), 34 L. J. Ex. 128; *Re* Cobb, *Ex p.* Fairfax & Bryson (1866), 14 W. R. 289; Cairncross *v.* Wills (1869), 38 L. J. Ex. 87.

9453. ——.]—A deed of composition was expressed to be made between the several persons whose names & seals were subscribed & affixed in the schedule, being creditors, of the first part, debtor, of the second part, & two sureties of the third part. By the deed, of which the paramount object was declared to be the equal benefit of all the creditors, the parties of the second & third parts covenanted with the parties of the first part & with all the other creditors respectively to pay them respectively a composition of 10*s.* in the pound, & in consideration of the covenants the covenantees released debtor:—*Held:* (1) a non-assenting creditor was no party to the deed & could not sue on the covenants, & he was not, under 1861 Act, s. 192, bound by the deed; (2) to a deed so framed the sect. would not operate to make non-assenting creditors parties.—CHESTERFIELD & MIDLAND SILKSTONE COLLIERY CO., LTD. *v.* HAWKINS (1865), 3 H. & C. 677; 34 L. J. Ex. 121; 12 L. T. 427; 11 Jur. N. S. 468; 13 W. R. 841; 159 E. R. 698.

Annotations:—**Distd.** Scott *v.* Berry (1865), 3 H. & C. 966; Reeves *v.* Watts (1866), 35 L. J. Q. B. 171. **Apld.** *Re* Cobb, *Ex p.* Fairfax & Bryson (1866), 14 W. R. 289. **Consd.** Isaacs *v.* Green (1867), L. R. 2 Exch. 352. **Dbtd.** M'Laren *v.* Baxter (1867), L. R. 2 C. P. 559. **Consd.** *Re* Trust-Deed, *Ex p.* Snibstone Colliery Co. (1867), 15 L. T. 545; Cairncross *v.* Wills (1869), 20 L. T. 529. **Refd.** Gurrin *v.* Kopera (1865), 3 H. & C. 694; Kitchin *v.* Hawkins (1866), L. R. 2 C. P. 22.

9454. ——.]—A composition deed was made between the several persons whose names were subscribed & seals affixed in the schedule thereunder written, on behalf of themselves & all & every other the creditors of deft., of the first part, & deft. of the second part, whereby, after reciting that deft. was indebted to the several persons parties thereto of the first part, in the several sums of money set opposite to their respective names in the schedule thereunder written, & was also indebted to other persons in certain sums of money, & being unable to discharge his debts in full, had agreed to pay a composition of 5*s.* in the pound, such payment or composition to be made & paid to all & every the creditors of deft., whether executing the deed or not, to be paid & payable on Sept. 22, 1865, & to be in full discharge of all & every the debts due & owing at the time of the executing of the deed, in pursuance of the agreement & in consideration of the payment by deft. to his several creditors of such composition, they the several persons, parties thereto of the first part, did thereby accept the composition in full satisfaction & discharge of their respective debts, & did by the indenture release the debts which the several parties thereto of the first part had against deft.:—*Held:* the deed was not binding on non-assenting creditors, under 1861 Act, s. 192, as they had no means of enforcing their rights, if any, under it.—GURRIN *v.* KOPERA (1865), 3 H. & C. 694; 34 L. J. Ex. 128; 12 L. T. 432; 11 Jur. N. S. 491; 13 W. R. 843; 159 E. R. 704.

Annotations:—**Apld.** *Re* Cobb, *Ex p.* Fairfax & Bryson (1866), 14 W. R. 289. **Folld.** *Re* Trust Deed, *Ex p.* Keober (1866), 13 L. T. 646. **Consd.** *Re* Baker, *Ex p.* Snibstone Colliery Co. (1867), 15 W. R. 365. **Expld.** Isaacs *v.* Green (1867), L. R. 2 Exch. 352. *Gurrin* v. *Kopera* seems to have been decided on the ground that there was no provision in the deed at all, by which the payment of the composition to the creditors was secured or could be enforced (KELLY, C.B.). **Consd.** M'Laren *v.* Baxter (1867), L. R. 2 C. P. 559.

9455. What amounts to exclusion—No benefit unless coming in & signing.]—Action on bill of exchange. Plea, that after the accruing, etc., & after 1861 Act, to wit, etc., by indenture between deft. of the first part, J. & M., trustees on behalf of themselves & others the undersigned creditors of deft. of the second part, & the several other persons creditors of deft. whose names were thereunder signed, of the third part, deft. assigned to the trustees all his estate, etc., upon trust out of the proceeds to pay to the several persons, parties thereto of the third part, a composition of 2*s.* 6*d.* in the pound upon the amount of their respective debts, in consideration whereof the parties thereto of the third part released deft., his exors., etc., from their respective debts; & it was declared that the deed should not be binding upon any creditor

not remain enough to pay the creditors in full, the balance was to be distributed *pro ratâ* among the named creditors & any surplus returned to the assignor:—*Held:* the assignment was void.—WATTS *v.* HOWELL (1861), 21 U. C. R. 255.—**CAN.**

9450 i. *Creditor not executing within given time excluded.*]—A provision appointing a time within which creditors must come in & execute, in order to receive the benefit of the trusts, does not render the deed void under 22 Vict. c. 96.—METCALF *v.* KEEFER (1860), 8 Gr. 392.—**CAN.**

9450 ii. ——.]—P. executed a trust deed for the benefit of all his creditors who should sign the deed within three months:—*Held:* the deed was valid against the assignees in bkpcy.—*Re* PHELAN (1862), 12 I. Ch. R. 467; 14 Ir. Jur. 281.—**IR.**

9450 iii. ——.]—A trader executed a trust deed, purporting to be for the benefit of all his creditors who executed it within a month:—*Held:* the form of the deed was objectionable, & was contradictory in its terms, as purporting to be for the benefit of all the creditors, & then attempting to exclude such creditors as did not execute it within a time named.—*Re* SMART (1864), 16 Ir. Jur. 194.—**IR.**

Sect. 10.—*Position of creditors: Sub-sect.* 3, *B.* (*c*) *ii.*]

party thereto to whom the amount of the composition should not be paid within seven days from the time of such creditor executing the deed. The plea then averred that the deed was a trust-deed under 1861 Act, s. 192, & duly executed by the requisite majority, etc., & that pltf. was a creditor, etc. :—*Held :* the plea was bad, & the deed was not a good deed under s. 192, as, on the face of it, it excluded non-assenting creditors, who did not come in & sign, from getting any benefit under it.—RAPHAEL *v.* DAVIS (1864), 11 L. T. 539 ; *sub nom.* DAVIS *v.* RAPHAEL 11 Jur. N. S. 140 ; 13 W. R. 185, Ex. Ch.

9456. —— —— Provision that if clause illegal only binding assenting creditors.]—A composition deed appearing to be *bonâ fide*, & containing a provision that anything therein contained not authorised by 1861 Act, s. 192, should only be binding on the creditors who execute will not be invalid, because it excludes creditors who do not prove in time.—*Re* TRESIDDER, *Ex p.* SOMERVILLE (1865), 1 Ch. App. 21 ; 35 L. J. Bcy. 1 ; 13 L. T. 350 ; 11 Jur. N. S. 1029 ; 14 W. R. 113, L. C.

Annotations :—**Mentd.** *Re* Trust-Deed, *Ex p.* Terrell (1866), 15 L. T. 302 ; Fitzpatrick *v.* Bourne (1868), 9 B. & S. 157, Ex. Ch.

9457. —— Provision only for distribution among joint creditors.]—To a declaration containing the common money counts, defts. pleaded that they were traders & that they had entered into a composition deed, which was signed by & on behalf of six-seventhsin number & value of their creditors, within 1849 Act, that pltf. was a creditor, & did not sign the deed. The deed was set out in the plea, & by it defts. assigned all their joint & separate real & personal estate to trustees, upon trust, after paying expenses, etc., to pay & divide all the remainder of the trust money unto & among themselves & all the other creditors, & upon further trust to pay the ultimate surplus, if any, & also the dividends of such of the creditors as should not execute the deed, to defts. Pltf. replied that there were separate creditors of defts. to the amount of more than £10. Defts. traversed & demurred to the replication :—*Held :* the deed set out in the plea was invalid, on the grounds (1) it directed the distribution of the joint & separate estate of defts. amongst the joint creditors only, and (2) the estate ought to be divided amongst those who did not sign, as well as amongst those who did sign the deed.—LEONARD *v.* SHEARD (1859), 1 E. & E. 667 ; 28 L. J. Q. B. 183 ; 33 L. T. O. S. 9 ; 5 Jur. N. S. 1050 ; 7 W. R. 262 ; 120 E. R. 1060.

Annotation :—**Refd.** Walker *v.* Nevill (1865), 34 L. J. Ex. 73.

9458. —— Trust for creditors entitled to prove in bankruptcy.]—B., on Dec. 3, 1862, in pursuance of a resolution passed on Nov. 25, at a meeting of his creditors, executed an assignment of the whole of his property to pltfs. as trustees, to pay & discharge ratably all the debts due & owing from B. to his creditors, being such persons as would have been entitled to rank as creditors in bkpcy. if B. had been adjudged bkpt. upon a petition for that purpose filed on Nov. 25 :—*Held :* there was no intention to exclude any creditor from executing, & the deed was not void.—EVANS *v.* JONES (1864), 3 H. & C. 423 ; 5 New Rep. 95 ; 34 L. J. Ex. 25 ; 11 L. T. 636 ; 11 Jur. N. S. 784 ; 159 E. R. 595.

9459. —— Promissory notes only secured to creditors executing.]—Declaration for goods sold & delivered. Plea, a deed made between all & every the creditors & creditor, thereinafter called "the creditors," of deft. of the one part, & deft. of the other part, which, after reciting that the creditors agreed to accept a composition of 12*s.* in the pound, to be paid by instalments, & to be secured by promissory notes of deft., & an instalment of 2*s.* in the pound in cash, at or immediately before the execution of the deed, & that the creditors should execute to deft. such release as should be valid & effectual & binding on all the creditors, pursuant to 1861 Act, witnessed that, in consideration of the premises, & the delivery to the creditors of the promissory notes, & of the payment to the creditors on their execution of the deed of 2*s.* in the pound, the balance of the composition, the creditors did release to deft. all actions, suits, debts, etc., which they had against him, except the promissory notes, & deft. covenanted to pay the sums intended to be secured by the promissory notes. Averments, that a majority in number, representing three-fourths in value of the creditors whose debts respectively amounted to £10 & upwards, assented to the deed, which was duly attested, etc., & that at the time of the execution of the deed pltf. was a creditor & became bound by the deed, as if he had been a party thereto, that deft. tendered to pltf. the promissory notes & the 2*s.* in the pound cash, & that pltf. refused to receive them & to execute the deed, that the instalments of 2*s.* in the pound was paid into ct., & that deft. was ready to deliver the promissory notes to pltf. :—*Held :* (1) (COCKBURN, C.J., & CROMPTON, J.) the plea was bad, for the deed was not binding upon those creditors who did not execute it, as the promissory notes & the 2*s.* in the pound were only secured to those creditors who did execute it ; (2) (BLACKBURN & MELLOR, JJ.) the plea was good, for the

9455 i. *What amounts to exclusion—No benefit until execution.*]—A deed was made between insolvent of the first part, certain sureties of the second part, & "the several firms, persons, & corporations who are creditors of the parties of the first part, & are also mentioned in the annexed list, of the third part." It concluded with the following clause :—"This deed shall be ineffectual until completed by all creditors having claims for over $100" :—*Held :* this clause only applied to creditors mentioned in the annexed list, & other creditors refusing to execute the deed did not prevent it from being operative. —GAULT *v.* BAIRD (1879), 4 A. R. 436.—**CAN.**

9457 i. —— *Provision only for joint creditors.*]—A deed of assignment, purporting to be under Insolvency Statute, 1865, executed by partners assigning all their estate for the benefit of joint creditors, but not noticing separate estate or separate creditors, is not a good deed under the above statute.—*Re* UPTON & BOWES' TRUST ESTATE, *Re* INSOLVENCY STATUTE, 1865, *Ex p.* CURTAIN (1871), 2 V. R. 117.—**AUS.**

9457 ii. ——— ———.]—A. & B. assigned all their assets, both separate & partnership property, in trust to realise & pay "all the just debts of the creditors of debtors ratably & proprotionably, & without preference or priority" :—*Held :* the assignment was not void in providing for payment of partnership creditors only.—KERR *v.* CANADIAN BANK OF COMMERCE (1884), 4 O. R. 652.—**CAN.**

9457 iii. ——— ———.]—G. & W. made an assignment to pltfs. of all their partnership effects & of all the personal effects of G., "other than wearing apparel," in & about the dwelling-house of G., in trust to pay all the creditors of G. & W. :—*Held :* the deed was void, in consequence of providing for the payment of partnership creditors only. —MILLS *v.* KERR (1882), 7 A. R. 769.—**CAN.**

9457 iv. ——— ———.]—*Held :* a deed of arrangement made under 1862 Act by debtors carrying on business in co-partnership, if pleaded in bar to an action by a dissentient creditor, must have been for the benefit of separate as well as joint creditors, & it was incumbent upon the arranging debtors to show that the deed comprehended all such creditors & if the deed appeared in anywise to limit the class of creditors arranged with, it was incumbent on debtor to show that there were no creditors other than those arranged with, so that in point of fact no creditor was excluded.—BANK OF NEW ZEALAND *v.* EASTGATE, Mac. 197. —**N.Z.**

deed was binding upon all creditors, & its effect was not to exclude from the benefit of it those creditors who did not execute it.—DINGWALL *v.* EDWARDS (1864), 4 B. & S. 738; 3 New Rep. 642; 33 L. J. Q. B. 161; 10 L. T. 132; 10 Jur. N. S. 386; 12 W. R. 597; 122 E. R. 637.

Annotations:—**Folld.** Killby *v.* Wright (1865), 18 C. B. N. S. 272. **Refd.** Stone *v.* Jellicoe (1864), 34 L. J. Ex. 11; Clarke *v.* Williams (1865), 3 H. & C. 508; Martin *v.* Gribble (1865), 3 H. & C. 631; Brooks *v.* Jennings (1866), L. R. 1 C. P. 476.

9460. —— No provision for composition for all creditors.]—A composition deed, expressed to be made between debtor of the first part, & the several persons creditors of debtor, whose names & seals were thereto affixed, of the second part, witnessed that the several creditors parties of the second part covenanted that, if debtor paid to each of the several creditors parties of the second part a composition of 2*s.* 6*d.* in the pound, same should operate as a release & discharge in full from all the debts due to the creditors parties thereto:—*Held:* the deed was not a valid deed within 1861 Act, s. 192, so as to bind a creditor who had not executed it, since it did not provide for all the debts & liabilities of debtor, or for paying a composition to all the creditors, but only to those who executed the deed.—ILDERTON *v.* JEWELL (1864), 16 C. B. N. S. 142; 3 New Rep. 516; 33 L. J. C. P. 148; 9 L. T. 815; 10 Jur. N. S. 747; 12 W. R. 530; 143 E. R. 1079, Ex. Ch.; *affg.* S. C. (1863), 14 C. B. N. S. 665.

Annotations:—**Consd.** Dingwall *v.* Edwards (1864), 4 B. & S. 738. **Apld.** Leigh *v.* Pendlebury (1864), 15 C. B. N. S. 815. **Consd.** Lloyd *v.* Harrison (1865), 6 B. & S. 36. **Apld.** Martin *v.* Gribble (1865), 3 H. & C. 631. **Consd.** Ames *v.* Colnaghi (1868), L. R. 3 C. P. 359. **Refd.** Clapham *v.* Atkinson (1864), 4 B. & S. 722.

9461. —— Composition to be considered due within ten days from assent.]—A deed of composition, purporting to be made between debtor & the whole of his creditors, contained a covenant to pay each creditor 10*s.* in the pound, with a proviso that, "in case any creditors should not at the date of the deed assent to it, the composition should be considered to become due to them within ten days from their assent being received or left at debtor's abode":—*Held:* the deed, by reason of such proviso, was not binding on non-assenting creditors, & the proviso could not be rejected.—ARMITAGE *v.* BAKER (1864), 10 L. T. 526.

9462. —— Composition payable on creditors executing deed.]—A deed of composition made between "the several persons whose names were subscribed & seals affixed in the schedule, being creditors of T., of the first part, & T. of the second part," recited that debtor was indebted to the several persons parties thereto of the first part, in the sums set opposite their respective names, & had agreed to pay a composition of 6s. in the pound, "such payment or composition to be made & paid to all & every the creditors of debtor upon their executing this deed," & witnessed that, in consideration of the payment by debtor to the several creditors of such composition the parties of the first part released debtor:—*Held:* a void deed, as excluding non-assenting creditors from all benefits under it, notwithstanding all the formalities prescribed by 1861 Act, s. 192, had been duly observed.—KILLBY *v.* WRIGHT (1865), 18 C. B. N. S. 272; 144 E. R. 447.

9463. —— ——.]—A composition deed under 1861 Act, made between debtor of the first part, the undersigned J., one of his creditors, & also all his other undersigned creditors of the second part, recited that debtor was unable to pay his several creditors the full sum of 20*s.* in the pound, but was able & willing to pay each & all of them, on signing the deed, the composition of 5*s.* in the pound, & that debtor had applied to the several parties thereto of the second part to receive & take the composition of 5*s.* in the pound, payable on signing the deed, in full satisfaction & discharge of their several & respective debts, which the parties of the second part had agreed to accept in full satisfaction, & discharge as aforesaid, & in consideration thereof thereby respectively released debtor:—*Held:* the deed was not binding on non-assenting creditors, since the composition was only payable on signing the deed, & the creditors who signed were in a better position than those who dissented.—MARTIN *v.* GRIBBLE (1865), 3 H. & C. 631; 6 New Rep. 176; 34 L. J. Ex. 108; 12 L. T. 395; 11 Jur. N. S. 490; 13 W. R. 691; 159 E. R. 679.

Annotations:—**Distd.** Scott *v.* Berry (1865), 3 H. & C. 966. **Refd.** Reeves *v.* Watts (1866), 35 L. J. Q. B. 171.

9464. —— Covenant to pay scheduled creditors.]—A deed of composition under 1861 Act, s. 192, between debtor of the first part, & the several persons whose names & seals were thereunto subscribed & set, being creditors of debtor, & all other persons being creditors of debtor, of the other part, after reciting that debtor was indebted to the parties of the second part, contained a covenant by debtor with the persons of the second part, that he would pay unto such persons respectively the several sums of money placed opposite to the respective names of such persons in the third column of the schedule to the deed, being the amount of the composition agreed upon, by two instalments on certain days, & it was declared that until debtor should make default, the parties of the same part should not bring any action in respect of their several debts specified in the several columns of the schedule:—*Held:* the covenant as to payment & the covenant not to sue must override the generality of the earlier part of the deed, & were confined to the persons & their debts specified in the schedule, & the deed did not afford an equitable defence to an action by a creditor not named in the schedule.—BUVELOT *v.* MILLS (1865), L. R. 1 Q. B. 104; 6 B. & S. 986; 35 L. J. Q. B. 3; 13 L. T. 321; 14 W. R. 98; 122 E. R. 1457.

Annotations:—**Distd.** *Re* Baker, *Ex p.* Snibstone Colliery Co. (1867), 15 W. R. 365; Tetley *v.* Wanless (1867), 15 W. R. 932, Ex. Ch. **Refd.** Hickmott *v.* Simmonds (1866), L. R. 2 Eq. 462.

9465. —— —— On verification of debt in particular way.]—By a deed under 1861 Act, s. 192, expressed to be made between debtor of the first part, trustees of the second part, & the several other persons whose names & seals were thereunto subscribed & set, being creditors of debtor, & all other persons creditors of debtor of the third part, debtor assigned his estate to the trustees, upon trust to pay to the parties thereto of the third part the sums set opposite to their respective names in the schedule, subject to the covenant hereinafter contained for verifying the amounts thereof, such covenant being to the effect that it should be lawful for the trustees to require the amounts of the debts to be verified by solemn declaration, or in such other manner as to the trustees should seem expedient, & in the event of a creditor failing

9465 i. —— *Covenant to pay scheduled creditors—& other creditors on verification of debt to trustee's satisfaction.*]—A deed containing a trust to pay scheduled creditors & all others, who should by reasonable evidence satisfy the trustee that they were at the date of the deed creditors, with power for the trustee to inquire into & insist upon such proof as he might deem reasonable in support of any debt alleged in the sched. to be due, is not a trust for the benefit of all the creditors.—BEESTON *v.* DONALDSON, RIGGALL CLAIMANT (1892), 18 V. L. R. 208.—AUS.

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or refusing so to verify his debt, such creditor was to be excluded from all benefit of the deed :—*Held :* the deed was not binding on a creditor whose name was not in the schedule, & who had not assented. —HICKMOTT *v.* SIMMONDS (1866), L. R. 2 Eq. 462 ; 35 L. J. Ch. 580 ; 14 L. T. 614 ; *sub nom. Re* SIMMOND'S ESTATE, THICKMOTT *v.* SIMMONDS, 14 W. R. 882.

Annotation :—**Mentd.** Tetley *v.* Wanless (1867), 15 W. R. 932.

9466. —— **Agreement with executing creditors—On behalf of themselves & other creditors—Letter of licence—Absolute release.**]—A deed of composition, made between debtor of the first part, & the creditors who execute or approve of same, " on behalf of themselves & all & every the creditors of debtor," of the second part, which provides for payment, within six months after registration, of a composition of 1*s.* in the pound, & which contains also a letter of licence to debtor for a period of twelve months, & an absolute release by the creditors of their claims, is invalid as against a dissenting creditor.—*Re* COBB, *Ex p.* FAIRFAX & BRYSON (1866), 14 W. R. 289.

9467. —— **No provision for tender or notice to non-executing creditors.**]—A composition deed under 1861 Act, s. 192, made between debtor of the first part, a trustee of the second part, & the creditors named in the schedule of the third part, after reciting that debtor proposed to pay all his creditors a composition by giving them promissory notes, & that such promissory notes had been deposited with the trustee to deliver to the non-executing & non-assenting creditors, witnessed that in consideration of the premises each of the creditors who executed or assented to or were bound by the deed released debtor :—*Held :* the deed was not bad on the ground of inequality among the creditors, by reason of its containing no provision making it obligatory on the trustee to tender the promissory notes or give notice of the deed to non-assenting creditors.—BLUMBERG *v.* ROSE (1866), L. R. 1 Exch. 232 ; 4 H. & C. 311 ; 35 L. J. Ex. 144 ; 14 L. T. 365 ; 12 Jur. N. S. 378 ; 14 W. R. 657.

Annotation :—**Folld.** *Re* Trust-Deed, *Ex p.* Snibstone Colliery Co. (1867), 15 L. T. 545.

9468. —— **Deed capable of being construed to include all creditors.**]—J., in June, 1861, under 1849 Act, s. 68, assigned all his personal estate to three trustees, upon trust, after payment of rent, taxes, etc., & expenses, to pay the cost of any creditor who might commence legal proceedings, & to divide the residue amongst such of his creditors as should, within three calendar months from the date, assent to the deed ; & it was thereby declared that, in case any creditors should not assent within three calendar months, then the assignor should stand in the place of the same creditors, & should have the same benefit, by way of dividend, as the creditors themselves would have been entitled to have :—*Held :* this was a valid assignment of all the assignor's effects in favour of all his creditors, although some of them might not have come in & proved under it.—HARRIS *v.* PETTIT (1862), 31 L. J. Ch. 552 ; 6 L. T. 572 ; 9 Jur. N. S. 68 ; 10 W. R. 599.

9469. —— —— **Express words to include not necessary.**] — A deed of composition between debtor of the first part, & the several creditors whose names were subscribed, " on behalf of themselves & all & every other the creditors," of the second part, professed to be a deed under 1861 Act, s. 192, & to secure the payment of a composition to all the creditors, & contained a covenant " with each & every of the creditors " to pay the composition, & a release by the parties of the second part :—*Held :* the deed was not void, on the ground of inequality, as it might be construed as making all the creditors parties, & capable of enforcing the covenant. *Semble :* where creditors not executing or assenting to the deed are excluded, the deed is invalid, but the absence of express words to include all creditors does not necessarily render the deed bad.—M'LAREN *v.* BAXTER (1867), L. R. 2 C. P. 559 ; 36 L. J. C. P. 247 ; 16 L. T. 521 ; 15 W. R. 1017.

Annotations :—**Folld.** Isaacs *v.* Green (1867), L. R. 2 Exch. 352. **Apld.** Jung *v.* Phosphate of Lime Co. (1868), L. R. 3 C. P. 139.

9470. —— —— **Agreement with all creditors.**]—To an action on a promissory note, deft. pleaded, by way of equitable defence, that, after the accruing of pltf.'s claim, he was indebted to pltf. & other persons, & that a deed was made & entered into by & between deft. of the one part, & the several persons being creditors of deft. who should execute the same of the other part, relating to the debts & liabilities of deft. & his release therefrom. The deed was set out in the plea, & after reciting that deft., being unable to pay his debts in full, had applied to his several creditors to receive a composition of 2*s.* 6*d.* in the pound, it went on as follows : " which we, the several creditors signing these presents, have agreed to do, & being a majority in number representing three-fourths in value of the creditors of [deft.] whose debts respectively amount to £10 & upwards, have agreed to accept such composition as aforesaid, & in consideration thereof, & on payment thereof, or whenever thereafter called upon for the purpose, hereby severally undertake & agree to execute to [deft.] a good & sufficient release in the law of our several & respective claims & demands upon him." The plea then averred that a majority representing three-fourths in value of the creditors of deft., whose debts respectively amounted to £10 & upwards, did in writing assent to & approve of the execution of the deed, that the deed was duly registered, & that pltf. was bound thereby, as if he had been a party thereto, & had duly executed same :—*Held :* pltf., though a non-assenting creditor, was barred by the deed from maintaining his action, for the deed was a valid deed within 1861 Act, s. 192, as it sufficiently showed that it was intended to be an arrangement between debtor & the whole body of his creditors, as all had the option of coming in & signing it.—CLAPHAM *v.* ATKINSON (1864), 4 B. & S. 730 ; 4 New Rep. 379 ; 34 L. J. Q. B. 49 ; 10 L. T. 908 ; 11 Jur. N. S. 217 ; 12 W. R. 1062 ; 122 E. R. 634, Ex. Ch.

Annotations :—**Expld.** Benham *v.* Broadhurst (1864), 3 H. & C. 472, Ex. Ch. **Expld. & Apld.** Hidson *v.* Barclay (1864), 3 H. & C. 9. **Consd.** Keyes *v.* Elkins (1864), 5 B. & S. 240. **Apld.** Stone *v.* Jellicoe (1864), 3 H. & C. 263. **Distd.** Buvelot *v.* Mills (1865), 6 B. & S. 986. **Consd.** Fessard *v.* Mugnier (1865), 18 C. B. N. S. 286; Gurrin *v.* Kopera (1865), 3 H. & C. 694 ; Walker *v.* Nevill (1865), 3 H. & C. 403. **Expld.** Cairncross *v.* Wills (1869), 20 L. T. 529. **Refd.** Dingwall *v.* Edwards (1864), 4 B. & S. 738 ; Garrod *v.* Simpson (1864), 3 H. & C. 395 ; Whitehead *v.* Porter (1864), 5 B. & S. 193 ; *Re* Williams, *Ex p.* Williams (1864), 10 L. T. 243 ; Scott *v.* Berry (1865), 6 New Rep. 265 ; Latham *v.* Lafone (1867), 36 L. J. Ex. 97 ; M'Laren *v.* Baxter (1867), L. R. 2 C. P. 559 ; Sowry *v.* Law (1868), L. R. 3 Q. B. 281. **Mentd.** Dewhirst *v.* Jones (1864), 3 H. & C. 60 ; Naylor *v.* Mortimore (1864), 17 C. B. N. S. 207 ; Strick *v.* De Mattos (1864), 3 H. & C. 22 ; Wells *v.* Hacon (1864), 12 W. R. 790 ; Union Bank of Manchester *v.* Beech (1865), 12 L. T. 499 ; Corner *v.* Sweet (1866), L. R. 1 C. P. 456; Giddings *v.* Penning (1866), 4 H. & C. 498.

9471. —— —— ——.]—A deed of composition, being an indenture made between debtor, A., of

the first part, & all the creditors of A. of the second part, by which debtor covenants with the several persons parties thereto of the second part respectively, to pay a certain composition on their respective debts unto the several persons parties, etc., being all & every his present creditors, & the several creditors parties thereto, etc., release their several debts, etc., is a valid deed under 1861 Act, s. 192, & binding on non-assenting creditors, for every creditor is made a party by the general description of all the creditors of A., & can sue on the covenant.—REEVES *v.* WATTS (1866), L. R. 1 Q. B. 412 ; 7 B. & S. 523 ; 35 L. J. Q. B. 171 ; 14 L. T. 478 ; 12 Jur. N. S. 565 ; 14 W. R. 672.

Annotations :—**Consd.** Isaacs *v.* Green (1867), 36 L. J. Ex. 253 ; Solomon *v.* Laverick (1863), 17 L. T. 545. **Refd.** Latham *v.* Lafone (1867), L. R. 2 Exch. 115 ; M'Laren *v.* Baxter (1867), L. R. 2 C. P. 559.

9472. —— —— ——.]—In a composition deed under 1861 Act, s. 192, made between debtor of the one part, & all his creditors of the other part, debtor covenanted severally with all his creditors to pay a certain composition :—*Held :* any creditor could sue on the covenant.—GRESTY *v.* GIBSON (1866), L. R. 1 Exch. 112 ; 4 H. & C. 28 ; 35 L. J. Ex. 74 ; 13 L. T. 676 ; 12 Jur. N. S. 319 ; 14 W. R. 284.

Annotations :—**Apprvd.** Reeves *v.* Watts (1866), L. R. 1 Q. B. 412. **Consd.** Isaacs *v.* Green (1867), L. R. 2 Exch. 352 ; M'Laren *v.* Baxter (1867), L. R. 2 C. P. 559. **Distd.** Cairncross *v.* Wills (1869), 20 L. T. 529. **Refd,** Brooks *v.* Jennings (1866), L. R. 1 C. P. 476.

9473. —— —— ——.]—By a deed expressed to be made between debtor of the one part, & all his creditors of the other part, debtor covenanted with all his creditors to pay them a composition by instalments, & also that, " as soon as the deed should be delivered to him, signed & sealed by the several creditors, he would give to each of them, the several creditors, promissory notes or acceptances for the payment of the instalments, signed or indorsed by two sureties " :—*Held :* the latter covenant, if operative at all, would have the effect of giving the promissory notes to all the creditors without distinction, & it created no inequality.—PEEL *v.* WEBSTER (1867), 36 L. J. Ex. 188 ; 16 L. T. 598.

9474. —— —— ——.]—A deed was made under 1861 Act, s. 192, between " the several persons whose names are subscribed & seals affixed, etc., creditors of S. on behalf of themselves & all & every other the creditors of S. of the first part, & S. of the second part." It contained a covenant by debtor with all his creditors for payment of a composition on all his debts, & a release by the parties of the first part :—*Held :* the deed was to be read as making all the creditors parties, & it was valid.—ISAACS *v.* GREEN (1867), L. R. 2 Exch. 352 ; 36 L. J. Ex. 253 ; 16 L. T. 633.

9475. —— —— —— **Whether scheduled or not.**]—A deed under 1861 Act, s. 192, between debtor of the first part, J., a surety, of the second part, & the several persons, creditors of debtor, whose names were thereunto subscribed, & all other the creditors of debtor, of the third part, after reciting that deft. was indebted " to the several creditors in the several sums of money set opposite to their respective names in the schedule " thereunder written, & that it had been agreed by the requisite majority in number & value of the several creditors to accept the composition & security therein expressed in full satisfaction of their respective debts, witnessed that in consideration of the joint & several promissory notes of debtor & J. for the payment of such composition " on the respective sums of money aforesaid," they, the creditors, parties thereto of the third part, released to deft. all actions, suits, debts, claims, & demands, which they had against him, & accepted the stipulated composition in full satisfaction of the debts & sums due to them " specified in the schedule ; " & debtor & J. covenanted with each & every of the creditors parties thereto of the third part to pay the composition " upon their respective debts as aforesaid," & to make & deliver to them " the promissory notes " :—*Held :* there was no inequality in the deed, as all the creditors, whether their debts were scheduled or not, were equally entitled to the benefit of the covenants therein contained.—TETLEY *v.* WANLESS (1867), L. R. 2 Exch. 275 ; 36 L. J. Ex. 153 ; 16 L. T. 601 ; 15 W. R. 932, Ex. Ch.

Annotations :—**Expld.** Foster *v.* Gamgee (1876), 1 Q. B. D. 666. **Refd.** Harper *v.* Linthorpe Dinsdale Smelting Co. (1909), 101 L. T. 608, D. C. **Mentd.** Ash *v.* Pouppeville (1867), 8 B. & S. 825.

C. Right to levy Execution.

9476. Debtor arrested on judgment previously obtained.]—Where, after certificate of registration, the amount of composition was tendered to the only dissenting creditors & to their solrs., & refused, all the other unsecured creditors having been paid their composition upon their execution of the deed, & the dissenting creditors, with full knowledge of the deed & certificate of registration, arrested debtor upon a judgment obtained previously, the ct. ordered him to be released.—*Re* COMPOSITION DEED, *Ex p.* SHETTLE (1862), 7 L. T. 366 ; 11 W. R. 45 ; *revsd.* on other grounds, *Re* SHETTLE, *Ex p.* GODDEN, 1 De G. J. & Sm. 260, L. JJ.

Annotations :—**Mentd.** *Re* Bryant (1862), 7 L. T. 442 ; *Re* T. W. (1862), 7 L. T. 475 ; *Re* Llewellyn (1862), 1 New Rep. 230 ; Berridge *v.* Abbott (1863), 13 C. B. N. S. 507 ; Dewhurst *v.* Kershaw (1863), 1 H. & C. 726 ; Hodgson *v.* Wightman (1863), 1 H. & C. 810 ; Ilderton *v.* Castrique (1863), 14 C. B. N. S. 99 ; King *v.* Randall (1863), 14 C. B. N. S. 721 ; *Re* Smith, *Ex p.* Smith (1864), 3 De G. J. & Sm. 218, L. C. ; Turquand *v.* Moss (1864), 17 C. B. N. S. 15 ; *Re* Wardell & Rolls, *Ex p.* Watts (1864), 10 L. T. 74 ; Gregory *v.* Baillon (1865), 4 F. & F. 1069, N. P. ; Whittaker *v.* Lowe (1865), L. R. 1 Exch. 74, Ex. Ch. ; Brooks *v.* Jennings (1866), Har & Ruth, 414 ; *Re* Johnson, *Ex p.* Johnson (1866), 15 L. T. 163 ; Reeves *v.* Watts (1866), 35 L. J. Q. B. 171.

9477. Writ of fieri facias issued after notice of registration of deed.]—If a writ of *fi. fa.* be issued at the suit of a non-assenting creditor after notice of the registration of a valid composition deed operating under 1861 Act, s. 192, the ct. will set it aside.—STONE *v.* JELLICOE (1864), 3 H. & C. 263 ; 34 L. J. Ex. 11 ; 11 L. T. 140 ; 10 Jur. N. S. 976 ; 12 W. R. 922 ; 159 E. R. 531.

Annotations :—**Mentd.** Latham *v.* Lafone (1867), 15 L. T. 627 ; *Re* Richmond Hill Hotel Co., *Ex p.* King (1867), L. R. 4 Eq. 566 ; *Re* Trust-Deed, *Ex p.* Snibstone Colliery Co. (1867), 15 L. T. 545.

PART XXIII. SECT. 10, SUB-SECT. 3. —C.

d. *Attachment on judgment after assignment.*]—A dissenting creditor cannot attach, in satisfaction of a judgment obtained by him after the deed of assignment was executed, assets of the assignor in the hands of the assignees.—FARR *v.* BERGMANN & CO.'S ASSIGNEES (1913), E. D. L. 252. —S. AF.

e. *Judgment mortgage registered before confirmation of resolution.*]—Until the confirmation of the resolution or agreement of the creditors accepting debtor's proposal, the property of debtor remains in him, & judgment mtges., registered before the confirmation of the resolution, attach debtor's lands.—*Re* LAMBE'S ESTATE (1869), 3 I. L. T. Jo. 224.—IR.

f. ——.]—A trader presented a petition for arrangement with his creditors, under Irish 1857 Act, & obtained a protection order under s. 343. At the first sitting, in Mar., 1872, the majority of his creditors assented to his proposal for a composition. The proposal was subsequently confirmed. S. was returned in debtor's sched. as an unsecured creditor whose debt was admitted. He did not prove his debt nor vote

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9478. —— Inquiry as to validity of deed—Sale & payment into court.]—Upon a motion under 1861 Act, s. 198, to set aside a *fi. fa.* upon the ground of a composition deed, the facts necessary to the validity of the deed being disputed, the ct. referred to the master to report the facts, & ordered the sheriff to sell & bring the money into ct.—MAGINN *v.* COLES (1865), 13 W. R. 350.

9479. Validity of deed questioned—Duty to get leave of court before issuing execution.]—Where a creditor disputes the validity of a composition deed:—*Semble:* it is a proper course for him, instead of issuing execution at his own risk, to apply to the comr. for leave to do so, & the comr. has jurisdiction to give such leave.—*Re* TRESIDDER, *Ex p.* SOMERVILLE (1865), 1 Ch. App. 21; 35 L. J. Bcy. 1; 13 L. T. 350; 11 Jur. N. S. 1029; 14 W. R. 113, L. C.

Annotation:—**Mentd.** Fitzpatrick *v.* Bourne (1868), 9 B. & S. 157, Ex. Ch.

9480. Debtor failing to plead deed—Withdrawal of execution refused.]—Where debtor, who made a composition deed under 1861 Act, was sued by a non-assenting creditor & suffered judgment by default, the ct. refused to order the sheriff to withdraw from possession of debtor's goods under a *fi. fa.* issued on the judgment.—WHITMORE *v.* WAKERLEY (1865), 3 H. & C. 538; 5 New Rep. 336; 34 L. J. Ex. 83; 11 L. T. 683; 11 Jur. N. S. 182; 13 W. R. 350; 159 E. R. 642.

Annotations:—**Distd.** Hartley *v.* Mare (1865), 19 C. B. N. S. 85. **Consd.** Staffordshire Banking Co. *v.* Emmott (1867), L. R. 2 Exch. 208; Rossi *v.* Bailey (1868), L. R. 3 Q. B. 621.

9481. —— Whether execution available without leave of court.]—After action brought, deft. executed a deed of inspectorship under 1861 Act, s. 192, which was duly filed, etc., before judgment signed. Execution was afterwards issued, & deft.'s goods taken:—*Held:* the execution so issued could not be made available without leave of the ct. under s. 198, notwithstanding deft. might have pleaded the deed.—HARTLEY *v.* MARE (1865), 19 C. B. N. S. 85; 6 New Rep. 204; 34 L. J. C. P. 187; 12 L. T. 424; 11 Jur. N. S. 625; 13 W. R. 777; 144 E. R. 718.

Annotations:—**Consd.** Staffordshire Banking Co. *v.* Emmott (1867), L. R. 2 Exch. 208. **Refd.** Rossi *v.* Bailey (1868), L. R. 3 Q. B. 621. **Mentd.** Braun *v.* Weller (1867), L. R. 2 Exch. 183.

9482. —— Whether protection of 1861 Act, s. 198 available.]—Deft., having had the opportunity to plead to an action a deed under 1861 Act, s. 192, omitted to do so, & judgment was recovered against him. A *fi. fa.* was afterwards levied on his goods, & he sought to avail himself of the protection of s. 198:—*Held:* (1) (KELLY, C. B., & PIGOTT, B.) he could do so; (2) (BRAMWELL & CHANNELL, BB.), he could not.—STAFFORDSHIRE BANKING CO., LTD. *v.* EMMOTT (1867), L. R. 2 Exch. 208; 36 L. J. Ex. 105; 16 L. T. 175; 15 W. R. 1135.

Annotations:—**Refd.** Rossi *v.* Bailey (1868), L. R. 3 Q. B. 621; Godwin *v.* Stone (1869), L. R. 4 Exch. 331. **Mentd.** Braun *v.* Weller (1867), L. R. 2 Exch. 183.

9483. —— ——.]—*Qu.:* whether, supposing deft. had had the opportunity & power of pleading a deed under 1861 Act, s. 192, & had neglected to do so, he could avail himself of it.—BRAUN *v.* WELLER (1867), L. R. 2 Exch. 183; 36 L. J. Ex. 100; 16 L. T. 22; 15 W. R. 519.

Annotations:—**Distd.** Allen *v.* Carter (1870), L. R. 5 C. P. 414. **Refd.** Rossi *v.* Bailey (1868), L. R. 3 Q. B. 621.

9484. —— ——.]—Debtor, who had executed & registered a deed of composition under 1861 Act, s. 192, containing a release, was sued by a non-assenting creditor for a debt due before the execution of the deed. Debtor neglected to plead the deed, & the creditor obtained judgment & issued execution:—*Held:* as debtor might have pleaded the deed, he was estopped from setting it up afterwards to defeat the execution under s. 198.—ROSSI *v.* BAILEY (1868), L. R. 3 Q. B. 621; 8 B. & S. 748; 37 L. J. Q. B. 204; 19 L. T. 130; 16 W. R. 1042.

Annotations:—**Apld.** Godwin *v.* Stone (1869), L. R. 4 Exch. 331. **Folld.** Allen *v.* Carter (1870), L. R. 5 C. P. 414. **Refd.** Ames *v.* Waterlow (1869), L. R. 5 C. P. 53. **Mentd.** Davis *v.* Hedges (1871), 25 L. T. 155, D. C.

9485. Grounds for granting leave of court—Deed invalid against non-assenting creditor.]—When a deed is invalid as against a dissenting creditor, an application by him for leave to render process available notwithstanding the deed should be granted.—*Re* COBB, *Ex p.* FAIRFAX & BRYSON (1866), 14 W. R. 289.

—— —— **What deeds are invalid.**]—*See* Sub-sect. 3, B. (b), (c), *ante.*

9486. —— Costs awarded to debtor of arranging debtor—Less than amount of debt.]—An adjudication in bkpcy. obtained by D. against C. was set aside, & D. was ordered to pay C. his costs, for which, if not paid when taxed, C. was to be at liberty to issue execution. D. then executed an assignment to trustees for his creditors in the form of 1861 Act, Sched. D. The costs were afterwards taxed. C., at the date of the deed, owed D. a sum exceeding the amount of the taxed costs. If C., who had not acceded to the deed, was reckoned as a creditor of D. for the amount of taxed costs, the deed was not assented to by the requisite majority of creditors:—*Held:* C. ought to be allowed to issue execution for the costs, for if he was, in respect of those costs, a creditor of D. within 1861 Act, s. 192, the deed was not assented to by the majority requisite to bind non-assenting creditors, & if he was not such a creditor, the deed did not apply to his claim, so that in neither view could he be affected by the deed.—*Re* DAVIES, *Ex p.* CLELAND (1867), 2 Ch. App. 808; 36 L. J. Bcy. 45; 17 L. T. 187; 15 W. R. 1160, L. J.

Annotations:—**Consd.** Mercer *v.* Graves (1872), L. R. 7 Q. B. 499. **Refd.** Robarts *v.* Buèe (1878), 8 Ch. D. 198; Wilde *v.* Walford (1883), 31 W. R. 518.

9487. —— Judgment debt omitted to make assents appear sufficient.]—A. executed a creditors' deed, omitting a judgment debt of C., by which omission the necessary assents were made to appear to have been given, & the deed was registered. C. did not know of the existence of the deed, & was, for about eighteen months after his judgment, unable to find A., but he at length took proceedings in outlawry against him without obtaining leave of the Ct. of Bkpcy. By direction of a judge in chambers, a special case was submitted to the Ct. of Common Pleas, upon argument of which judgment was given for debtor. C. then applied in bkpcy. for leave to issue execution

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in the arrangement matter. Pending the arrangement proceedings, he, on Feb. 15, obtained a judgment in an action against debtor, for a portion of the debt returned on the sched., &, on Feb. 20, registered the judgment as a statutable mtge. against lands of debtor. In Apr., debtor duly lodged his composition notes, including composition notes on the whole debt due to S.:—*Held:* the creditor was not barred from realising his demand under the judgment mtge. by the statutable operation of the arrangement proceeding.—*Re* ROONEY'S ESTATE (1874), 8 I. L. T. 125.—IR.

g. *Execution before certificate of conformity.*]—Until the final certificate of conformity under Irish 1857 Act, s. 352, is obtained, a creditor who has not assented to the arrangement may issue execution against debtor's goods.—MORAN *v.* REYNOLDS (1869), 3 I. L. T. Jo. 366.—IR.

notwithstanding the deed, & although in opposition to the application debtor set up as a defence that the debt was altogether invalid in equity, the leave sought was given by the comr., & an appeal against that order was refused with costs.—*Re* AMES, *Ex p.* AMES (1868), 19 L. T. 270 ; 16 W. R. 1132, L. JJ.

Annotation :—**Consd.** *Re* Pullen, *Ex p.* Williams (1870), L. R. 10 Eq. 57.

9488. —— Creditor throughout insisting on invalidity of deed—Delay in impeaching same.]—A creditor obtained judgment against his debtor on Aug. 1, 1868. On the same day debtor executed a deed of composition with his creditors, whereby he assigned all his property to a trustee by way of security for payment of the composition. The deed was registered under 1861 Act, s. 192. The creditor refused to assent to the deed, & proceeded to sue out execution, but the sheriff interpleaded, & the issue was tried between the creditor & the trustee of the deed. The Ct. of Exch. decided, on Jan. 23, 1869, (1) the deed was invalid as a trust deed under the above sect., as the requisite number of assents had not been obtained ; (2) it operated at law as an assignment of debtor's property to the trustee, & the issue must be decided against the creditor. The creditor, without further delay, proceeded to examine debtor in bkpcy. in order to impeach the deed, & on Apr. 6 applied under s. 198 for leave to issue execution notwithstanding the deed :—*Held :* as the creditor had throughout the proceedings at law insisted on the invalidity of the deed, he had been guilty of no delay in not sooner impeaching the deed in bkpcy., & his application should be granted.—*Re* PRIOR, *Ex p.* OSENTON (1869), 4 Ch. App. 690 ; 20 L. T. 505 ; 17 W. R. 777, L. JJ.

9489. Grounds for refusing leave of court—Conduct of creditor—Delay.]—A composition deed contained covenants for debtor forthwith to deliver to his creditors bills of exchange, to be drawn by the creditors on, & to be accepted by debtor, & in default the deed to be void. The deed was executed on Apr. 21, 1865, & registered on May 16. On June 8, debtor's solr. wrote to inform A., a judgment creditor, that the acceptances were ready, &, the first bill becoming due on Oct. 24, tender of it & cash to the amount was made to A., but was refused by him. In Nov., 1866, he obtained leave, under 1861 Act, s. 198, from the Ct. of Bkpcy. to issue execution on his judgment against debtor, on the ground, mainly, that the bills had not been delivered "forthwith." In July A. had impeached the deed on other grounds, & had in the Ct. of Bkpcy. examined two of the creditors in support of his case :—*Held :* the order of the comr. must be discharged, on the ground that the conduct of the creditor & his delay had been such that a ct. of equity ought not to exercise its discretion in granting the application. —*Re* SULLIVAN, *Ex p.* SULLIVAN (1866), 36 L. J. Bcy. 1 ; 15 L. T. 434 ; 15 W. R. 185, L. JJ.

Annotations :—**Consd.** *Re* Pullen, *Ex p.* Williams (1870), L. R. 10 Eq. 57. **Refd.** *Re* Prior, *Ex p.* Osenton (1869), 4 Ch. App. 690, L. JJ.

9490. —— Deed not ex facie void—Inquiry ordered.]—Debtor, by deed, registered on Nov. 2, 1866, under 1861 Act, s. 192, covenanted to pay his creditors 2*s.* 6*d.* in the pound within two months from the registration, & the creditors released their debts, subject to a proviso for avoiding the deed on default in payment of the composition. Default was made, & on Jan. 3, 1867, a similar deed was registered, with the assent of the requisite majority of creditors, by which debtor covenanted for payment of 2*s.* 6*d.* in the pound within seven days after the expiration of four months. A non-assenting judgment creditor applied for leave to issue execution, on the ground that the deed was unreasonable, as the composition, having regard to the state of debtor's affairs, was unreasonably small, & as the second deed provided for payment only of the same composition as the first deed, after a longer time, & without any additional security. The comr. gave leave to issue execution : —*Held :* as the deed was not *ex facie* void, the circumstance that it had been immediately preceded by the other deed being not decisive against its validity, but only a circumstance rendering strict investigation proper, the order for leave to issue execution ought to be discharged, & the case remitted to the comr. for further investigation.—*Re* ROOTS, *Ex p.* ROOTS (1867), 2 Ch. App. 559 ; 36 L. J. Bcy. 38 ; 15 W. R. 728, L. JJ.

9491. —— Void clause in deed—Clause instructing trustee to sell to debtor.]—At a general meeting of creditors of debtor, who had filed a liquidation petition, a resolution was passed agreeing to the liquidation. A trustee was appointed, & a resolution was passed instructing the trustee to sell the estate to debtor at such a price as would pay to the creditors a composition of 7*s.* 6*d.* in the pound & the costs of the liquidation proceedings. A second meeting of creditors was held confirming the resolution. On an application to restrain a creditor, who was not a party to the proceedings, from enforcing an execution against debtor :—*Held :* the clause instructing the trustee to sell the estate to debtor was void, but the rest of the resolutions must be carried out, & the liquidation proceed in the ordinary course, & the creditor must be restrained from enforcing his judgment.—*Re* DUGDALE, *Ex p.* DUGDALE (1877), 36 L. T. 324 ; 25 W. R. 468.

9492. Execution against garnishee.]—A deed under 1861 Act, s. 192, is a bar to an execution against a garnishee under an order made pursuant to C. L. P. Act, 1854 (c. 125), s. 63, to the same extent that it is a bar to an execution on a judgment.—KENT *v.* TOMKINSON (1867), L. R. 2 C. P. 502 ; 36 L. J. C. P. 224 ; 17 L. T. 41.

9493. Execution before registration of extraordinary resolutions—Whether estoppel by silence at meeting.]—A non-assenting creditor of a compounding debtor under 1869 Act, s. 126, against whom no equity can be raised by reason of his personal conduct, can acquire a valid security for his debt by levying an execution on debtor's goods at any time before the registration of the extraordinary resolution accepting the composition. The mere fact that a judgment creditor, who is entered in debtor's statement of affairs as having no security for his debts, is present in silence at the first meeting of the creditors, not proving his debt, or taking any other part in the proceedings, will not raise an equity against him so as to prevent his levying an execution on his judgment. & thus acquiring a valid security for his debt before the registration of an extraordinary resolution accepting a composition.—*Re* MCCOLLA, *Ex p.* MCLAREN (1881), 16 Ch. D. 534 ; 50 L. J. Ch. 203 ; 44 L. T. 36 ; 29 W. R. 389, C. A.

Annotation :—**Consd.** *Re* Roundwood Colliery Co., Lee *v.* Roundwood Colliery Co., [1897] 1 Ch. 373, C. A.

9494. Execution issued before liquidation petition—Order restraining further proceedings on judgment until after meeting of creditors—No resolutions passed thereat.]—Judgment having been obtained against W. & execution having been issued but not levied, W. filed his petition for liquidation, & an order was made appointing L. receiver & manager, & an order restraining the

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creditor from further proceedings under the judgment until four days after the first meeting of creditors. The meeting was held, but no resolutions were passed, & the sheriff went into possession:—*Held:* the restraining order having expired, the execution creditor was entitled to proceed with his execution.—LOMAX *v.* WARD (1884), 50 L. T. 275.

SECT. 11.—POSITION OF DEBTOR.

NOTE.—*In considering the cases set out in this Section, regard must be had to the Notes at the beginning of the Part & of Sect.* 2, *ante.*

SUB-SECT. 1.—IN GENERAL.

9495. Complete dominion over property.]—Debtor who has filed a petition for liquidation in bkpcy. & has effected a composition with his creditors, has complete dominion over his property, & full power to dispose of it until, upon action taken by his creditors under 1869 Act, s. 126, the composition has been set aside & debtor adjudged bkpt.—*Re* KEARLEY & CLAYTON'S CONTRACT (1878), 7 Ch. D. 615; 47 L. J. Ch. 474; 38 L. T. 92; 26 W. R. 324.

Annotations:—**Apprvd.** *Re* McHenry, *Ex p.* McDermott (1888), 21 Q. B. D. 580, C. A. **Mentd.** Sharp *v.* McHenry, Sharp *v.* Brown (1887), 38 Ch. D. 427.

9496. Not same as that of discharged bankrupt.]—A resolution to accept a composition & the acceptance of it have not the same effect as a discharge in a regular bkpcy. (LORD BLACKBURN).—BRESLAUER *v.* BROWN (1878), 3 App. Cas. 672; 47 L. J. Q. B. 729; 39 L. T. 67; 26 W. R. 536, H. L.; *affg.* S. C. *sub nom.* WILSON *v.* BRESLAUER (1877), 2 C. P. D. 314, C. A.

Annotations:—**Refd.** Morgan *v.* Hardy (1887), 18 Q. B. D. 646, C. A. **Mentd.** Oppenheim *v.* Jackson (1879), 49 L. J. Q. B. 216, C. A.; *Re* Lacey, *Ex p.* Lacey (1880), 16 Ch. D. 131, C. A.; Lewis *v.* Leonard (1880), 5 Ex. D. 165, C. A.; Tea Co. *v.* Jones (1880), 43 L. T. 255; Morgan *v.* Hardy (1886), 17 Q. B. D. 770.

9497. ——.]—Debtor does not stand in the same position as a discharged bkpt., until the composition has been fully paid.—*Re* ANDREWS, *Ex p.* BARROW (1881), 18 Ch. D. 464; 50 L. J. Ch. 821; 45 L. T. 197, C. A.

Annotations:—**Mentd.** *Re* Bonacina, Le Brasseur *v.* Bonacina, [1912] 2 Ch. 394, C. A.; Wild *v.* Tucker, [1914] 3 K. B. 36.

SUB-SECT. 2.—RIGHTS.

A. To enforce Composition Agreement.

9498. To compel creditors to elect—Whether to come in or renounce benefit.]—Where there is a deed of trust for payment of such creditors as come in within a year, a bill may be exhibited after the year to compel the creditors, who stand out, to come in or renounce the benefit of the trust.—DUNCH *v.* KENT (1684), 1 Vern. 260; 23 E. R. 455.

Annotations:—**N.F.** Watson *v.* Knight (1854), 19 Beav. 369. **Dbtd.** Raworth *v.* Parker (1855), 2 K. & J. 163. **Consd. & Expld.** Whitmore *v.* Turquand (1860), 1 John. & H. 444. **Consd.** Whitmore *v.* Turquand (1861), 3 De G. F. & J. 107, L. C. **Refd.** Durant *v.* Robinson (1876), 34 L. T. 617. **Mentd.** Brandling *v.* Plummer (1857), 6 W. R. 117.

9499. Secret agreement entered into with some creditors—In creditor's favour.]—Where a tradesman failing compounds, but makes an underhand agreement with some of his creditors to pay them the whole, this is a fraud on the other creditors, & a bill to compel them to perform the agreement will be dismissed.—CHILD *v.* DANBRIDGE (1688), 2 Vern. 71; 23 E. R. 655.

9500. —— ——.]—A declaration in covenant stated that, by an indenture made between the several persons whose names & seals were thereunto subscribed & affixed, & who were creditors of pltf. of the first part, pltf. of the second part, & M. of the third part, it was recited that pltf. was indebted to the persons of the first part, in sums secured by bills of exchange accepted by pltf., &, being unable to pay his debts, he had agreed to give his creditors a composition of 5*s.* in the pound, to be guaranteed by bills drawn by M. upon & accepted by pltf., & that such composition bills of exchange had been given, & that by the indenture, such of the creditors to whom pltf. might have given, or who might be holders of bills of exchange of pltf., did covenant with pltf. that they would indemnify him against & in respect of such bills, & all actions, losses, etc., by reason thereof. Averments, that deft. did, as such creditor, subscribe his name & affix his seal to the indenture, & that, at that time, pltf. was indebted to deft. & his partner in an amount secured by two bills of exchange accepted by pltf., & which were then outstanding, that, when the bills became due, the holder sued pltf. for their amount, &, in order to stay the action, he paid a large sum of money. Breach, that deft. did not indemnify pltf. Plea, that, before deft. executed the indenture, pltf. was indebted to him & his partner & the other persons creditors & parties to the indenture of the first part, & pltf. being unable to pay deft. & his partner & the creditors their debts in full, offered to deliver to each of them a composition bill upon the terms & conditions in the indenture mentioned, provided they would execute the indenture, & thereupon pltf. represented to the other creditors that deft. & his partner had agreed to accept the composition bills for the same proportionate amount, & upon the same terms & under the same conditions as the other creditors, & that, upon the faith of such representations, the other creditors were induced to execute the indenture, whereas in truth & in fact, at the time such representations were made it was agreed between pltf. & deft. & his partner, that pltf. should pay deft. & his partner the full price of certain goods before then sold & delivered by deft. & his partner to pltf., & which formed part of the sum due from pltf. to deft. & his partner, & that pltf. would further pay in cash to deft. & his partner 5*s.* in the pound upon the whole amount due from pltf. to them, in lieu of delivering to them composition bills, & that, for the purpose of inducing the other creditors to believe that the representations were true, deft. should, for himself & his partner, make & execute the indenture, which agreement was, at the time of the other creditors executing the indenture, unknown to them:—*Held:* the plea sufficiently stated that a fraud was intended to be committed by pltf. & deft. on the other creditors, & pltf. could not sue on the covenant, which was part of the same fraudulent executory agreement, & void as against the creditors, & deft. might set up such defence, although a party to the fraud.—HIGGINS *v.* PITT (1849), 4 Exch. 312; 18 L. J. Ex. 488; 15 L. T. O. S. 139; 154 E. R. 1231.

Annotations:—**Distd.** Haddon *v.* Ayers (1858), 1 E. & E. 118. **Expld.** Dauglish *v.* Tennent (1866), 8 B. & S. 1. **Refd.** Mallalieu *v.* Hodgson (1851), 16 Q. B. 689; Atkinson *v.* Denby (1861), 6 H. & N. 778. **Mentd.** Bowes *v.* Foster (1858), 6 W. R. 257; *Re* Westrop, *Ex p.* Underwood (1859), 32 L. T. O. S. 395.

9501. —— **In debtor's favour.**]—A declaration alleged that in consideration that pltf. would execute to defts., creditors of pltf., an assignment of all his estate & effects upon trust for the equal

benefit of all his creditors, defts. promised pltf., upon the realisation of the estate & effects, to return & pay to pltf. £50 from the proceeds thereof. The declaration also averred the execution of such assignment by pltf. & a realisation by defts. of the estate & effects, & assigned for breach the non-payment of the £50 :—*Held :* the declaration disclosed a transaction which was a fraud on the other creditors of pltf. who were not parties to it, & was bad even after verdict.—BLACKLOCK *v.* DOBIE (1876), 1 C. P. D. 265 ; 45 L. J. Q. B. 498 ; 35 L. T. 338 ; 24 W. R. 674.

See, also, Sect. 10, sub-sect. 1, B., sub-sect. 2, D., *ante.*

9502. Absence of fraud—Or misrepresentation.]—Equity will assist a composition of a debt, if obtained without fraud, & upon a fair representation.—POLLEN *v.* HUBAND (1721), 1 P. Wms. 751 ; 24 E. R. 598.

B. To plead Composition Agreement as Bar to Action.

(*a*) *What Agreements.*

9503. Deed containing covenant not to sue—If trustee fairly accounted—Trustee refusing to account.]—A covenant in an indenture, whereby a debtor assigned his effects to trustees for benefit of creditors, not to sue, if the trustees fairly accounted for the effects, does not operate as a release of the creditor's debts, if the trustees refuse to account.—KESTERTON *v.* SABERY (1787), 2 Chit. 541.

9504. —— Provision that deed pleadable in bar to action.]—A simple covenant not to sue for a limited time is not pleadable in bar of an action ; but a covenant not to sue for a limited time, & that the deed may be pleaded in bar & discharge of any action brought within that time, may be pleaded in bar of an action by a non-assenting creditor.—WALKER *v.* NEVILL (1865), 3 H. & C. 403 ; 34 L. J. Ex. 73 ; 11 L. T. 774 ; 11 Jur. N. S. 246 ; 13 W. R. 523 ; 159 E. R. 588.

Annotations :—**Refd.** Newton *v.* Hallett (1868), 19 L. T. 471. **Mentd.** Ray *v.* Jones (1865), 19 C. B. N. S. 416.

9505. —— ——.]—A covenant in a composition deed, that the creditors will not sue for their debts, & that if they do, the deed may be pleaded as an accord & satisfaction & in bar to the suit or other proceedings, does not make the creditors who sue, & against whom the deed is set up, forfeit their debt or lose their right to dividends.—ELLIS *v.* M'HENRY (1871), L. R. 6 C. P. 228 ; 40 L. J. C. P. 109 ; 23 L. T. 861 ; 19 W. R. 503.

Annotations :—**N.F.** New Zealand Loan & Mercantile Agency Co. *v.* Morrison, [1898] A. C. 349, P. C. **Expld.** *Re* Nelson, *Ex p.* Dare & Dolphin, [1918] 1 K. B. 459, C. A.

What amounts to covenant not to sue.]—*See* Nos. 9222 *et seq.*, *ante.*

9506. Deed containing covenant not to molest or interfere with debtor—During period of licence—Provision that deed pleadable in bar if licence contravened.]—A., a trader, entered into an arrangement, by deed, with his creditors, by which it was agreed that he should have a letter of licence for five years, during which period he should carry on the trade under the inspection of certain persons therein named, & it was provided, that, if any creditor should, during the continuance of the licence, molest or interfere with A., contrary to the true intent & meaning of the indenture, A. should thenceforth be relieved, exonerated, acquitted & discharged of & from all debts & demands of the creditor by whom the letter of licence should be so contravened, & that the indenture should or might be pleaded in bar to such respective debts or demands accordingly :—*Held :* the bringing of an action by a creditor, party to the deed, within the five years, was a "molestation or interference" with A., within the proviso, & the indenture operated as a defeasance, & was pleadable in bar as such.—GIBBONS *v.* VOUILLON (1849), 8 C. B. 483 ; 7 Dow. & L. 266 ; 19 L. J. C. P. 74 ; 14 Jur. 66 ; 137 E. R. 596.

Annotations :—**Apld.** Legg *v.* Cheesebrough (1859), 5 C. B. N. S. 741. **Folld.** Corner *v.* Sweet (1866), L. R. 1 C. P. 456. **Apld.** Emptage *v.* McCulloch (1867), 17 L. T. 67. **Refd.** Phillips *v.* Surridge (1850), 9 C. B. 743 ; Belshaw *v.* Bush (1851), 11 C. B. 191 ; Andrews *v.* Garrett (1859), 6 C. B. N. S. 262. **Mentd.** Taylor *v.* Best (1854), 14 C. B. 487 ; Newington *v.* Levy (1870), L. R. 5 C. P. 607 ; Ellis *v.* M'Henry (1871), L. R. 6 C. P. 228.

9507. —— —— ——.]—Debtor conveyed his life interest in certain property in trust for creditors, parties to the deed, & the creditors, in consideration thereof, granted to debtor licence to reside & attend to his affairs in any place he might think proper, without suit or molestation, in his person or his goods, chattels & effects, by any such creditors, & that, in case of any suit or molestation, by any of such creditors, contrary to the true intent & meaning of such licence, debtor should be wholly released & acquitted of the debt, & the deed might be pleaded in bar :—*Held :* an administration suit by creditors against the estate of debtor after his decease, for payment of so much of the debt as the trust property was insufficient to pay, was barred by the trust deed.—O'BRIEN *v.* OSBORNE (1852), 10 Hare. 92 ; 20 L. T. O. S. 201 ; 16 Jur. 960 ; 68 E. R. 852.

9508. Deed signed after action brought.]—A deed of composition, completed by execution of the requisite number of creditors after action, may be pleaded as a defence, on condition of payment of costs up to the time of pleading.—MORGAN *v.* HARDING (1862), 11 W. R. 65.

Annotations :—**Mentd.** Gresty *v.* Gibson (1866), 13 L. T. 676 ; Tetley *v.* Wanless (1867), 15 W. R. 932, Ex. Ch.

See, also, No. 9520, *post.*

9509. Deed signed while accommodation bill running.]—Pltf. accepted a bill of exchange for the

PART XXIII. SECT. 11, SUB-SECT. 2. —B. (a).

9504 i. *Deed containing covenant not to sue—Provision that deed pleadable in bar to action.*]—Pltf. sued deft., on an adjusted account. Later deft. executed a deed, whereby he assigned all his property to pltf. & other persons as trustees for the payment of his creditors. The deed contained no release & no agreement by the creditors to take less than the full amount of their debts. It declared that the agreement for the payment of the debts was accepted by the creditors, & that, upon payment to the creditors, respectively, of the amount of their respective claims, it might be pleaded in bar to any claim in respect thereof ; & the creditors covenanted with debtor, that they would not, if debtor should pay the debts due to the creditors, bring any action, or proceeding against him in respect of the debts due. Deft. pleaded the deed to pltf.'s suit :—*Held :* there had been a concluded agreement, which precluded pltf. from proceeding with his suit, & to allow him to proceed would be a fraud on other creditors.—GOKULDAS MUCCANJI *v.* VASSANJI JAIRAM (1894), I. L. R. 19 Bom. 12.—**IND.**

9504 ii. —— —— *Conditional on payment within fixed time.*]—A. procured his creditors to execute a deed of composition & discharge, whereby his creditors agreed to accept a composition on their respective debts, payable thirty days from the date of the deed. There was a covenant by A. to pay the composition to the several creditors on or before a fixed date, & by the creditors with A. not to sue for their several debts, & if A. should observe & perform the covenants, the creditors would release & deliver up the bills & notes, etc., held by them, & if any of the creditors should sue for their debts the deed might be pleaded in bar. A. did not pay his creditors within the time limited :—*Held :* the covenant not to sue in the deed of composition & discharge was not absolute, but merely conditional on payment being made within thirty days, & A. could not set up the covenant as a bar to an action.—ANDREWS *v.* BANK OF TORONTO (1888), 15 O. R. 648.—**CAN.**

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accommodation of deft. While the bill was running deft. executed a deed of arrangement under 1861 Act. Pltf., having afterwards taken up & paid the bill, brought an action against deft. to recover the amount:—*Held:* the deed was no answer to the action.—MARE *v.* UNDERHILL (1863), 4 B. & S. 566; 12 W. R. 102; 122 E. R. 571.

Annotations:—**Expld.** Balden *v.* Pell (1864), 5 B. & S. 213. **Refd.** Wood *v.* De Mattos (1865), L. R. 1 Exch. 91, Ex. Ch.

9510. Deed in form of Schedule D. to 1861 Act.]—A deed of trust, in the form prescribed by 1861 Act, Sched. D., is a valid deed, within s. 192.—ANON. (1863), 1 New Rep. 309.

9511. ——.]—A composition deed under 1861 Act, s. 200, in the form in Sched. D., which does not contain a release from the creditors to debtor, is no bar to an action by one of them against him for his debt.—JONES *v.* MORRIS (1865), 6 B. & S. 198; 34 L. J. Q. B. 90; 11 Jur. N. S. 481; 122 E. R. 1169.

9512. Deed containing no release.]—Deft., a trader, by a composition deed under 1861 Act, s. 192, made between himself & a trustee on behalf of & with the assent of undersigned creditors, conveyed to such trustee all his estate absolutely to be applied for the benefit of his creditors in like manner as if he had been at the date thereof duly adjudged bkpt., & the creditors assenting thereto thereby agreed to accept the sum of 5*s.* in the pound in discharge of their respective debts, to be paid within tweve months from the date of the deed. The deed was signed by the requisite number of creditors & all the other statutory requisites were complied with. In an action by pltf., a non-assenting creditor:—*Held:* the deed, though valid under the Act as a composition-deed, & available for all purposes in bkpcy., yet, as it contained no release in terms of debtor from his debts, was not pleadable in bar to the action, & did not operate as a statutable release in answer to pltf.'s claim.—IPSTONES PARK IRON ORE CO. *v.* PATTINSON (1864), 2 H. & C. 828; 3 New Rep. 514; 33 L. J. Ex. 193; 9 L. T. 806; 10 Jur. N. S. 427; 12 W. R. 344; 159 E. R. 344.

Annotations:—**Expld.** Garrod *v.* Simpson (1864), 3 H. & C. 395. **Dbtd.** Keyes *v.* Elkins (1864), 5 B. & S. 240. **Folld.** Clarke *v.* Williams (1865), 3 H. & C. 508. **Refd.** Ilderton *v.* Jewell (1864), 16 C. B. N. S. 142; Whitehead *v.* Porter (1864), 5 B. & S. 193; Clarke *v.* Williams (1865), 3 H. & C. 1001, Ex. Ch.; Wright *v.* Jelley (1868), L. R. 4 Exch. 9; Slater *v.* Jones, Capes *v.* Ball (1873), 29 L. T. 56; Gilbey *v.* Jeffries (1882), 52 L. J. Q. B. 116.

9513. Deed conveying estate to trustee—To be administered as if in bankruptcy.]—A deed, by which debtor simply conveys all his estate & effects to a trustee to be applied & administered for the benefit of his creditors, as if he had been duly adjudged bkpt., cannot be pleaded in bar to an action by a creditor.—CLARKE *v.* WILLIAMS (1865), 3 H. & C. 1001; 34 L. J. Ex. 189; 13 W. R. 923; 159 E. R. 830, Ex. Ch.

Annotations:—**Folld.** Jones *v.* Morris (1865), 6 B. & S. 198. **N.F.** Gilbey *v.* Jeffries (1883), 11 Q. B. D. 559, C. A. **Refd.** Staffordshire Banking Co. *v.* Emmott (1867), L. R. 2 Exch. 208.

9514. Extraordinary resolution to accept composition—Duly passed, confirmed & registered.]—If, after an extraordinary resolution to accept a composition, payable at a future time or by instalments, in satisfaction of the debts due to creditors by their debtors, has been duly passed, confirmed & registered under 1869 Act, s. 126, a creditor who is bound by the resolution sues for his original debt before default in payment of the composition, or of any instalment, the resolution is pleadable in bar of the action.—SLATER *v.* JONES, CAPES *v.* BALL (1873), L. R. 8 Exch. 186; 42 L. J. Ex. 122; 29 L. T. 56; 21 W. R. 815.

Annotations:—**Consd.** *Re* Harper, *Ex p.* King (1873), L. R. 17 Eq. 336, n.; Newell *v.* Van Praagh (1874), L. R. 9 C. P. 96. **Expld.** *Re* Bestwick, *Ex p.* Hodgkinson (1876), 34 L. T. 73. **Consd.** Dane *v.* Mortgage Insce. Corpn., [1894] 1 Q. B. 54, C. A.; West Yorkshire Darracq Agency *v.* Coleridge, [1911] 2 K. B. 326. **Refd.** *Re* Stock, *Ex p.* Amos (1896), 66 L. J. Q. B. 146.

9515. Proceedings in liquidation of stock exchange defaulter—Not accord & satisfaction of member's debts.]—Where a member of the London Stock Exchange is declared a defaulter, & his contracts are dealt with by the official assignee of the Stock Exchange, the proceedings in that liquidation are not an accord or satisfaction of the member's debts, & do not bar his creditors from suing him at law for the balance of their claims, after deducting the dividends received by them in that liquidation.—MENDELSSOHN *v.* RATCLIFF, [1904] A. C. 456; 73 L. J. K. B. 1027; 91 L. T. 204; 53 W. R. 240; 20 T. L. R. 669; 10 Com. Cas. 14, H. L.

Annotation:—**Refd.** West Yorkshire Darracq Agency *v.* Coleridge, [1911] 2 K. B. 326.

(*b*) *Pleading and Evidence.*

9516. Form of plea—Must show agreement was bar to action—Must allege notice given under 1845 Act, s. 225.]—To a *sci. fa.* suggesting a further breach of a bond, deft. pleaded that after the commencement of the action, & before the issuing of the *sci. fa.*, he was a trader, etc., & indebted, etc., & suspended payment, & that thereupon "a certain memorandum of arrangement within & according to 1849 Act was made between him & the several persons whose names were thereunto subscribed, being creditors, etc., that all things were performed & done as required by the Act to make the memorandum of arrangement an obligatory instrument within the Act upon all the creditors of deft.," that pltfs. were creditors, & after suspension of payment, & after the memorandum of arrangement had been so signed, & before the issuing of the *sci. fa.*, had notice, & that deft. & the parties of the other part had at all times since the making of the memorandum of arrangement well & truly observed the agreements, etc., therein, & that, by reason of the premises, & by force of the Act, the memorandum of arrangement became & was obligatory on pltfs. as if they had signed same:—*Held:* the plea was bad. as it disclosed nothing to show that the memorandum of agreement was a bar to the action. *Semble:* the plea should have alleged that such a notice was given as was required by s. 225.—TABOR *v.* EDWARDS (1858), 4 C. B. N. S. 1; 27 L. J. C. P. 183; 31 L. T. O. S. 100; 4 Jur. N. S. 339; 140 E. R. 978.

Annotations:—**Distd.** Whitehead *v.* Porter (1864), 5 B. & S. 193. **Consd.** Corner *v.* Sweet (1866), L. R. 1 C. P. 456.

9517. —— **Where debtor & trader—Under 1849 Act.**]—A plea of a deed of arrangement

PART XXIII. SECT. 11, SUB-SECT. 2. —B. (b).

9516 i. *Form of plea—Must disclose something to show agreement was bar to action.*]—To an action on notes by the payee against the maker deft., a trader, pleaded that after giving the notes he made a voluntary assignment in insolvency, & thereby obtained a discharge by a deed of composition & discharge duly executed under 1869 Act, in the sched. to which pltf. appeared as a creditor:—*Held:* (1) the plea was bad in not showing that the deed was made for benefit of all creditors, & that deft. was a trader; (2) it was not necessary to aver that the parties to the deed were creditors within the Act, or to negative pltf. being a special creditor, it appearing sufficiently from the nature of the claim sued for that he was not.—DREDGE *v.* WATSON (1872), 33 U. C. R. 165.—CAN.

between an insolvent trader & his creditors, under 1849 Act, s. 224, should allege that debtor was a trader for six calendar months preceding his suspension of payment.—DREW *v.* COLLINS (1851), 6 Exch. 670 ; 20 L. J. Ex. 369 ; 17 L. T. O. S. 158 ; 15 Jur. 584 ; 155 E. R. 712.

Annotations :—**Mentd.** Fisher *v.* Bell (1852), 12 C. B. 363 ; Tetley *v.* Taylor (1853), 1 E. & B. 521 ; March *v.* Warwick (1856), 1 H. & N. 158 ; Irving *v.* Gray (1858), 3 H. & N. 34 ; Legg *v.* Cheesebrough (1859), 5 Jur. N. S. 795 ; Walter *v.* Adcock (1862), 7 H. & N. 541.

9518. —— Where joint & several creditors on same footing—Averment that requisite majority of creditors & " each of them " signed sufficient.]—Where a composition deed places joint & separate creditors on the same footing as regards composition, an averment in a plea that the requisite majority of creditors & " each of them " executed the deed, is a sufficient averment that it was executed by both joint & separate creditors.—WALKER *v.* NEVILL (1865), 3 H. & C. 403 ; 34 L. J. Ex. 73 ; 11 L. T. 774 ; 11 Jur. N. S. 246 ; 13 W. R. 523 ; 159 E. R. 588.

Annotations :—**Refd.** Newton *v.* Hallett (1868), 19 L. T. 471. **Mentd.** Ray *v.* Jones (1865), 19 C. B. N. S. 416.

9519. —— Need not set out deed.]—A plea of a composition deed within 1861 Act, made between deft. & his creditors, relating to his debts & liabilities, & his release therefrom, need not set out the deed.—WHITEHEAD *v.* PORTER (1864), 5 B. & S. 193 ; 122 E. R. 803.

Annotation :—**Mentd.** Wells *v.* Hacon (1864), 5 B. & S. 196.

9520. —— Deed entered into after action begun.]—A deed under 1861 Act, s. 192, between debtor of the first part, J., a surety, of the second part, & the several persons, creditors of debtor, whose names were thereunto subscribed, & all other the creditors of debtor, of the third part, witnessed that in consideration of the joint & several promissory notes of debtor & J. for the payment of a composition on their respective debts, they, the creditors, parties thereto of the third part, released to deft. all actions, suits, debts, claims, & demands, which they had against him, & accepted the stipulated composition in full satisfaction of the debts & sums due to them " specified in the schedule," & debtor & J. covenanted with each & every of the creditors parties thereto of the third part to pay the composition " upon their respective debts as aforesaid," & to make & deliver to them " the promissory notes." To a declaration in debt by non-assenting creditors, debtor pleaded the above deed, which had been entered into after the commencement of the suit, generally to the further maintenance of the action :—*Held :* the release contained in the deed discharged not only the debt sued for, but also all claims or demands arising therefrom by way of damages for its detention, costs, or otherwise, & the plea was rightly pleaded generally.—TETLEY *v.* WANLESS (1867), L. R. 2 Exch. 275 ; 4 H. & C. 613 ; 36 L. J. Ex. 153 ; 16 L. T. 601 ; 15 W. R. 932, Ex. Ch.

Annotations :—**Apld.** Harper *v.* Linthorpe Dinsdale Smelting Co. (1909), 101 L. T. 608. **Refd.** Ash *v.* Pouppeville (1867), 8 B. & S. 825. **Mentd.** Foster *v.* Gamgee (1876), 1 Q. B. D. 666.

See, also, No. 9508, *ante.*

9521. —— Where certain creditors postponed.]—To a declaration containing *indebitatus* counts, a plea setting up a release contained in a composition deed, which it alleges to be binding upon pltf. under 1861 Act, & by which certain specified creditors, not however including pltf., are postponed to the general body of creditors, is bad, if it does not allege that the creditors so postponed executed, or at least assented to the deed. *Semble :* where the persons so postponed are trustees, it is not sufficient for the plea to allege that some or one of them executed the deed, but it ought to show that all executed it.—CAIRNCROSS *v.* WILLS (1869), 38 L. J. Ex. 87 ; 20 L. T. 529.

9522. —— Creditor suing inducing others to compound—Must show that all or majority of creditors agreed.]—To a declaration on three bills of exchange, deft. pleaded that he was also indebted to E., & to certain other persons, in certain other sums of money, of which pltfs. had notice, & that afterwards, & before the bills became due, & whilst he was so indebted to E., & the other persons, he, deft., became insolvent, & unable to pay his debts, that thereupon, in consideration of the premises, & with the view & intention of inducing, & of enabling deft. to induce, the other creditors of deft., to accept & receive a composition of one moiety of their debts, & in consideration that deft. would pay to them, pltfs., half the amount of the bills, when same respectively became due, pltfs. agreed to accept a composition of one half of the amount of the bills as they became due, & that afterwards the agreement, so made & entered into by pltfs., was, by deft., with their knowledge, & by their direction, represented & made known to E., being such creditor as aforesaid, who thereupon, in consideration of the premises, & in faith of that agreement, was lured & induced to accept that composition, & that he, E., had not at any time since recovered or received, or sought to recover or receive, any greater or other sum than half the amount of his debt :—*Held :* the plea was bad, as it did not show that all or the great body of deft.'s creditors, had come into the arrangement, & agreed to take the composition.—REAY *v.* RICHARDSON (1835), 2 Cr. M. & R. 422 ; 1 Gale, 219 ; 5 Tyr. 931 ; 4 L. J. Ex. 236 ; 150 E. R. 182.

Annotation :—**Refd.** Clapham *v.* Atkinson (1864), 4 B. & S. 722.

9518 i. —— *Joint & several creditors—Averment that requisite majority of creditors assented sufficient.*]—To an action on a mtge. deft. pleaded that he & his partners were released upon a deed of composition from all debts due, three-fourths of the creditors in value assenting thereto :—*Held :* plea was good.—TRUST & AGENCY CO. *v.* MARKWELL (1874), 4 Q. S. C. R. 46.—AUS.

9519 i. —— *Need not set out deed.*]—Declaration, on a joint & several note made by defts. payable to pltf. Plea (by two defts.), that the note was made by them as sureties for other deft., with notice thereof to pltf., who took same upon the express agreement that they should be liable thereon only as sureties, that pltf., while holder of the note, without their knowledge or consent, after the accrual of the alleged claim, & before action, by deed released other deft. :—*Held :* if it was desired to rely on the release as valid at common law, it should have been accompanied with such averments as would have shown it to be operative, or it should not have been set out *in haec verba,* but its legal effect only should have been stated, & its efficacy left to be established by such facts as it was contended contributed thereto.—FOWLER *v.* PERRIN (1866), 16 C. P. 258.—CAN.

9520 i. —— *Deed entered into after action begun.*]—Pltf. brought an action on promissory notes. Deft. pleaded, & thereafter obtained from his creditors a deed of composition & discharge. Pltf. did not sign the deed. Later deft. added a plea, setting up the deed & acceptance of a composition, but did not plead the discharge *puis darrein continuance.* The cause was tried & a verdict found for pltf., but the jury acquitted deft. of the charge of fraud. Deft. then took a rule *nisi* to stay proceedings on the ground that the debt had been discharged :—*Held :* deft. could have pleaded the discharge *puis darrein continuance.*—HARRINGTON *v.* WITTER (1881), 2 R. & G. 183 ; 1 C. L. T. 663.—CAN.

9520 ii. —— *Estoppel from setting up discharge as bar to execution.*]—W. sued B., who thereafter assigned for benefit of creditors, & pleaded that since action commenced he duly assigned & by deed of composition executed by his creditors he was discharged of all liability, but he did not plead that such composition & discharge thereunder were confirmed by the ct. W. recovered judgment :—*Held :* B. was estopped from setting up his discharge to defeat an execution on the judgment.—WALLACE *v.* BOSSON (1878), 2 S. C. R. 488.—CAN.

Sect. 11.—*Position of debtor: Sub-sect.* 2, *B.* (*b*), *C.* & *D.*]

9523. —— Provision for avoidance of deed if certain creditors did not sign.]—An agreement, whereby debtor undertook to convey his property to trustees for the benefit of his creditors, contained a proviso that "the agreement was to be void, unless the creditors, whose names & descriptions were stated on the other side of the agreement, should concur in the arrangement":—*Held:* this was not a condition precedent, the performance of which debtor was bound to aver on setting up the agreement as an answer to a action by one of his creditors.—MATHEWS *v.* TAYLOR (1841), 2 Man. & G. 667; 133 E. R. 914; *sub nom.* MATTHEWS *v.* TAYLOR, 3 Scott N. R. 52; 5 Jur. 321.

9524. Sufficiency of plea—Plaintiff not executing deed.]—In an action on a bill of exchange by indorsee against acceptor, a plea of a deed of arrangement by creditors with their debtor, deft., executed by six-sevenths of the creditors in number & value, is not a good plea in bar to the action, the indorsee not having himself executed the deed.—LARPENT *v.* BIBBY (1855), 5 H. L. Cas. 481; 24 L. J. Q. B. 301; 25 L. T. O. S. 289; 3 W. R. 622; 3 C. L. R. 1057; 10 E. R. 988, H. L.

Annotations:—**Folld.** Noble *v.* Gadban (1855), 5 H. L. Cas. 504, H. L. **Consd.** Tabor *v.* Edwards (1858), 4 C. B. N. S. 1. **Refd.** McNaught *v.* Russell (1857), 5 W. R. 360; Taylor *v.* Pearse (1857), 2 H. & N. 36; Irving *v.* Gray (1858), 3 H. & N. 34; **Legg** *v.* Cheesebrough (1859), 5 C. B. N. S. 741; Walter *v.* Adcock & Spokes (1862), 7 H. & N. 541; Ilderton *v.* Jewell (1864), 16 C. B. N. S. 142. **Mentd.** *Re* Athlumney, *Ex p.* Wilson, [1898] 2 Q. B. 547.

9525. Composition deed executed in Scotland.]—In *assumpsit* on a bill of exchange against the acceptor, deft. pleaded that, after the accepting & after the time for payment, he, being resident in Scotland, & subject to the laws thereof, in consideration that certain supposed creditors should forbear to molest or sue him, made his deed or writing, duly stamped & attested according to the law of Scotland, by which he conveyed to J., & such persons as might thereafter be appointed trustees by the creditors, for the use of the creditors mentioned in the deed, & of other creditors whom the trustees should assume into the benefit of the disposition, all his movable estate in Scotland, in lieu & full satisfaction & discharge of all his debts owing to the creditors, that notice of the execution of the deed was given to certain supposed creditors in Scotland & England, including pltf., that pltf. by writing signed by him, & valid by the law of Scotland, appointed H. his attorney, to concur in & adopt the deed, & receive the dividends, that H. did adopt the deed, & its provisions on pltf.'s behalf, acted therein as pltf.'s authorised agent, took part in the management of the estates, etc., that other creditors, in consideration of the assignment, & the acceptance thereof by pltf., agreed to accept, & did accept, same, in full satisfaction of their debts, that funds of deft. had since become available under the deed for the benefit of the creditors, sufficient to pay the debts of deft., including that to pltf., & that all the proceedings were pursuant to the laws of Scotland, whereby, & by reason of the premises, & by the aforesaid laws, deft. had become absolutely discharged from the causes of action stated in the declaration:—*Held:* (1) assuming that the allegations in the plea respecting the law of Scotland could be rejected, & the plea be construed as setting up a defence according to the law of England, such defence was not shown on the plea; (2) the pleadings must be understood to put in issue the law of Scotland, & deft., to succeed on the plea, was bound to prove such law as a fact. *Semble:* the allegations in the plea respecting the law of Scotland could not be rejected.—WOODHAM *v.* EDWARDES (1836), 5 Ad. & El. 771; 2 Har. & W. 443; 1 Nev. & P. K. B. 207: 6 L. J. K. B. 38; 111 E. R. 1358.

Annotation:—**Refd.** Benham *v.* Mornington (1846), 3 C. B. 133.

9526. Allegation that misrepresentation by creditor was made through agent.]—A creditor, who had accepted a composition on certain bills, & who had induced other creditors to agree to the composition on the faith of his false representation that he was not the holder of any other bills for which debtor was liable, afterwards sued debtor upon such other bills:—*Held:* an averment in deft.'s plea that the false representation was made by H., as the agent of pltf., meant that it was made with the authority of pltf.—BLACKSTONE *v.* WILSON (1857), 26 L. J. Ex. 229.

9527. Sufficiency of answer to plea of agreement.]—To an action by pltfs., as indorsees of a bill of exchange, against defts., as acceptors, defts pleaded that the necessary proceedings for a composition by defts, under 1869 Act, s. 126, had been taken, & that a trustee on behalf of the creditors had been appointed by the extraordinary resolution for receipt & distribution of the composition, & that a sum sufficient to pay the composition had been duly paid to the trustee for the purpose of his paying same pursuant to the resolution. Pltfs. replied that the amount of the composition due to them was not paid or tendered to them, but the trustee, by the direction, request, & procurement of defts., refused to pay same to pltfs.:—*Held:* a bad replication, on the ground that defts. were discharged on the payment to the trustee of money applicable to & sufficient to pay the composition, & the mere non-payment by the trustee did not defeat the composition, & the money being impressed with a trust for the benefit of the creditor, any direction by debtor with respect to it was a nullity.—CAMPBELL *v.* IM THURN (1876), 1 C. P. D. 267; 45 L. J. Q. B. 482; 35 L. T. 265; 40 J. P. 775; 24 W. R. 675.

Annotations:—**Distd.** *Re* Lang, *Ex p.* Lang (1877), 5 Ch. D. 971, C. A. **Consd.** Wilson *v.* Breslauer (1877), 2 C. P. D. 314, C. A.; Breslauer *v.* Brown (1878), 3 App. Cas. 672, H. L.; Oppenheim *v.* Jackson (1879), 48 L. J. Q. B. 441; Lewis *v.* Leonard (1880), 5 Ex. D. 165, C. A.

9528. Necessity for pleading agreement—Application to stay proceedings on judgment by default.]—Deft., who, before action, had executed a deed of arrangement, did not appear but allowed judgment to go against him by default. Upon an application to stay proceedings upon the judgment, on the ground that the deed had been executed:—*Held:* it ought to have been pleaded, & deft. might have a rule *nisi* to set aside the judgment & be let in to plead the deed, on paying costs, & on terms to be ordered by a judge.—COUSTON *v.* ROBINS (1864), 12 W. R. 1012.

—— So as to render protection of 1861 Act, s. 198, available.]—*See* Nos. 9482 *et seq.*, *ante.*

9529. Sufficiency of evidence—Of assent to deed.]—A plea of composition with creditors

9527 i. *Sufficiency of answer to plea of agreement.*]—In an action of debt deft. pleaded an arrangement, & alleged that the notes for the composition "were duly issued & paid," but did not otherwise aver receipt by pltf. of such notes, or payment to him of the amount thereof. Pltf. replied that no certificate of conformity had been obtained under Irish 1872 Act, s. 64:—*Held:* the reply was good.—SMITH *v.* SIMMONDS (1881), 8 L. R. Ir. 357.—IR.

9527 ii. —— *Sufficiency of rejoinder.*]—GRAHAM *v.* MCKERNAN (1878), 42 U. C. R. 368.—CAN.

stated that defts. were indebted to pltfs., & to certain other persons, whose names were to defts. unknown, & that defts. agreed with pltfs. & their other creditors, & pltfs. & the other creditors mutually agreed with defts. & each other, to accept a composition:—*Held:* the plea was not proved by evidence of some only of the other creditors besides pltfs. having agreed to accept a composition.—BROWN *v.* DAKEYNE (1847), 11 Jur. 39.

Annotation:—**Distd.** Norman *v.* Thompson (1850), 4 Exch. 755.

9530. —— Of execution of deed.]—In order to prove a deed of arrangement, defts. produced from the Ct. of Bkpcy. a certificate of the inspectors, filed there in conformity with 1849 Act, s. 226, & an account & affidavit of deft. in conformity with s. 227. The account included the debts & names of the creditors mentioned in the schedule to the deed. The certificate & other documents were not filed until after action brought. Defts. also proved that the deed was, for some time before the commencement of the action, in the same state as to the execution thereof by the several parties as when produced at the trial, with the exception of two creditors, without whom 6-7ths in number & value appeared to have executed:—*Held:* sufficient evidence of the due execution of the deed.—IRVING *v.* GRAY (1858), 3 H. & N. 34; 27 L. J. Ex. 273; 31 L. T. O. S. 152; 4 Jur. N. S. 380; 157 E. R. 377.

Annotations:—**Folld.** Legg *v.* Cheesebrough (1859), 5 C. B. N. S. 741. **Refd.** Leonard *v.* Sheard (1859), 28 L. J. Q. B. 183; Cruger *v.* Dunlop (1862), 7 H. & N. 525, Ex. Ch.; Walter *v.* Adcock (1862), 10 W. R. 542; Spitzer *v.* Chaffers (1863), 14 C. B. N. S. 686. **Mentd.** *Re* Calvert, *Ex p.* Calvert (1858), 3 De G. & J. 95, L. JJ.; Copeman *v.* Hart (1863), 14 C. B. N. S. 91.

9531. —— Allegation that misrepresentation of creditor was made through agent.]—A creditor, who had accepted a composition on certain bills, & who had induced other creditors to agree to the composition on the faith of his false representation that he was not the holder of any other bills, afterwards sued debtor upon such other bills. The only evidence to affect pltf. was, that S., whom he had employed as the attorney in an action on one of the bills sued on, the actions on which were afterwards consolidated, made a statement, before the other bill was due, that "all the bills," meaning the bills sued on & those on which the composition had been accepted, were pltf.'s bills:—*Held:* although the admissibility of the evidence had not been objected to at the trial, as it was the only evidence against pltf., & it was doubtful whether it was admissible, the verdict for deft. was unsatisfactory as not supported by evidence, & a new trial should be granted.—BLACKSTONE *v.* WILSON (1857), 26 L. J. Ex. 229.

C. To recover Sums paid to induce Creditors' Assent.

See Sect. 10, sub-sect. 2, D. (c), *ante*.

D. To revoke Composition Agreement.

9532. General rule—Limits of application—Trustee beneficially interested in deed.]—The doctrine, that a conveyance of property to trustees in favour of creditors operates as a mere power to mandatories or agents, does not apply where the trustee himself takes a beneficial interest under the deed.—SIGGERS *v.* EVANS (1855), 5 E. & B. 367; 24 L. J. Q. B. 305; 25 L. T. O. S. 213; 1 Jur. N. S. 851; 3 C. L. R. 1209; 119 E. R. 518.

Annotations:—**Consd.** Hobson *v.* Thelluson (1867), L. R. 2 Q. B. 642; Johns *v.* James (1878), 8 Ch. D. 744, C. A. **Refd.** *Re* Sanders' Trusts (1878), 47 L. J. Ch. 667; Standing *v.* Bowring (1885), 31 Ch. D. 282, C.A. **Mentd.** Graham *v.* Van Diemen's Land Co. (1856), 26 L. J. Ex. 73, Ex. Ch.; Biron *v.* Mount (1857), 24 Beav. 642; London & County Banking Co. *v.* London & River Plate Bank (1888), 21 Q. B. D. 535, C. A.; Roberts *v.* Jones, Rice Roberts, Garnishee (1892), 61 L. J. Q. B. 523; Runtz *v.* Longbourne (1892), 8 T. L. R. 568; Muller's Margarine *v.* I. R. Comrs. (1899), 69 L. J. Q. B. 291, C. A.; Mallott *v.* Wilson, [1903] 2 Ch. 494; Ellis *v.* Cross, [1915] 2 K. B. 654.

9533. Creditors not parties—Voluntary deed.]—Lands were conveyed to a trustee in trust for payment of the debts of the grantor; no creditors were named, & there was a proviso that the grantor might have maintenance out of the premises for himself & his family. The grantor & trustee purported to revoke the deed, & the grantor assured the premises by bargain & sale enrolled to a purchaser who took with notice of the trust:—*Held:* the deed was irrevocable.—LANGTON *v.* TRACY & ASTREY (1670), 2 Rep. Ch. 30; 21 E. R. 607; *sub nom.* LANGTON *v.* ASHLEY (1669), Nels. 126.

9530 i. *Sufficiency of evidence—Of execution of deed—Of performance.*]—Action on notes. Plea to further maintenance of the action, a parol composition with pltf. & creditors, whereby it was agreed that defts. were to convey their estate to two persons in trust for pltf. & other creditors, etc. The assignment, completed after the action, was executed by many creditors, but not by pltf. At the time of the composition pleaded no part thereof was delivered or accepted, nor earnest paid, nor part payment made; nor was an agreement in writing pleaded; & one of the alleged parties to the agreement did not appear to have contracted under seal:—*Held:* plea was not supported.—BRUNSKILL *v.* METCALF (1853), 3 C. P. 143.—**CAN.**

m. —— *Notarial copy.*]—A notarial copy of an assignment in insolvency may be received as evidence thereof under C. S. C. c. 80, s. 2.—PRESCOTT ELECTION (ONT.), MCKENZIE *v.* HAMILTON (1872), 32 U. C. R. 303.—**CAN.**

PART XXIII. SECT. 11, SUB-SECT. 2.—D.

9532 i. *General rule—Limits of application—Trustee beneficially interested in deed.*]—An assignment of goods to a trustee, for the benefit of the trustee & certain specified creditors, gives no legal right to those creditors, unless assented to by them, but the property remains subject to the control of the assignor, who may at any time revoke the trust.—FALCONER *v.* SAWYER (1851), 2 James 277.—**CAN.**

9532 ii. —— —— ——.]—Debtor made an assignment for the benefit of his creditors generally, to a member of a firm who were creditors of debtor. There was no evidence of acceptance of the benefits of the assignment by any other creditor or even of communication of it to any other:—*Held:* the fact that the assignee was a creditor & entitled to the benefit of the assignment, rendered it irrevocable.—SCHWARTZ *v.* WINKLER, 21 C. L. T. Occ. N. 574; 13 Man. L. R. 493.—**CAN.**

9532 iii. —— —— ——.]—A trader made an assignment for the benefit of creditors to a mtgee. as security against his indorsement for the assignor of notes then current. No creditor joined in the conveyance, nor was the consent to or knowledge of it by any creditor shown:—*Semble:* had the trustee been beneficially interested in the proceeds of the property, his assent would have rendered the deed irrevocable.—COOPER *v.* DIXON (1884), 10 A. R. 50.—**CAN.**

9532 iv. ——————.]—An assignee for the benefit of creditors, who is himself a creditor, may render the assignment irrevocable by acting under it.—HENRY *v.* GLASS (1885), 2 Man. L. R. 97.—**CAN.**

o. —— —— *Acceptance by trustee.*]—Where an assignment for the benefit of creditors has been duly made by the assignors & accepted by the assignee, such assignment is irrevocable & cannot be disclaimed.—AHLBERG *v.* BLAIR (1915), 8 W. W. R. 59.—**CAN.**

p. —— —— —— *Subsequent conduct inconsistent with trust.*]—Where personal property is assigned *bonâ fide* to pay a debt due the trustee, who accepts the trust, its revocation may be implied from subsequent conduct of the parties wholly inconsistent with the trust.—FALCONER *v.* SAWYER (1851), 2 James 277.—**CAN.**

9533 i. *Creditors not parties—Voluntary deed.*]—A., tenant for life, with remainder to B., conveyed the lands to trustees, in trust to sell, & pay debts, & then to other uses:—*Held:* the creditors, not being parties, A. & B. could revoke the uses without any power of revocation.—BROWNE *v.* CAVENDISH (1844), 7 I. Eq. R. 369; 1 Jo. & Lat. 606.—**IR.**

q. —— *Non-assenting.*]—An assignment for the benefit of creditors is revocable until the creditors either execute or otherwise assent to it.—RENNIE *v.* BLOCK (1896), 26 S. C. R. 356.—**CAN.**

r. —— ——.]—A conveyance of property for the benefit of creditors may create a valid & irrevocable trust, although none of the creditors are either parties or privy to the deed.—GOODEVE *v.* MANNERS (1855), 5 Gr. 114.—**CAN.**

Sect. 11.—*Position of debtor: Sub-sect.* 2, *D.*]

9534. —— ——.]—A trust-deed was executed for payment of creditors, no creditor being a party, nor made by agreement & without consideration on the part of any creditor. Debtor afterwards executed other deeds, varying the trust of the first. A motion for an injunction by a creditor under the first deed, who had filed a bill, to restrain the trustees from executing the trusts of the subsequent deeds till they had raised money to answer the first, was refused.—WALLWYN *v.* COUTTS (1815), 3 Mer. 707; 36 E. R. 272; *sub nom.* WALWYN *v.* COUTTS, 3 Sim. 14.

Annotations:—**Folld.** Garrard *v.* Lauderdale (1830), 3 Sim. 1. **Distd.** Foster *v.* Blackstone (1833), 2 L. J. Ch. 84. **Folld.** Ravenshaw *v.* Hollier (1834), 7 Sim. 3. **Expld.** Bill *v.* Cureton (1835), 2 My. & K. 503. **Folld.** Maber *v.* Hobbs (1836), 2 Y. & C. Ex. 317; La Touche *v.* Lucan (1840), 7 Cl. & Fin. 772, H. L. **Distd.** Gibbs *v.* Glamis (1841), 11 Sim. 584. **Folld.** Steele *v.* Murphy (1841), 3 Moo. P. C. C. 445; Wilding *v.* Richards (1845), 4 L. T. O. S. 411. **Apprvd.** Synnot *v.* Simpson (1854), 5 H. L. Cas. 121. **Consd.** Siggers *v.* Evans (1855), 5 E. & B. 367. **Apprvd.** Johns *v.* James (1878), 8 Ch. D. 744, C. A. **Folld.** *Re* Sanders' Trusts (1878), 47 L. J. Ch. 667. **Distd.** Godfrey *v.* Poole (1888), 13 App. Cas. 497, P. C. **Consd.** Priestley *v.* Ellis, [1897] 1 Ch. 489. **Refd.** Alexander *v.* Wellington (1831), 2 Russ. & M. 35, L. C.; Kirwan *v.* Daniel (1847), 5 Hare, 493; O'Brien *v.* Osborn (1853), 20 L. T. O. S. 201; Paterson *v.* Murphy (1853), 11 Hare, 88; Montefiore *v.* Browne (1858), 7 H. L. Cas. 241, H. L.; Cosser *v.* Radford (1863), 1 De G. J. & Sm. 585, L. JJ.; Lees *v.* Whiteley (1866), 35 L. J. Ch. 412. **Mentd.** Hartwell *v.* Colvin (1838), 2 Jur. 984; Hughes *v.* Stubbs (1842), 1 Hare, 476; Walker *v.* Jeffreys (1842), 1 Hare, 341; Ledbrook *v.* Passman (1888), 57 L. J. Ch. 855.

9535. —— ——.]—Where debtor, by a deed-poll, directs (*inter alia*) the receiver of the rents of his estate to keep down the interest of a certain debt, the direction does not create a trust in favour of a creditor, if it be without consideration, & without the privity of the creditor.—PAGE *v.* BROOM (1827), 4 Russ. 6, 224; 38 E. R. 707, 789; *affd.* (1830), 2 Russ. & M. 214, L. C.

Annotations:—**Consd.** *Re* Sanders' Trusts (1878), 47 L. J. Ch. 667. **Mentd.** *Re* Sea Fire & Life Assce., Port of London Assce. Co.'s Case (1854), 5 De G. M. & G. 465, L. JJ.

9536. —— ——.]—A person by deed conveyed to trustees certain personal property, upon trust to sell same, & after satisfying certain specified charges & claims in a prescribed order out of the proceeds, to divide the residue among his scheduled creditors, none of whom were parties or privy to the execution of the deed. The trustees, after partially executing the trusts by making sales & paying off the specified charges & claims in the order directed, concurred with the grantor in doing several acts inconsistent with the subsequent trusts:—*Held:* after the death of the grantor a scheduled creditor had no equity against the trustees to enforce the execution of the trusts, the conveyance being in the nature of a private arrangement for the personal convenience of the grantor, & vesting no right in the creditors.—GARRARD *v.* LAUDERDALE (LORD) (1831), 2 Russ. & M. 451; 39 E. R. 465, L. C.

Annotations:—**Consd.** Acton *v.* Woodgate (1833), 2 My. & K. 492. **Expld.** Bill *v.* Cureton (1835), 2 My. & K. 503. **Folld.** La Touche *v.* Lucan (1840), 7 Cl. & Fin. 772, H. L.; Gibbs *v.* Gibbon (1841), 5 Jur. 378, L. C. **Distd.** Gibbs *v.* Glamis (1841), 11 Sim. 584. **Folld.** Steele *v.* Murphy (1841), 3 Moo. P. C. C. 445, P. C. **Consd.** Law *v.* Bagwell (1843), 1 L. T. O. S. 319. **Folld.** Wilding *v.* Richards (1845), 1 Coll. 655. **Consd.** Kirwan *v.* Daniel (1847), 5 Hare, 493; Mackinnon *v.* Stewart (1850), 1 Sim. N. S. 76. **Distd.** Harland *v.* Binks (1850), 15 Q. B. 713. **Consd.** Rodick *v* Gandell (1852), 1 De G. M. & G. 763, L. C. **Distd.** Hunt *v.* Jessel (1854), 18 Beav. 100. **Apprvd.** Synnot *v.* Simpson (1854), 5 H. L. Cas. 121, H. L. **Consd.** Siggers *v.* Evans (1855), 5 E. & B. 367; Cosser *v.* Radford (1863), 1 De G. J. & Sm. 585, L. JJ.; Glegg *v.* Rees (1871), 7 Ch. App. 71, L. C. **Folld.** Johns *v.* James (1878), 8 Ch. D. 744, C. A.; *Re* Sanders' Trusts (1878), 47 L. J. Ch. 667. **Consd.** Henderson *v.* Rothschild (1886), 33 Ch. D. 459. **Distd.** *Re* Fitzgerald's S. E., Fitzgerald *v.* White (1887), 57 L. J. Ch. 594, C. A.; Godfrey *v.* Poole (1888), 13 App. Cas. 497, P. C.; New, Prance & Garrard's Trustee *v.* Hunting, [1897] 2 Q. B. 19, C. A. **Consd.** New, Prance & Garrard's Trustee *v.* Hunting, [1897] 1 Q. B. 607; Priestley *v.* Ellis, [1897] 1 Ch. 489. **Folld.** Ellis *v.* Cross, [1915] 2 K. B. 654, D. C. **Refd.** Alexander *v.* Wellington (1831), 2 Russ. & M. 35, L. C.; Malcolm *v.* Scott (1843), 3 Hare, 39; Dale *v.* Hamilton (1846), 5 Hare, 369; O'Brien *v.* Osborn (1853), 20 L. T. O. S. 201; Paterson *v.* Murphy (1853), 11 Hare, 88; Stone *v.* Van Heythuysen (1854), Kay. 721; Montefiore *v.* Browne (1858), 7 H. L. Cas. 241, H. L.; Lees *v.* Whiteley (1866), L. R. 2 Eq. 143; *Re* Agra & Masterman's Bank, *Ex p.* Asiatic Banking Corpn. (1867), 16 L. T. 162; Glegg *v.* Rees (1871), 7 Ch. App. 72, n.; Henriques *v.* Bensusan, Bank of England Claim (1872), 20 W. R. 350. **Mentd.** Hartwell *v.* Colvin (1838), 2 Jur. 984; Hughes *v.* Stubbs (1842), 1 Hare, 476; Walker *v.* Jeffreys (1842), 1 Hare, 341; Ravenscroft *v.* Frisby (1844), 1 Coll. 16; Watson *v.* Macquire (1848), 5 C. B. 836; Vandenberg *v.* Palmer (1858), 4 K. & J. 204; Thayer *v.* Lister (1861), 30 L. J. Ch. 427; Ledbrook *v.* Passman (1888), 57 L. J. Ch. 855.

9537. —— ——.]—Where debtor executes voluntary deeds, assigning his property to trustees for the payment of his debts, if creditors be not parties to those deeds, debtor may revoke the deeds or alter the trusts, or may arrest the funds in the hands of the trustees.—ACTON *v.* WOODGATE (1833), 2 My. & K. 492; 3 L. J. Ch. 83; 39 E. R. 1032.

Annotations:—**Consd.** Siggers *v.* Evans (1855), 5 E. & B. 367; Johns *v.* James (1878), 8 Ch. D. 744, C. A.; *Re* Sanders' Trusts (1878), 47 L. J. Ch. 667. **Refd.** Steele *v.* Murphy (1841), 3 Moo. P. C. C. 445, P. C.; Hughes *v.* Stubbs (1842), 1 Hare, 476; Wilding *v.* Richards (1845), 1 Coll. 655; Kirwan *v.* Daniel (1847), 5 Hare, 493; Smith *v.* Keating (1848), 6 C. B. 136, Ex. Ch.; Mackinnon *v.* Stewart (1850), 1 Sim. N. S. 76; Montefiore *v.* Browne (1858), 7 H. L. Cas. 241, H. L.; Henriques *v.* Bensusan, Bank of England Claim (1872), 20 W. R. 350; Priestley *v.* Ellis, [1897] 1 Ch. 489.

9538. —— ——.]—A deed entered into by the owner of an estate with trustees for the payment of certain creditors therein enumerated, but who are no parties thereto, is voluntary, & as it may be revoked at any time, creates no lien on the estate of debtor in favour of the creditors named therein.—STEELE *v.* MURPHY (1841), 3 Moo. P. C. C. 445; 13 E. R. 181, P. C.

9539. —— **Special circumstances.**]—A deed of conveyance of land by debtor to a person upon trust for effectually securing the repayment of certain specified sums due in respect of certain bonds mentioned in the deed:—*Held:* in the circumstances, binding on debtor as between him & the creditors, although the creditors did not execute the deed.—WILDING *v.* RICHARDS (1845), 1 Coll. 655; 14 L. J. Ch. 211; 4 L. T. O. S. 411; 5 L. T. O. S. 20; 63 E. R. 584.

Annotations:—**Consd.** Jones *v.* James (1878), 39 L. T. 54, C. A. **Refd.** Griffith *v.* Ricketts, Griffith *v.* Lunell (1849), 7 Hare, 299.

9540. —— **Deed not communicated.**]—Where debtor conveys property in trust for creditors, to whom the conveyance is not communicated, & the creditors are not in any manner privy to the conveyance, the conveyance operates, not as an assignment, but only as a power to the trustee, which is revocable by debtor.—SMITH *v.* KEATING (1848), 6 C. B. 136; 136 E. R. 1203, Ex. Ch.; *affg.* S. C. *sub nom.* KEATING *v.* SMITH (1847), 9 L. T. O. S. 103.

Annotation:—**Mentd.** Siggers *v.* Evans (1855), 5 E. & B. 367.

9541. —— ——.]—Debtor executed a deed, expressed to be for the better management of his affairs & for the liquidation of his debts & engagements, & he thereby conveyed & assigned his real & personal estate & effects to one of his creditors, leaving it to the discretion of the creditor in what order & in favour of what creditors the proceeds should be applied, & giving him powers of management & sale, & to negotiate & enter into arrangements & apply the proceeds of the estate & property in carrying them into effect, such powers to terminate with his life or upon his

resignation. Debtor then went abroad, so that the arrangement of his affairs might be facilitated by his absence :—*Held :* the deed, independently of the grantee being a creditor, & of any communications with other creditors, was a mere deed of management, & it was competent to debtor to revoke it, & it was fraudulent & void against other creditors.—SMITH *v.* HURST (1852), 10 Hare, 30 ; 22 L. J. Ch. 289 ; 20 L. T. O. S. 303 ; 17 Jur. 30 ; 68 E. R. 826.

Annotations :—**Refd.** New, Prance & Garrard's Trustee *v.* Hunting, [1897] 2 Q. B. 19, C. A. **Mentd.** Neale *v.* Day (1858), 32 L. T. O. S. 143 ; Coventry *v.* Gladstone (1868), 37 L. J. Ch. 492 ; *Re* Cowbridge Ry. Co. (1868), L. R. 5 Eq. 413.

9542. —— ——.]—Debtor, by voluntary deed, conveyed property to trustees upon trust to realise same & pay his debts. The trustees were creditors. The statement of claim did not allege that the deed was communicated to pltf. or the other creditors :—*Held :* pltf. could not maintain an action for carrying out the trusts of the deed.—JOHNS *v.* JAMES (1878), 8 Ch. D. 744 ; 47 L. J. Ch. 853 ; 26 W. R. 821 ; *sub nom.* JONES *v.* JAMES, 39 L. T. 54, C. A.

Annotations :—**Folld.** *Re* Sanders' Trusts (1878), 47 L. J. Ch. 667 ; Roberts *v.* Jones (1892), 66 L. T. 617. **Consd.** Ellis *v.* Cross, [1915] 2 K. B. 654, D. C. **Refd.** New, Prance & Garrard's Trustee *v.* Hunting, [1897] 2 Q. B. 19, C. A. ; R. *v.* Humphris, [1904] 2 K. B. 89, C. C. R.

9543. —— ——.]—Bkpt. two days before his bkpcy. executed a deed, by which he conveyed an estate to a person upon trust to raise thereout by sale or mtge. £4,200 & therewith make good certain breaches of trust. The deed was not communicated to any of the beneficiaries :—*Held :* the deed was not a revocable mandate.—NEW, PRANCE & GARRARD'S TRUSTEE *v.* HUNTING, [1897] 2 Q. B. 19 ; 66 L. J. Q. B. 554 ; 76 L. T. 742 ; 45 W. R. 577 ; 13 T. L. R. 397 ; 41 Sol. Jo. 511 ; 4 Mans. 103, C. A. ; *affd. sub nom.* SHARP *v.* JACKSON, [1899] A. C. 419, H. L.

Annotations :—**Refd.** Radcliffe *v.* Abbey Rd. & St. John's Wood Permanent Bldg. Soc., [1918–19] B. & C. R. 84. **Mentd.** Hermoux *v.* Harbord (1898), 14 T. L. R. 243 ; *Re* Blackburn, Buckley's Case, [1899] 2 Ch. 725 ; *Re* Vautin, *Ex p.* Saffery, [1900] 2 Q. B. 325 ; *Re* Blackpool Motor Car Co., Hamilton *v.* Blackpool Motor Car Co., [1901] 1 Ch. 77 ; *Re* Lake, *Ex p.* Dyer, [1901] 1 K. B. 710, C. A. ; Taylor *v.* London & County Banking Co., London & County Banking Co. *v.* Nixon, [1901] 2 Ch. 231, C. A. ; *Re* Pidcock, Penny *v.* Pidcock (1907), 51 Sol. Jo. 514 ; Wigan *v.* English & Scottish Law Life Assce. Assocn., [1909] 1 Ch. 291 ; *Re* Cozens, Green *v.* Brisley, [1913] 2 Ch. 478.

See, also, No. 9536, *ante.*

9544. —— —— **Creditor party to arrangement but not to deed.**]—By a trust deed, executed by debtor, it was declared that the money assured by certain policies on his life should be held by the trustees, who were also creditors as security for the payment to certain creditors, parties to the deed, of the several debts therein mentioned. S., one of such creditors, never executed the deed, & it was never communicated to him :—*Held :* after the death of debtor, his exor. was at liberty to revoke the trusts of the deed as against S., though *a* party to it, it never having been communicated to him.—*Re* SANDERS' TRUSTS (1878), 47 L. J. Ch. 667.

9545. —— —— **Discretionary trust for creditors.**]—By a settlement made in 1873, real estates were limited to such uses & for such trusts as A. & B. should by deed jointly appoint, with remainder, in default of appointment, to A. for life, with remainder to B. for life, with remainders over. The property settled was not B.'s property, & he was not a party to the deed. By a resettlement, made in 1888, A. & B., in exercise of their joint power of appointment under the deed of 1873, appointed the same estates to trustees for a term of years to raise by way of mtge. certain sums of money to pay (*inter alia*) the private debts of B., which were scheduled to the deed, with remainder to the trustees during the life of B. to permit him to receive the income until he should become bkpt., with a discretionary trust over, in the happening of that event, for the benefit of B., his wife & children or relatives, with remainders over. The trustees raised the money, & had in Mar., 1889, paid some of the debts, when they received a written notice from B. not to pay any more. In 1889 B. was adjudicated bkpt., & in 1890 A. died :—*Held :* the trust to pay debts was a revocable mandate which had been duly revoked, & the trustee in bkpcy. was entitled to the balance in the hands of the trustees of the settlement.—*Re* ASHBY, *Ex p.* WREFORD, [1892] 1 Q. B. 872 ; 66 L. T. 353 ; 40 W. R. 430 ; 9 Morr. 77.

9546. —— —— **Except to some creditors.**]—Deft., a judgment debtor, had previous to judgment assigned to a third party a sum of money under a deed of arrangement, under which the third party was to retain from the sum so assigned rent due to himself, & to hold the balance for the benefit of deft.'s creditors. The arrangement was communicated to deft.'s local creditors, but not to pltf., the judgment creditor :—*Held :* no trust had been created by the assignment for the benefit of the creditors generally, & the mandate of debtor was revocable.—ROBERTS *v.* JONES, RICE ROBERTS, GARNISHEE (1892), 61 L. J. Q. B. 523 ; 66 L. T. 617 ; 40 W. R. 573, D. C.

9547. —— —— **Execution of deed not communicated.**]—In pursuance of a resolution passed at a meeting of his creditors debtor subsequently executed a deed of assignment of all his property to a person specified in the resolution as trustee for the benefit of his creditors. The deed was handed to the trustee's solr., but the fact of its execution was not communicated to any creditor :—*Held :* its execution not having been communicated to any creditor, the deed was revocable.—ELLIS & Co. *v.* CROSS, [1915] 2 K. B. 654 ; 84 L. J. K. B. 1622 ; 113 L. T. 503 ; [1915] H. B. R. 239, D. C.

9548. —— **Deed communicated—So as to give creditors interest therein.**]—A conveyance for the benefit of creditors :—*Held :* not to be revocable by the author as against any creditors with whom such communications had taken place as would give them an interest under the deed, but, at the utmost, to be revocable only as to the surplus proceeds of the estate, after satisfying such creditors. *Qu. :* whether the deed was revocable at the option of the author as to such surplus.—GRIFFITH *v.* RICKETTS, GRIFFITH *v.* LUNELI (1849), 7 Hare, 299 ; 19 L. J. Ch. 100 ; 14 Jur. 166 ; 68 E. R. 122.

Annotations :—**Refd.** Clarke *v.* Franklin (1858), 4 K. & J. 257. **Mentd.** Hope *v.* Liddell (1855), 7 De G. M. & G.

9546 i. —— *Deed not communicated—Except to some creditors.*]—The mere fact that certain creditors had notice of an assignment does not make the deed irrevocable.—SPOONER *v.* JONES (1871), 3 Ch. Ch. 481.—**CAN.**

s. —— *Deed communicated—No repudiation by creditor.*]—As soon as the fact of an assignment for creditors has been communicated to a creditor who, though he may not execute it, does not repudiate it, a binding, irrevocable trust is created which constitutes the trustee a purchaser for value.—BERTRAND *v.* PARKES (1892), 8 Man. L. R. 175.—**CAN.**

t. —— —— ——.]—A deed of assignment for the benefit of creditors is voluntary & revocable until communicated to, & expressly or implicitly assented to, by the creditors or some of them.—BRIGHAM *v.* MORTON, 4 J. R. N. S. 6.—**N.Z.**

9548 i. —— —— *So as to give creditor interest in deed—Creditor having changed his position.*]—A trust deed for the benefit of creditors is irrevocable if it

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331, L. JJ.; Lee *v.* Angas (1866), L. R. 2 Eq. 59; Clissold *v.* Cork (1872), 27 L. T. 143; Jones *v.* James (1878), 39 L. T. 54, C. A.; *Re* Grimthorpe, Beckett *v.* Grimthorpe, [1908] 1 Ch. 666.

9549. —— —— Creditor having changed his position.]—*Semble:* where a deed of assignment has been executed to a stranger as trustee for creditors, a communication of the trust to a creditor, by reason of which he may not have pursued his remedy, or his position may have been altered, will render the deed irrevocable by the assignor, without any actual assent by any creditor.—SIGGERS *v.* EVANS (1855), 5 E. & B. 367; 24 L. J. Q. B. 305; 25 L. T. O. S. 213; 1 Jur. N. S. 851; 3 C. L. R. 1209; 119 E. R. 518.

Annotations:—**Consd.** Hobson *v.* Thelluson (1867), L. R. 2 Q. B. 642; Johns *v.* James (1878), 8 Ch. D. 744, C. A.; Ellis *v.* Cross, [1915] 2 K. B. 654. **Refd.** Graham *v.* Van Diemen's Land Co. (1856), 26 L. J. Ex. 73, Ex. Ch.; Biron *v.* Mount (1857), 24 Beav. 642; *Re* Sanders' Trusts (1878), 47 L. J. Ch. 667; Standing *v.* Bowring (1885), 31 Ch. D. 282, C. A.; Runtz *v.* Longbourne (1892), 8 T. L. R. 568. **Mentd.** London & County Banking Co. *v.* London & River Plate Bank (1888), 21 Q. B. D. 535, C. A.; Roberts *v.* Jones, Rice Roberts, Garnishee (1892), 61 L. J. Q. B. 523, D. C.; Muller's Margarine *v.* I. R. Comrs. (1899), 69 L. J. Q. B. 291, C. A.; Mallott *v.* Wilson, [1903] 2 Ch. 494.

9550. Creditor advancing money on faith of deed.]—*Semble:* where a creditor advances money on the credit of a voluntary deed constituting a trust for the payment of the assignor's debts, debtor is bound & cannot revoke the deed.—ACTON *v.* WOODGATE (1833), 2 My. & K. 492; 3 L. J. Ch. 83; 39 E. R. 1032.

Annotations:—**Consd.** Johns *v.* James (1878), 8 Ch. D. 744, C. A. **Refd.** Kirwan *v.* Daniel (1847), 5 Hare, 493; Mackinnon *v.* Stewart (1850), 1 Sim. N. S. 76; Siggers *v.* Evans (1855), 5 E. & B. 367; Montefiore *v.* Browne (1858), 7 H.L. Cas. 241, H. L.; Priestley *v.* Ellis, [1897] 1 Ch. 489. **Mentd.** Steele *v.* Murphy (1841), 3 Moo. P. C. C. 445, P. C.; Hughes *v.* Stubbs (1842), 1 Hare, 476; Wilding *v.* Richards (1845), 1 Coll. 655; Smith *v.* Keating (1848), 6 C. B. 136, Ex. Ch.; Henriques *v.* Bensusan, Bank of England Claim (1872), 20 W. R. 350; *Re* Sanders' Trusts (1878), 47 L. J. Ch. 667.

9551. Onus of proving that deed irrevocable.]—When debtor has made an assignment of his property to a trustee for the benefit of his creditors generally, & when the trustee sets up such deed of assignment against an execution creditor, the *onus* of proving that the deed is irrevocable & binding, as against such execution creditor, lies on the trustees, *i.e.*, the trustee has to prove that the deed has gone beyond the stage of being revocable, by showing that it has been communicated to a creditor, & assented to, or at least not dissented from, by him. The burden of giving such affirmative evidence lies on the person setting up the deed against the execution creditor.—ADNITT *v.* HANDS (1887), 57 L. T. 370, D. C.

9552. Power to revoke reserved to two grantors—Termination of power by death of one.]—A deed for (*inter alia*) payment of the debts of A. contained a power of revocation to be exercised by A. & B. A. died without exercising it:—*Held:* the power of revocation was at an end.—MONTEFIORE *v.* BROWNE (1858), 7 H. L. Cas. 241; 4 Jur. N. S. 1201; 11 E. R. 96, H. L.

Annotations:—**Mentd.** Johns *v.* James (1878), 8 Ch. D. 744, C. A.; English & Scottish Mercantile Investment Trust *v.* Brunton, [1892] 2 Q. B. 1; Priestley *v.* Ellis, [1897] 1 Ch. 489.

See, also, No. 8901, *ante.*

E. Other Rights.

9553. To sue creditor—For return of deposit paid to him as vendor—Other creditors compounding on understanding that vendor will not enforce contract of sale.]—A., having agreed to purchase an estate, & paid a deposit, B. the seller was unable to make a good title by the stipulated day. A. afterwards, upon negotiating a compromise with his creditors, stated his apprehension that he might be compelled by B. to complete the purchase, & applied to B. to cancel the contract & return the deposit. B. refused to do either, but said he would never take any steps against A. to enforce the contract. Upon that footing, the composition proceeded, C. engaging to secure 7*s.* in the pound:—*Held:* it would be a fraud upon the creditors & upon C. if B. were to seek to enforce the contract, & A. could not maintain an action against B. for the deposit.—CLARK *v.* UPTON (1828), 3 Man. & Ry. K. B. 87.

9554. —— For money paid in respect of acceptance of creditor's draft—Creditor included in composition—Money paid for creditor's use.]—A. having accepted a bill of exchange drawn upon him by B. for money lent by B. to A., compounded with his creditors, including B., & paid the composition. A. was afterwards sued to judgment by an indorsee of the bill & compelled to pay its amount, with interest & costs:—*Held:* he was entitled to recover the amount from B. as money paid to B.'s use.—HAWLEY *v.* BEVERLEY (1843), 6 Man. & G. 221; 6 Scott N. R. 837; 1 L. T. O. S. 256; 134 E. R. 873.

Annotation:—**Dbtd.** Davey *v.* Baines (1892), 9 T. L. R. 29, C. A. Where KAY, L. J., said that in *Hawley* v. *Beverley* all the three judges had given different reasons for arriving at the same judgment, & he was quite unable to understand the conclusion to which they had come.

9555. —— For alleged balance due by him—Creditor forcibly excluded from meeting.]—At the first meeting of the creditors under a liquidation petition, one person, who claimed to be the largest creditor, was ejected by force & not allowed to vote. Resolutions were passed by the other creditors present, but the registration of them was opposed by the excluded creditor, & the ct. refused to allow them to be registered. Debtor soon afterwards commenced an action against the excluded creditor for a balance, which he alleged to be due to him. At that time no order had been made for the discharge of a receiver, who had been appointed under the petition:—*Held:* there was jurisdiction to restrain debtor from proceeding with his action, but the excluded creditor should be required to undertake to apply within a fortnight either for an order to call a fresh first meeting of the creditors under the petition, or for an adjudication of bkpcy. against debtor.—*Re* MORRISY, *Ex p.* TAYLOR (1874), L. R. 18 Eq. 256; 43 L. J. Bcy. 103; 30 L. T. 473; 22 W. R. 613.

9556. To stand in place of creditor in respect of dividends.]—Where a liquidating debtor has obtained his discharge & a creditor whose debt was incurred by fraud, notwithstanding that the liquidation is not closed & that he has proved in the liquidation, sues for the amount of his debt, debtor, if no dividends have been paid, is entitled, if he pays the creditor in full, to stand in the place of the creditor in respect of any dividend which may be declared on the debt in the liquidation.—*Re* CHATTERTON, *Ex p.* HEMMING (1879), 13 Ch. D. 163; 49 L. J. Bcy. 17; 41 L. T. 513; 44 J. P. 153; 28 W. R. 218, C. A.

Annotation:—**Expld.** Ross *v.* Gutteridge (1882), 52 L. J. Ch. 280.

has been communicated to a creditor, & acted upon by him so as to alter his position, though he has not executed it.—DOUGLAS *v.* SANSOM (1895), 1 N. B. Eq. Rep. 122.—CAN.

a. *Character of representations.*]—Whether a conveyance for the benefit of creditors has or has not ceased to be revocable depends on the character of the representation made to the creditors as to its existence, & the manner in which such representation has been acted upon.—LEACOCK *v.* CHAMBERS (1886), 3 Man. L. R. 645.—CAN.

9557. To sue in his own name.]—To an action for debt, deft. pleaded a composition deed, under 1861 Act, s. 192, by which pltf. had assigned his estate to trustees, & averred that the cause of action was vested in the trustees. Pltf. replied, setting out a clause of the composition deed, which provided that the trustees might reassign the estate to pltf., & averred that the composition was paid, that the trustees had reassigned the estate to pltf., & that pltf.'s right of suing for the debt claimed had revived. Deft. rejoined that the alleged reassignment was not in pursuance of the Act, or under the sanction of the Ct. of Bkpcy :—*Held :* pltf. had no right to sue in his own name.—LOCKWOOD *v.* JENKINSON (1871), 25 L. T. 698 ; 20 W. R. 182.

9558. To sue sheriff—For trespass—For retaining goods seized before presentation of petition for liquidation by arrangement—Jurisdiction of court to restrain action.]—On Nov. 9, 1870, judgment was obtained in an action against E., & on Nov. 15 execution was levied by the sheriff under a writ of *fi. fa.* On Nov. 17 a petition for liquidation by arrangement with his creditors, under 1869 Act, s. 125, was presented by E., & on the 19th an injunction restraining further proceedings in the execution was granted. On Jan. 20, 1871, the creditors held a statutory meeting, & passed a resolution, which was afterwards duly confirmed & registered, to accept a composition. E. then brought an action for trespass against the sheriff for retaining possession of the goods seized, & at the same time the execution creditor ruled the sheriff to return the writ of *fi. fa.* which had been directed to him. In those circumstances, the sheriff applied to the ct. to restrain the proceedings against him & for protection & directions :—*Held :* the Ct. of Bkpcy. had jurisdiction, & the execution was good against the estate of E. notwithstanding the resolution for composition, & an order should be made restraining the action which had been brought by E.—*Re* ENGLAND, *Ex p.* MIDDLESEX SHERIFF (1871), L. R. 12 Eq. 207 ; 40 L. J. Bcy. 65 ; 24 L. T. 519 ; *affd.* 40 L. J. Bcy. 68, L. JJ.

Annotation :—**Apld.** Crew *v.* Terry (1877), 2 C. P. D. 403.

9559. —— For unlawful sale—To realise possession money, fees & expenses—Sale unauthorised by judgment creditor—Assent to composition.]—Goods having been seized under a writ of *fi. fa.*, the execution debtor under 1869 Act, s. 126, entered into a composition, to which the execution creditor assented. The sheriff afterwards, without instructions from the execution creditor, sold a portion of the goods seized under the writ in order to realise the amount of his possession-money, fees, & expenses. In an action by the execution debtor against the sheriff for an unlawful sale :—*Held :* in the absence of evidence to show that the sheriff was required to proceed to the sale by the execution creditor, a cause of action accrued to the execution debtor.—SNEARY *v.* ABDY (1876), 1 Ex. D. 299 ; 45 L. J. Q. B. 803 ; 34 L. T. 801, D. C.

Annotations :—**Refd.** Roe *v.* Hammond (1877), 2 C. P. D. 300. **Mentd.** Smith *v.* Darlow (1884), 26 Ch. D. 605, C. A. ; *Re* Thomas, *Ex p.* Middlesex, [1899] 1 Q. B. 460, C. A.

9560. To redeem mortgage on assigned estate.]—A. by deed conveyed all his real & personal estate, subject as to part of the real estate to a mtge. in fee from A. to a mtgee. then in possession, to trustee in trust to sell for the benefit of his creditors, & to pay the surplus to himself, his exors., administrators & assigns. The trustees did not sell the mortgaged premises, nor complete the trusts for the creditors. A. filed a bill for redemption of the mortgaged estates, to which the trustees were not parties, nor was any mention made of the trust deed, but the suit did not proceed beyond the answers. A. died intestate, & the devisee of his heir-at-law filed a bill for redemption of the same estates, & claimed the benefit of A.'s suit :—*Held :* pltf. was not entitled to redeem, because the real estate of A. had been converted by the deed of trust into personalty, & had not been subsequently reconverted, nor had that deed been revoked by A.—GRIFFITH *v.* RICKETTS, GRIFFITH *v.* LUNELL (1849), 7 Hare, 299 ; 19 L. J. Ch. 100 ; 14 Jur. 166 ; 68 E. R. 122.

Annotations :—**Consd.** Clarke *v.* Franklin (1858), 4 K. & J. 257. **Refd.** Clissold *v.* Cork (1872), 27 L. T. 143. **Mentd.** Hope *v.* Liddell (1855), 7 De G. M. & G. 331, L. JJ. ; Lee *v.* Angas (1866), L. R. 2 Eq. 59 ; Jones *v.* James (1878), 39 L. T. 54, C. A. ; *Re* Grimthorpe, Beckett *v.* Grimthorpe, [1908] 1 Ch. 666.

9561. To protection—From arrest for costs as well as judgment—Former accessory to latter.]—On Nov. 12, 1849, deft. presented a petition to the Bkpcy. Ct. for protection for his person & property under 1849 Act, s. 211, & obtained a protection. On Nov. 28 an action against him was tried, in which pltf. recovered £29 damages, the costs of which were, on Dec. 12, taxed at £57 14*s.* 3*d.* On Dec. 7, deft. filed an account of his debts, in which he described pltf.'s debt thus :—"[Pltf.] has got judgment for debt estimated at £22, & £50." On Dec. 20 deft. made a proposal, which was accepted, to certain of his creditors to pay them 7*s.* 6*d.* in the pound "with a satisfactory guarantee." On Jan. 31 all the creditors who had proved debts to the amount of £10 & upwards agreed to the terms above proposed, provided the amount of such composition were guaranteed by two parties named. That agreement was sanctioned by the Ct. of Bkpcy. :—*Held :* the debt of £22 was correctly described in the account, & deft., who had been arrested during the continuance of his protection, was entitled to his discharge both from the debt & costs, the latter being an accessory only to the principal debt.—SOUTHGATE *v.* SAUNDERS (1850),

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PART XXIII. SECT. 11, SUB-SECT. 2.—E.

9557 i. *To sue in his own name—Necessity of discharge.*]—The assignor has not a right to sue in his own name, unless duly discharged under 1869 Act.—NICHOLSON v. GUNN (1874), 35 U. C. R. 7.—**CAN.**

9557 ii. —— *For damages.*]—Creditors refused to accept the benefit of an assignment, & the assignor was notified of such refusal :—*Held :* an action for damages was properly brought in the name of the assignor against a mtgee. of his stock-in-trade, who sold the goods improperly.—RENNIE *v.* BLOCK (1896), 26 S. C. R. 356.—**CAN.**

9557 iii. —— *On insurance policy.*]—An absolute assignment for the benefit of creditors of all interest in insurance policies precludes the assignor from suing the insurance cos. in his own name.—TAYLOR *v.* EQUITABLE FIRE & MARINE INSURANCE CO., [1918] 1 W. W. R. 277 ; 13 Alta. L. R. 53.—**CAN.**

9557 iv. —— *Payment of creditors essential.*]—A man who has made an assignment of his property under Insolvent Act, cannot sue in his own name, unless all his creditors have been paid.—GILL *v.* FLEMING (1787), 1 Ridg. Parl. Rep. 420, 431.—**IR.**

c. *To disclaim lease—Application of Irish* 1872 *Act.*]—M. arranged with his creditors under Irish 1857 Act ss. 271, 349. M. held lands from D., under a lease. D. was returned as a creditor for one half-year's rent, accrued due prior to the petition, & also for the estimated value of the covenant to pay rent under the lease. D. issued a writ against M. for a half-year's rent due subsequent to the filing of the petition, & M. moved for an injunction in the Ct. of Bkpcy. to restrain the action :—*Held :* Irish 1872 Act, ss. 97, 98, did not apply to proceedings in arrangements, & the motion refused.—*Re* M. (AN ARRANGING DEBTOR) (1890), 27 L. R. Ir. 1.—**IR.**

9561 i. *To protection—Under* 1865 *Act, s.* 13—*From compulsory sequestration.*]—Debtor, who had executed a

Sect. 11.—*Position of debtor: Sub-sect.* 2, *E.*]

5 Exch. 565; 1 L. M. & P. 553; 19 L. J. Ex. 331; 15 L. T. O. S. 365; 14 Jur. 765; 155 E. R. 247.

Annotation:—**Refd.** Tomline *v.* Cadman (1859), 6 C. B. N. S. 733.

9562. To discharge from arrest.]—Case against deft. as under-sheriff, for an escape & false return. The declaration stated that a *ca. sa.* on a judgment recovered by pltf. against B. was on Dec. 17, 1862, sued out & directed to the sheriff, that B., on Dec. 16 entered into a deed of assignment, which was set out, that after the delivery of the writ an entry was made of the deed by the chief registrar of the Ct. of Bkpcy. in a book kept for such registration, & a copy of such entry was published in the *Gazette*, pursuant to 1861 Act, that by a certificate under the hand of the chief registrar & the seal of the ct., he certified that the deed was duly registered pursuant to the Act, & that such certificate set forth the nature & effect of the deed, that the writ was delivered to deft., & he took B. & detained him in custody, but suffered him to escape & remain out of his custody until he rearrested him, after which he again suffered him to escape, & made a false return that B. was entitled to protection from arrest under the writ by virtue of 1861 Act, s. 198. The declaration then alleged that the return was false, in that deft. suffered B. to escape, & that he rearrested him & suffered him to escape upon the production of the certificates of the filing & registration of the deed, which certificate & deed were not within s. 198, & that pltf. had not executed or assented to the deed. Third plea, to the first arrest, & so much of the declaration as related to it, that deft. discharged B. out of his custody, & made such return to the writ upon the production by him of such certificate, which was set out, & at the foot of it was the following note: "This certificate is available to B. for all purposes as a protection in bkpcy." The plea then averred that the deed was valid & binding on all the creditors of B. as if they had executed it. Fourth plea, to the rearrest & so much of the declaration as related to it, the same as the third plea:—*Held:* the sheriff was justified in discharging debtor on the production of the certificate, although the deed afterwards turned out to be invalid, & was not liable to an accion for escape.—LLOYD *v.* HARRISON (1865), 6 B. & S. 36; 6 New Rep. 25; 34 L. J. Q. B. 97; 12 L. T. 271; 11 Jur. N. S. 364; 13 W. R. 602; 122 E. R. 1111; *affd.* (1866), L. R. 1 Q. B. 502, Ex. Ch.

Annotations:—**Folld.** Ames *v.* Colnaghi (1868), L. R. 3 C. P. 359. **Appld.** Hargreaves *v.* Armitage (1868), L. R. 4 Q. B. 143. **Consd.** Rossi *v.* Bailey (1868), L. R. 3 Q. B. 621; Allen *v.* Carter (1870), L. R. 5 C. P. 414. **Refd.** Parkin *v.* Ernest (1861), 16 L. T. 713; Marks *v.* Hall (1866), 7 B. & S. 839; Staffordshire Banking Co. *v.* Emmott (1867), L. R. 2 Exch. 208; Williams *v.* Rose (1867), 17 L. T. 253; Ames *v.* Waterlow (1869), L. R. 5 C. P. 53.

9563. —— Judgment on bill of exchange running at date of execution of deed.]—Debtor executed a valid deed of composition under 1861 Act, s. 192. Afterwards an action, to which he did not appear, was commenced against him, on a bill of exchange, of which he was acceptor, & which was running at the time of the execution of the deed. Judgment was obtained & a *ca. sa.* issued, on which debtor was arrested, but immediately discharged, on production of the certificate of registration. In an action against the sheriff for escape:—*Held:* debtor was rightly discharged.—DIGNAM *v.* BAILY (1869), L. R. 4 Q. B. 376; 10 B. & S. 891; 38 L. J. Q. B. 218; 17 W. R. 727; *subsequent proceedings* (1870), L. R. 6 Q. B. 47, Ex. Ch.

Annotations:—**Consd.** Rossi *v.* Bailey (1868), L. R. 3 Q. B. 621; Allen *v.* Carter (1870), L. R. 5 C. P. 414. **Refd.** Godwin *v.* Stone (1869), L. R. 4 Exch. 331.

9564. —— Where debtor neglects to plead deed.]—To a declaration for not executing a writ of *ca. sa.* against debtor, defts. pleaded that they had not arrested debtor, because subsequently to the accrual to pltfs. of the claim for which the judgment in the declaration mentioned was recovered & the writ of *ca. sa.* issued, & before delivery of the writ to defts., debtor had executed a deed of arrangement under 1861 Act, s. 192, & obtained a certificate of its registration, whereof defts. had notice. Pltfs. replied, that the deed was a deed executed before the commencement of the action, & contained a release, &, if valid, might have been, but was not, pleaded in bar of the action, & that the judgment was signed for want of a plea, & the deed was not assented to by the required number of creditors, & was null & void, of all which defts. had notice:—*Held:* a good replication.—GODWIN *v.* STONE (1869), L. R. 4 Exch. 331; 38 L. J. Ex. 153; 20 L. T. 711; 17 W. R. 923.

Annotations:—**Consd.** Allen *v.* Carter (1870), L. R. 5 C. P. 414. **Refd.** Ames *v.* Waterlow (1869), L. R. 5 C. P. 53.

9565. —— ——.]—Where debtor, having had an opportunity to plead a deed under 1861 Act, s. 192, has neglected to do so, both he & the sheriff, provided the latter has notice of the facts, are estopped from relying on it, under s. 198, as a bar to an execution.

B. was on Aug. 3 served with a writ under Bills of Exchange Act, 1855 (c. 67), at the suit of A., & on the 5th B. executed a composition-deed, which was registered on the 13th. On the 15th judgment was signed for non-appearance to the writ, & a *ca. sa.* issued on Sept. 25, under which B. was arrested. The sheriff, having notice of the facts, released B. from custody, on being shown the certificate of registration of the deed:—*Held:* the sheriff was liable to an action for escape. *Semble:* debtor might have obtained leave to appear to the writ at any time after the execution of the deed, & was not bound to wait until it was registered.—ALLEN *v.* CARTER (1870), L. R. 5 C. P. 414; 39 L. J. C. P. 212; 22 L. T. 586.

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deed of assignment under 1865 Act failed after the coming into operation of 1871 Act to satisfy a judgment recovered against him, & informed the officer charged with its execution of the deed, as a reason for not satisfying the judgment. On a rule *nisi* for compulsory sequestration:—*Held:* the protection afforded by 1865 Act, s. 13, was continued by 1871 Act, & applied to the alleged act of insolvency.—*Re* MACDONALD (1871), 2 V. R. L. 12.—**AUS.**

d. *To wages for carrying on business.*]—At a meeting of the creditors of insolvent, it was agreed that the business should be carried on for a certain period:—*Held:* insolvent was not entitled to a claim against the estate for wages for carrying on the business, since the terms of the agreement to which he was a party showed that he was not so entitled.—*Re* MATEJKA (1906), 5 W. L. R. 1—**CAN.**

e. *To object to trust accounts.*]—In a trust-deed for behoof of creditors, the agent of the trustee was appointed one of the trustees, & at the first meeting of trustees he was by them appointed agent & factor in the trust. His accounts were regularly rendered at meetings of the trustees, & were examined & docqueted by them as correct, the truster being present & offering no objection to the trust management. Th first account rendered by the agent was docqueted as correct by the truster himself, along with the trustees. In an accounting at the instance of the truster:—*Held:* the facts alleged as inferring acquiescence, & even the signing the docquet not being proved to have taken place in the knowledge of his legal rights, the truster was not barred from objecting to the agent's accounts.—LAUDER *v.* MILLARS (1859), 21 Dunl. (Ct. of Sess.) 1353.—**SCOT.**

9566. To have property reconveyed—On payment of composition—Property originally conveyed to trustee—To defeat creditors.]—Pltf., being in pecuniary difficulties, assigned certain leasehold property to a trustee with the view of defeating his creditors. Two & a half years afterwards he was adjudicated bkpt., but obtained the sanction of the creditors under 1861 Act, s. 110, to an arrangement, by which his estate & effects were revested in him, he covenanting to prosecute a suit for the recovery of the assigned property, & to pay a composition of 2*s.* 6*d.* in the pound to his creditors in case such suit had a successful termination :—*Held :* pltf. was entitled to have the property reconveyed to him by deft., who claimed by assignment from the original trustee.—SYMES *v.* HUGHES, SYMES *v.* HUGHES (1870), L. R. 9 Eq. 475 ; 39 L. J. Ch. 304 ; 22 L. T. 462.

Annotations :—**Folld.** Taylor *v.* Bowers (1876), 1 Q. B. D. 291. **Distd.** *Re* Great Berlin Steamboat Co. (1884), 54 L. J. Ch. 68, C. A. **Apld.** Petherpermal Chetty *v.* Muniandy Servai (1908), 24 T. L. R. 462, P. C. **Refd.** Wilson *v.* Strugnell (1881), 7 Q. B. D. 548.

9567. —— After resolution accepting final dividend.]—A special resolution of creditors accepting a final dividend in a liquidation revests the property in the liquidating debtor.—CALVERT *v.* GREAT WESTERN COLLIERY CO. (1891), 8 T. L. R. 181.

9568. To order directing trustee to pay back surplus—Jurisdiction to order accounts between debtor & trustee.]—A resolution having been passed at a meeting of creditors to accept a composition from debtor, debtor paid to the trustee a sum of money, which was more than sufficient to pay the composition to all the creditors whose names & debts were entered in his statement. Other creditors, who were not bound by the composition, had previously filed a bill in Ch. against debtor & certain persons, charging them with a breach of trust. They did not come in & prove the debt in the composition, but simply gave notice to the trustee of their claim. After all the creditors who were bound by the composition had been paid, debtor applied to the ct. to order the trustee to pay back the surplus of the fund to him :—*Held :* the ct. had jurisdiction to entertain the application under 1869 Act, s. 72, & to take the necessary accounts between the trustee & debtor.—*Re* CAREW, *Ex p.* CAREW (1875), 10 Ch. App. 308 ; 44 L. J. Bcy. 67 ; 32 L. T. 318 ; 23 W. R. 459, L. JJ.

Annotations :—**Mentd.** Breslauer *v.* Brown (1878), 3 App. Cas. 672, H. L. ; Oppenheim *v.* Jackson & Till (1879), 41 L. T. 193 ; *Re* Lacey, *Ex p.* Lacey (1880), 16 Ch. D. 131, C. A.

9569. To injunction restraining creditors from proceeding against after acquired property.]—The creditors of a manufacturer resolved on a liquidation by arrangement, & appointed a trustee & a committee of inspection. They afterwards passed a resolution accepting an offer by debtor & B., a friend of his, to purchase "the whole of debtor's estate & effects" for £6,000, towards which debtor was to contribute £200, payable by instalments. A deed was executed conveying the machinery, stock-in-trade, etc., & all other property then vested in the trustee under the liquidation, or which he had power to dispose of, to B. B. took debtor into partnership in the business, & the instalments were all duly paid. Debtor then applied for his discharge, but a meeting of the creditors, summoned to consider the question, refused to grant it :—*Held :* the sale included all the future property of debtor, & debtor was entitled to an injunction restraining the committee of inspection & other creditors from taking proceedings against property acquired by him since the commencement of the liquidation.—*Re* FRANCE, *Ex p.* TINKER (1874), 9 Ch. App. 716 ; 43 L. J. Bcy. 147 ; 30 L. T. 806, L. JJ.

Annotations :—**Consd.** *Re* Russell, *Ex p.* Russell (1875), 10 Ch. App. 255, L. JJ. **Distd.** *Re* Wainwright, *Ex p.* Wainwright (1881), 19 Ch. D. 140, C. A. **Refd.** *Re* Coughey, *Ex p.* Ford (1876), 34 L. T. 634, C. A.

9570. To present second petition for liquidation or composition—Enforceable resolution previously passed.]—When a resolution for composition has been passed, which is capable of being enforced against debtor, he cannot present a second petition for liquidation or composition.—*Re* SYDNEY, *Ex p.* SYDNEY (1875), 10 Ch. App. 208 ; 44 L. J. Bcy. 21 ; 31 L. T. 714 ; 23 W. R. 205, L. JJ.

Annotations :—**Distd.** *Re* Russell, *Ex p.* Russell (1875), 44 L. J. Bcy. 42. **Consd.** *Re* Robinson, *Ex p.* Burrell (1876), 1 Ch. D. 537. **Distd.** *Re* Roberts, *Ex p.* Watson (1879), 41 L. T. 516, C. A. **Apld.** *Re* Andrews, *Ex p.* Barrow (1881), 18 Ch. D. 464, C. A.

9571. To deposit assets with surety—To amount of composition secured.]—Creditors resolved to accept a composition payable by three instalments, the first two of which were to be secured by the acceptances of debtor, & the third by the acceptances of a surety. The surety required as the condition of giving his acceptances that debtor should deposit goods to the amount thereof, but that was not known to the creditors. Debtor failed to pay the second instalment, & filed a second petition, & the trustee appointed under the second petition applied for an order upon the surety for delivery up of the goods deposited : —*Held :* the creditors by accepting the composition had left debtor absolute owner of the assets, & there was nothing to prevent his depositing them with the surety.—*Re* ROBINSON, *Ex p.* BURRELL (1876), 1 Ch. D. 537 ; 45 L. J. Bcy. 68 ; 34 L. T. 198 ; 24 W. R. 353, C. A.

Annotations :—**Apld.** *Re* Kearley & Clayton's Contract (1878), 7 Ch. D. 615. **Distd.** *Re* Simons, *Ex p.* Allard (1881), 16 Ch. D. 505, C. A.

9572. To rectify deed—To charge trustees with neglect—Whether application to Bankruptcy or Chancery Court.]—In cases coming under 1844 Act application to rectify a deed, or to charge trustees with wilful neglect or default, should be made in bkpcy., not in Ch.

Pltf., being unable to meet his engagements, & not being a trader, presented a petition under the above Act. Resolutions for carrying into effect the proposals contained in the petition were duly passed by the creditors, & pltf. executed a deed conveying all his property to trustees for the purpose, as he believed, of carrying into effect the resolutions. Subsequently he ascertained that the deed did not carry out the resolutions as passed by the creditors, & being advised that the Act contained no power to rectify deeds or to charge trustees with wilful neglect or default, he filed a bill in Ch. :—*Held :* under s. 15 such cases were to be construed by analogy to the bkpcy. law, which had power to grant adequate relief, & application to the Ct. of Ch. was unnecessary.—HUTCHINSON *v.* BASHAM (1876), 35 L. T. 467 ; 25 W. R. 54.

9566 i. *To have property reconveyed—On payment of composition.*]—Where insolvent has made a composition with his creditors he is, upon rehabilitation, reinstated by operation of law with the *dominium* of his assets, movable & immovable, after payment of all objecting, concurrent, & preferent creditors.—*Ex p.* MORRIS (1915), T. P. D. 562.—**S. AF.**

1. —— *Effect of reconveyance.*]—A reconveyance by the assignee to debtor has, if made in conformity with the terms of the composition & discharge, the same effect under 1869 Act as if the property had been sold by the assignor in the ordinary course to a third person after all preliminary proceedings have been taken.—NICHOLSON *v.* GUNN (1874), 35 U. C. R. 7.—**CAN.**

Sect. 11.—*Position of debtor: Sub-sect.* 2, *E.; sub-sect.* 3, *A., B. & C.*]

9573. To waive conditions imposed by 1869 Act, s. 126.]—Debtor cannot waive the conditions imposed by the above sect.—BRESLAUER *v.* BROWN (1878), 3 App. Cas. 672; 47 L. J. Q. B. 729; 39 L. T. 67; 26 W. R. 536, H. L.; *affg.* S. C. *sub nom.* WILSON *v.* BRESLAUER (1877), 2 C. P. D. 314, C. A.

Annotations:—**Mentd.** Oppenheim *v.* Jackson (1879), 49 L. J. Q. B. 216, C. A.; Burliner *v.* Royle (1880), 5 C. P. D. 354; *Re* Lacey, *Ex p.* Lacey (1880), 16 Ch. D. 131, C. A.; Lewis *v.* Leonard (1880), 5 Ex. D. 165, C. A.; Tea Co. *v.* Jones (1880), 43 L. T. 255; *Re* Engelhardt, *Ex p.* Engelhardt (1883), 23 Ch. D. 706, C. A.; Morgan *v.* Hardy (1887), 18 Q. B. D. 646, C. A.

9574. To raise money while authorised to carry on business.]—Two partners in trade filed a liquidation petition, under which a trustee of their property was appointed. Afterwards the creditors, under 1867 Act, s. 28, passed resolutions authorising the trustee to accept a composition from debtors, & the arrangement was approved by the ct. The composition was to be paid in four instalments, part of the last of which was to be secured by a surety. One of debtors, who was about to carry on the business alone, agreed to pay £30 to the trustee weekly, until he should have paid the amount of the composition. In case of his making default, the trustee was to be at liberty to take possession of his stock-in-trade, assets, & effects, & realise them for the benefit of the creditors of the firm. The discharge of debtors was to be granted, the liquidation closed, & the trustee released, so soon as the trustee should certify to the ct. that a sum sufficient to pay the composition had been paid to him by debtor:—*Held:* the resolutions of the creditors gave an implied authority to debtor to carry on the business in the ordinary way, & to pledge the assets in order to raise money for the purposes of the business, or for the purpose of paying the composition, but did not authorise the pledging of the assets as an indemnity to the surety against his liability in respect of the last instalment of the composition.—*Re* SIMONS, *Ex p.* ALLARD (1881), 16 Ch. D. 505; 44 L. T. 35; 29 W. R. 406, C. A.

9575. To solicit former customers—Notwithstanding sale of goodwill by trustee.] — The trustee of a liquidating debtor sold the goodwill of debtor's business. Debtor, having obtained his discharge, started a similar business in the same town, & solicited the customers of his old firm:—*Held:* (1) no injunction could be granted to restrain such solicitation; (2) the concurrence of bkpt. in the assignment of his property by his trustee was immaterial, as, being bound by every lawful disposition of his property by his trustee, he was bound to respect whatever rights such a disposition conferred on the purchaser.—WALKER *v.* MOTTRAM (1881), 19 Ch. D. 355; 51 L. J. Ch. 108; 45 L. T. 659; 30 W. R. 165, C. A.

Annotations:—**Folld.** Dawson *v.* Beeson (1882), 22 Ch. D. 504. **Consd.** Trego *v.* Hunt, [1896] A. C. 7, H. L.; Jennings *v.* Jennings, [1898] 1 Ch. 378. **Folld.** Green *v.* Morris, [1914] 1 Ch. 562. **Refd.** Pearson *v.* Pearson (1884), 27 Ch. D. 145, C. A.

9576. —— ——.]—The rule, which precludes the vendor of the goodwill of a business from soliciting the customers of the old firm, does not apply to the case of a sale not by the man carrying on the business, but by the trustees of a deed of assignment for the benefit of his creditors.—GREEN & SONS (NORTHAMPTON), LTD. *v.* MORRIS, [1914] 1 Ch. 562; 83 L. J. Ch. 559; 110 L. T. 508; 30 T. L. R. 301; 58 Sol. Jo. 398.

9577. To use trade name & marks sold by trustee.]—For some years before 1908, A. carried on business under the name of A. & Co., as a wine & spirit merchant, owning certain brands & marks in connection therewith. In 1908 he assigned his business & property to a trustee for his creditors. Pltf. bought from the trustee the brands & marks & received from the trustee a receipt for the purchase-money, in which it was expressed to be paid in respect of the brands as *per* schedule, together with all the labels & advertising matter on hand appertaining thereto, brands for cases, seals, & branding irons, whether in possession of A. & Co., or in that of the firm they had been buying from, so far as they constituted the property of A. & Co. In 1911 the trustee assigned to pltf. by deed all the brands & trade marks enumerated in the schedule together with the goodwill of the business concerned in the goods with respect to which the trade marks or brands had been registered or in the goods to which they related, & pltf. became registered as proprietor of the trade marks. In July, 1914, A. commenced business as a wine & spirit merchant under the name of A. & Co. Pltf. commenced an action against A., & claimed an injunction to restrain him from using the name of A. & Co., & from using any brands or marks so contrived as by colourable imitation or otherwise to represent the marks or brands used by pltf., & also claimed damages. Deft. had used labels on his rum, whiskey & other goods which contained the name A. & Co. in the same special type as that in which pltf. had used it. Pltf. complained of the labels & also of circulars by deft.:—*Held:* (1) the right to the name A. & Co. passed to the trustee with the goodwill of the business & from the trustee to pltf., & pltf. was entitled to an injunction restraining deft. from using the name of A. & Co.; (2) the use of the name A. & Co. in the distinctive type in labels was an infringement of pltf.'s rights.—WOOD *v.* HALL (1915), 33 R. P. C. 16.

9578. To enter into valid agreement to pay debt in full.]—After composition resolutions under 1869 Act, s. 126, have been passed & registered, debtor cannot, before the completion of the composition in accordance with the resolutions, enter into a valid agreement with one of the creditors who is bound by the resolutions, to pay him his debt in full, even though the creditor agrees at the same time to give debtor fresh credit; & such an agreement would be inconsistent with good faith to the other creditors, & with the spirit of s. 126.—*Re* ANDREWS, *Ex p.* BARROW (1881), 18 Ch. D. 464; 50 L. J. Ch. 821; 45 L. T. 197, C. A.

Annotations:—**Distd.** Wild *v.* Tucker, [1914] 3 K. B. 36. **Mentd.** *Re* Bonacina, Le Brasseur *v.* Bonacina, [1912] 2 Ch. 394, C. A.

See, also, cases in Sect. 10, sub-sect. 2, D., *ante.*

9579. To apply to reduce creditor's proof—Notwithstanding lapse of time.]—After the creditors of bkpt. have resolved, under 1869 Act, s. 28, to accept a composition offered by bkpt., bkpt., though undischarged, has a *locus standi* to apply to the ct. to reduce the amount of the proof of a creditor, & the mere fact that the proof has been upon the file of the proceedings in the bkpcy. for upwards of a year does not estop bkpt. from making

9575 i. *To solicit former customers—Notwithstanding sale of goodwill by trustee—To use trade name.*]—An assignor, notwithstanding the goodwill of his business & his trade name have been sold. by his assignee or trustee for the benefit of creditors, to a purchaser for valuable consideration, is not under any obligation to such purchaser, & may still carry on a similar trade under his former trade name & canvass his old customers, but he is not entitled to restrain a person who is doing the same thing honestly.—FERNE *v.* WILSON (1900), 26 V. L. R. 422.—AUS.

the application.—*Re* BOND, *Ex p.* BACON (1881), 17 Ch. D. 447; 44 L. T. 834; 29 W. R. 574.

9580. To apply to expunge proof.]—Where, after a scheme has been accepted, additional proofs are made, to which debtor objects, & the official receiver refuses either to reject or admit them, debtor can by leave apply by motion against the creditors to expunge the proofs.—*Re* CALVERT, *Ex p.* DEBTOR (1899), 80 L. T. 268; *sub nom. Re* CALVERT, *Ex p.* CALVERT, 6 Mans. 209; *subsequent proceedings*, [1899] 2 Q. B. 145.

9581. To costs out of estate—In case of hardship.]—The creditors of a liquidating debtor in 1877 passed a special resolution authorising the sale of his estate to the trustee at such a price as would pay a dividend of 5*s.* in the pound to the creditors, & also the costs of the liquidation. The resolution was sanctioned by the ct., & was carried out by the trustee. Debtor was not a party to the arrangement, & did not know of it for some time afterwards. The creditors did not pass any formal resolution fixing the close of the liquidation, or granting debtor a discharge, but he commenced another business. In 1881 this came to the knowledge of the trustee, & he thereupon took possession of debtor's stock-in-trade, claiming it on behalf of the creditors under the liquidation:—*Held:* although the trustee was entitled to debtor's after-acquired property for the benefit of the creditors, in the circumstances, debtor's costs must be paid out of the estate, & the trustee's costs must also be allowed out of the estate.—*Re* WAINWRIGHT, *Ex p.* WAINWRIGHT (1881), 19 Ch. D. 140; 45 L. T. 562; *sub nom. Re* WAINWRIGHT, *Ex p.* GREENER, 51 L. J. Ch. 67; 30 W. R. 125, C. A.

SUB-SECT. 3.—DUTIES AND LIABILITIES.

A. On Default of Tender.

See Sect. 10, sub-sect. 1, A., *ante.*

B. On Default in Performance.

See Sect. 10, sub-sect. 1, A., *ante.*

C. Discharge of Debts.

See, also, cases in Sect. 10, sub-sect. 2, C. (b), *ante.*

9582. In general.]—Composition arrangements with creditors form an exception to the rule, that an agreement to accept part of a debt in discharge of the whole is no legal satisfaction of the remainder.—PFLEGER *v.* BROWNE (1860), 28 Beav. 391; 54 E. R. 416.

9583. Liability under lease.]—Deft., pltf.'s lessee, duly registered a deed under 1861 Act, s. 192, by which he conveyed "all his estate & effects" to trustees for the benefit of creditors:—*Held:* 1849 Act, s. 145, applied, & the conditions of that sect. having been satisfied, deft. was discharged from liability under the lease.—PORTER *v.* KIRKUS (1867), L. R. 2 C. P. 590; 36 L. J. C. P. 311; 17 L. T. 85; 15 W. R. 1018.

9584. ——.]—A tenant in possession of premises under an agreement for a lease for twenty-one years to commence from Michaelmas, 1861, liquidated by arrangement in 1872, & got his discharge in 1880. The trustee took no steps with regard to the premises, which the tenant continued to occupy till Michaelmas, 1882:—*Held:* the tenant was tenant from year to year upon the terms of the original agreement & was bound to leave the premises in the state of repair required by that agreement.—PONSFORD *v.* ABBOTT (1884), 1 Cab. & El. 225.

9585. Separate debts—Resolution by joint creditors.]—Where proceedings for liquidation have been instituted by partners, & the joint creditors have passed a resolution for liquidation & appointed a trustee, a discharge by the joint creditors will not operate to discharge any partner or his separate estate from his separate debts.—EBBS *v.* BOULNOIS (1875), 10 Ch. App. 479; 44 L. J. Ch. 691; 33 L. T. 342; 23 W. R. 820, L. JJ.

Annotations:—**Reid.** *Re* Chatterton, *Ex p.* Hemming (1879), 13 Ch. D. 163, C. A.; *Re* Smith, Green *v.* Smith (1883), 24 Ch. D. 672; *Re* Powell, Powell *v.* Powell (1904), 20 T. L. R. 374. **Mentd.** *Re* Caughey, *Ex p.* Ford (1876), 1 Ch. D. 521, C. A.; *Re* Pettit's Estate (1876), 1 Ch. D. 478; Meggy *v.* Imperial Discount Co. (1878), 3 Q. B. D. 711, C. A.; *Re* Wainwright, *Ex p.* Wainwright (1881), 19 Ch. D. 140, C. A.; Cholmeley School Highgate *v.* Sewell, [1894] 2 Q. B. 906; Imray *v.* Oakshette, [1897] 2 Q. B. 218, C. A.

9586. Bills given in payment of composition.]—Pltfs., with other creditors, entered into an agreement with deft., whereby he agreed to pay them a composition of 15*s.* in the pound, by two instalments, & a surety, in consideration of the creditors discharging deft. from all debts & demands, on receiving such 15*s.* in the pound, agreed to pay a sum of money, in part of the first instalment, & to accept a bill of exchange drawn by deft., in part payment of the second, the creditors agreeing "to exonerate & discharge deft., on payment of the 15*s.* in the pound." It was further agreed, that several bills of exchange, the amount of which was equal to the residue of the sum payable on the composition, before indorsed by deft. & handed over to pltfs., should "be considered as in part payment of the 15*s.* in the pound":—*Held:* the bills left in the hands of pltfs. were not, under the agreement, to be considered an absolute payment, but the liability of deft. thereon still continued.—CONSTABLE *v.* ANDREW (1834), 2 Cr. & M. 298; 4 Tyr. 206; 3 L. J. Ex. 55; 149 E. R. 773.

9587. Contingent debt not included in schedule.]—Debtor filed a petition to obtain an arrangement under 1869 Act, s. 126, & inserted in his statement the name & address of a creditor, describing a certain sum of money as due to him. The creditor claimed a larger sum, obtained the allowance of it, signed a composition deed, the composition being payable in one month from the registration of the deed, & received the composition agreed to by the creditors. While the arrangement was being made, a suit in the Ct. of Admlty. was proceeding against debtor, in which suit the creditor had given a bond,

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PART XXIII. SECT. 11, SUB-SECT. 3.—C.

g. *Claim under award.*]—L. & G. formerly carried on business in co-partnership. They referred certain partnership disputes to arbn., & by the award G. was directed to pay L. a certain sum. After deducting the amount of some payments made by G., L. claimed £457 6*s.* 6*d.*, as being the balance due to him. After the award G. executed a deed of arrangement, which was assented to by the necessary majority of creditors. Upon motion to make absolute a rule obtained by L. for the payment by G. of the £457 6*s.* 6*d.*:—*Held:* L.'s claim on account of the unpaid portion of the balance due was barred by G.'s deed.—*Re* LOGAN *v.* GALT, Mac. 505.—N.Z.

9583 i. *Liability under lease.*]—On the application of an arranging debtor to have an action for rent against him stayed, on the ground that the property was onerous & not worth the rent:—*Held:* such course could only be adopted by the arranging debtor going into bkpcy.—*Re* AN ARRANGING DEBTOR (1890), 24 I. L. T. Jo. 585.—IR.

h. *Contingent liability as surety.*]—A covenant by a surety to pay a mtge. debt of his principal is released by the surety's deed of assignment being completed under 1876 Act, although the liability under the covenant has not arisen.—MERCER *v.* BUCHANAN (1882), 1 N. Z. L. R. 165.—N.Z.

9587 i. *Contingent debt not included in schedule.*]—H. drew, & C. accepted, a bill of exchange for value. It was

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as surety for debtor, for the payment of any costs & damages found due in that suit. The liability on the bond was in no way referred to in debtor's statutory statement. After the composition had been completed, & the composition had been paid, the Admlty. suit was decided against debtor, & on default by debtor, the creditor was called on to pay the amount secured by the bond:—*Held:* in the circumstances, an action for money paid under the Admlty. bond was maintainable against debtor, no mention of the bond having been made in the statutory statement, & such payment not being affected by 1861 Act, ss. 31, 126.—BRESLAUER *v.* BROWN (1878), 3 App. Cas. 672; 47 L. J. Q. B. 729; 39 L. T. 67; 26 W. R. 536, H. L.; *affg.* S. C. *sub nom.* WILSON *v.* BRESLAUER (1877), 2 C. P. D. 314, C. A.

Annotations:—**Expld.** *Re* Lacey, *Ex p.* Lacey (1880), 16 Ch. D. 131, C. A. **Consd.** Morgan *v.* Hardy (1886), 17 Q. B. D. 770. **Refd.** Oppenheim *v.* Jackson (1879), 49 L. J. Q. B. 216, C. A.; Tea Co. *v.* Jones (1880), 43 L. T. 255. **Mentd.** Lewis *v.* Leonard (1880), 5 Ex. D. 165, C. A.; Burliner *v.* Royle (1880), 5 C. P. D. 354; *Re* Engelhardt, *Ex p.* Engelhardt (1883), 52 L. J. Ch. 748, C. A.

9588. Costs against husband & wife—Composition by husband.]—By a decree made on Feb. 7, 1877, an appeal from which was dismissed on Apr. 8, a husband & wife, co-defts., were ordered to pay pltf.'s costs. On Feb. 21, the costs not having been paid, the husband presented a petition for liquidation, &, on Mar. 14, a first meeting of creditors was held. On Mar. 15 a writ of sequestration was issued on behalf of pltf., empowering & commanding the sequestrators to enter upon property settled under a marriage settlement, & sequester the rents. Notices were given by the sequestrators to the trustees & the tenants, & a counter-notice was given by the trustees. On Mar. 21, at an adjourned first meeting of creditors, a composition of 10*s.* in the pound was resolved upon. This was afterwards duly confirmed, & pltf. proved for the costs, & received the composition of 10*s.* for the amount. Afterwards the sequestrators having again served notice on the trustees & their tenants to attorn & pay the rents to them, in discharge of the balance:—*Held:* by force of the composition, & the acceptance by pltf. of payment under it, the debt of pltf. had become satisfied, & the issue of the writ of sequestration was irregular & improper, & the sequestrators must withdraw.—ROE *v.* DAVIES, [1878] W. N. 147.

9589. All debts provable in bankruptcy.]—When a bkpcy. has been annulled under 1869 Act, & a scheme of arrangement of bkpt.'s affairs has been approved of by the ct., bkpt. is discharged from his debts, & no action is maintainable against him in respect of any debt provable under the bkpcy. —GILBEY *v.* JEFFRIES (1883), 11 Q. B. D. 559; 52 L. J. Q. B. 601; 48 L. T. 699, C. A.

See, also, Nos. 9140, 9293, 9496, 9497, *ante.*

9590. Debt incurred by fraud.]—C., a broker, sold without authority bonds left with him by A., a customer, for safe custody, & misappropriated the proceeds. C. became bkpt., & the sale being then discovered A. proved for the value. The creditors passed a resolution under 1869 Act, s. 28, accepting a proposal that T., a friend of bkpt., should pay a composition of 6*d.* in the pound on all the debts in full discharge thereof, & that on such payment the bkpcy. should be annulled. A. received the composition, but did not otherwise assent to the arrangement. In Aug., 1880, the bkpcy. was annulled. In May, 1886, an order in the Ch. Div. was made for administration of the estate of C., who had died in the interval:—*Held:* the debt due from C. to A. was incurred by fraud within Debtors Act, 1869 (c. 62), s. 15, & the debt was not discharged by the arrangement.—*Re* CROSLEY, MUNNS *v.* BURN (1887), 35 Ch. D. 266; 57 L. T. 298; 35 W. R. 790, C. A.

Annotation:—**Mentd.** *Re* Benzon, Bower *v.* Chetwynd, [1914] 2 Ch. 68, C. A.

9591. Debts which would have been released by discharge in bankruptcy.]—The debts in respect of which a composition is binding include all debts & liabilities which would be released by an order of discharge in bkpcy.—FLINT *v.* BARNARD (1888), 22 Q. B. D. 90; 58 L. J. Q. B. 53; 37 W. R. 185; 5 T. L. R. 79, C. A.

Annotation:—**Refd.** *Re* Greer, Napper *v.* Fanshawe, [1895] 2 Ch. 217.

9592. Debt incurred by breach of trust.]—Trustees invested trust funds in their private business. A receiving order was made against them & a composition was approved by the ct. New trustees of the will were appointed, & they proved for & accepted the composition. Subsequently one of the original trustees became personally entitled to a share of the estate:—*Held:* his debt to the estate was released or satisfied by the composition, & he was not bound to bring into account the portion of the estate subsequently coming to him.—*Re* SEWELL, WHITE *v.* SEWELL, [1909] 1 Ch. 806; 78 L. J. Ch. 432; 100 L. T. 883; 16 Mans. 113.

Annotations:—**Refd.** *Re* Melton, Milk *v.* Towers, [1918] 1 Ch. 37, C. A. **Mentd.** *Re* Mitchell, Freelove *v.* Mitchell (1912), 82 L. J. Ch. 121.

D. Other Cases.

9593. To pay composition—In full though part secured by surety.]—Although debtor compounding with his creditors gives them the security of a third person for payment of part of the stipulated

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afterwards converted into an accommodation bill, & H. agreed to indemnify C. against liability in respect of it. H. carried an arrangement in bkpcy., of which C. had no notice. The bill-holder proved in the arrangement, got a dividend, & sued C. for the balance. He paid the amount claimed & the costs, & sued H. therefor on his indemnity:—*Held:* C.'s right of acton was concluded by the bill-holder's proof & he could not recover.—CAREY *v.* HARPER, [1897] 2 I. R. 92; 30 I. L. T. 53.—IR.

k. *Whether execution set aside—Judgment recovered before discharge.*]—Years after deft. had obtained his discharge, pltf., a scheduled creditor, issued a *fi. fa.* against deft.'s goods on a judgment recovered before the discharge. Pltf. consented to the assignment, & did not appeal from the order of discharge, nor did he, when the discharge was being granted, raise an objection:—*Held:* the *fi. fa.* must be set aside, & pltf.'s remedy, if any, was by action on the judgment:—*Semble:* pltf., by his conduct & the lapse of time, was precluded.—PARKE *v.* DAY (1875), 24 C. P. 619.—CAN.

l. —— *Award after discharge.*]—After an assignment & execution of the deed of composition & discharge, insolvent permitted an arbn. on pltf.'s claim to be proceeded with, personally attending the arbn., & not setting up the deed as a bar:—*Held:* insolvent precluded from afterwards setting up such deed as a ground for setting aside a *fi. fa.* against him issued on the award.—PIDGEON *v.* MARTIN (1875), 25 C. P. 233.—CAN.

9589 i. *All debts provable in bankruptcy.*]—The creditors of bkpt. passed resolutions accepting a composition to unsecured creditors. The composition was paid to all creditors who held no security, & an order annulling the bkpcy. was made. A secured creditor, whose securities subsequently to the order had on realisation proved deficient, & who had not until then proved against the estate, sued debtor for the balance of the original debt due to him, or in the alternative for the composition thereon:—*Held:* bkpt. was discharged by the composition.—LEVIN *v.* DEATH (1889), 8 N. Z. L. R. 150.—N.Z.

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m. *To seek creditor—After signing composition notes.*]—An arranging debtor, having signed & delivered composition notes to the assignee, is not bound to seek the creditor, or to take other steps until the notes are presented for payment.—*Re* CAMPBELL (1890), 25 L. R. Ir. 50.—IR.

dividend, he is not discharged upon payment of that part only, if the residue continues unpaid.—WALKER *v.* SEABORNE (1809), 1 Taunt. 526; 127 E. R. 938.

See, also, Sect. 10, sub-sect. 1, A. (a), *ante*.

9594. —— To put trustee in funds in time.]—A trustee, appointed by the creditors in composition proceedings to receive & distribute debtor's assets, is entitled to be put in funds in cash by debtor in time to enable him to pay the instalments upon the date fixed for payment thereof.—BRINTON *v.* MADDISON (1883), 1 Cab. & El. 68.

9595. —— Liability for default in trustee.]—When under a composition arrangement a trustee is appointed by the creditors, debtor is not liable for any default of the trustee in paying the composition.—*Re* TAYLOR, *Ex p.* WATERER (1874), 43 L. J. Bcy. 25; 29 L. T. 907; 22 W. R. 426, L. JJ.

Annotations:—**Apprvd.** Tea Co. *v.* Jones (1880), 43 L. T. 255. **Refd.** Campbell *v.* Im Thurn (1876), 1 C. P. D. 267. **Mentd.** *Re* Watson, *Ex p.* Watson (1876), 24 W. R. 592, C. A.

9596. —— ——.]—Where money has, within the proper time, been paid to the trustee, duly appointed by the creditors under a composition, sufficient to pay all creditors bound by such composition, debtor is absolved & cannot be sued for the original debt by any creditor so bound, notwithstanding the trustee has refused to pay over the composition. The mere non-payment by the trustee does not defeat the composition, & the money being impressed with a trust for the benefit of the creditors, any direction by debtor with respect to it is a nullity.—CAMPBELL *v.* IM THURN (1876), 1 C. P. D. 267; 45 L. J. Q. B. 482; 35 L. T. 265; 40 J. P. 775; 24 W. R. 675.

Annotations:—**Mentd.** *Re* Lang, *Ex p.* Lang (1877), 5 Ch. D. 971, C. A.; Wilson *v.* Breslauer (1877), 2 C. P. D. 314, C. A.; Breslauer *v.* Brown (1878), 3 App. Cas. 672, H. L.; Oppenheim *v.* Jackson & Till (1879), 41 L. T. 193; Lewis *v.* Leonard (1880), 5 Ex. D. 165, C. A.

9597. —— —— Trustee put in funds.]—The creditors of a liquidating debtor duly passed resolutions for a composition payable by instalments at certain definite times, & appointed a trustee. At the time when the first instalments of the composition became due debtor, who had sent cheques to all the creditors, had also placed in the hands of the trustee funds sufficient to pay the amount of that instalment to a particular creditor, who, however, neglected to present the cheque or apply to the trustee for the amount:—*Held*: such creditor was not entitled to institute bkpcy. proceedings against debtor with a view to having him adjudicated a bkpt., on the ground that he did not in fact receive the instalment of his composition upon the day named in the resolutions for payment.—*Re* SHERRATT, *Ex p.* ORTELLI (1882), 45 L. T. 799.

9598. —— —— Deficiency of funds due to trustee's negligence.]—Where a trustee for creditors in composition proceedings under 1869 Act might, but for his default, have been in funds to pay an instalment on the due date, the legal consequences, so far as debtor is concerned, are the same as if the trustee had been in funds.—BURGESS & COSENS *v.* GILLESPIE (1884), 1 Cab. & El. 321.

9599. —— Handing blank notes to trustee.]—The mere handing blank notes to the trustee in composition proceedings to be filled up with the amount he should deem correct, is no discharge of the duty imposed on debtor.—TEA CO., LTD. *v.* JONES (1880), 43 L. T. 255.

9600. —— Postponement of rights of creditors until after realisation of security.]—A right to seize & sell debtor's property given as security for the punctual payment of an instalment does not, on default of punctual payment, postpone the relegation of the creditors to their common law rights till after the realisation of the security.—BRINTON *v.* MADDISON (1883), 1 Cab. & El. 68.

9601. —— Power of court to enforce—Composition after adjudication.]—The ct. has the same power to enforce the payment of a composition agreed to after an adjudication of bkpcy., as it has to enforce the payment of a composition agreed to before any adjudication of bkpcy. has been made.—*Re* LAZARUS, *Ex p.* GODFREY (1887), 18 Q. B. D. 670; 56 L. J. Q. B. 369; 35 W. R. 533; 3 T. L. R. 518; 4 Morr. 121, C. A.

See, also, Sect. 10, sub-sect. 1, A. (b), *ante*.

9602. To have certificate of conformity avoided—Deed avoided by inspectors under power therein.]—Where a deed of arrangement under 1849 Act, s. 224, is avoided by the inspectors, by virtue of a power to that effect contained in the deed, the avoidance of the deed avoids the effect of any certificate of conformity granted by the inspectors to any of debtors under powers contained in the deed.—IRVING *v.* GRAY (1858), 3 H. & N. 34; 27 L. J. Ex. 273; 31 L. T. O. S. 152; 4 Jur. N. S. 380; 157 E. R. 377.

Annotations:—**Refd.** Walter *v.* Adcock (1862), 10 W. R. 542. **Mentd.** *Re* Calvert, *Ex p.* Calvert (1858), 3 De G. & J. 95, L. JJ.; Legg *v.* Cheesebrough (1859), 5 C. B. N. S. 741; Leonard *v.* Sheard (1859), 28 L. J. Q. B. 183; Cruger *v.* Dunlop (1861), 7 H. & N. 525, Ex. Ch.; Copeman *v.* Hart (1863), 14 C. B. N. S. 91; Spitzer *v.* Chaffers (1863), 14 C. B. N. S. 686.

9603. To have bill of costs taxed by client—Compounding solicitor.]—After the delivery by a solr. of his bill of costs, he executed a deed, assigning all his property for the benefit of his creditors, which became binding on all the creditors under 1861 Act. The clients afterwards obtained the common order for taxation against the solr. himself, notwithstanding the deed. He thereupon gave them notice of the deed, but went in before the taxing-master & opposed the taxation. There was a balance due from him:—*Held*: the clients should be allowed to complete the taxation, on their undertaking not to proceed personally against the solr.—*Re* BARTRUM (1864), 10 L. T. 313; 12 W. R. 699, L. JJ.

9604. To have action dismissed for want of prosecution—Service of notice of motion on trustee.]—The rule of equity that in the case of bkpt. pltf. notice of a motion to dismiss for want of prosecution must be served on his assignee does not apply to pltf., who has executed a deed of arrangement which is not binding on dissentient creditors.—PICKERING *v.* CAPE TOWN RY. CO. (1869), L. R. 7 Eq. 224; 19 L. T. 634; 17 W. R. 276.

Annotation:—**Distd.** Price *v.* Rickards (1869) L. R. 9 Eq. 35.

9605. —— Necessity for trustee to take proper supplemental proceedings.]—A registered deed of assignment in trust for creditors, executed by pltf. pending his suit, has the effect of an adjudication in bkpcy. against pltf., & deprives deft. of his right to move to dismiss for want of prosecution, the proper form of motion being, that the trustee of the deed be ordered to take proper supplemental proceedings within a given time, & in default that the bill stands dismissed.—PRICE *v.* RICKARDS (1869), L. R. 9 Eq. 35; 39 L. J. Ch. 118; 21 L. T. 581.

9606. To pay solicitor's costs—On ordinary scale.]—The solr. who acts for debtor in relation

n. *To pay charges of accountant appointed by creditors to estimate assets.*]—The ct. will not, as a general rule, order a trader to pay the expenses of an accountant appointed by creditors to estimate assets.—*Re* AN ARRANGING TRADER (1890), 5 I. L. T. 34.—**IR.**

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to his liquidation petition is, if the creditors resolve to accept a composition, entitled as against debtor to have his costs of the proceedings taxed on the ordinary, not the lower, scale, even though debtor's statement shows that his debts do not exceed £750, or that his assets do not exceed £200.—*Re* MEIKLE, *Ex p.* CASTLE (1875), 1 Ch. D. 111; 33 L. T. 612; 24 W. R. 143.

9607. —— Employment by creditors without special provision.]—Where creditors agree to accept a composition, & employ a solr. without making any special provisions therein for payment of the solr.'s costs, the ct. has no jurisdiction to enforce payment of such costs by debtor.—*Re* PRATT, *Ex p.* GUSH (1879), 12 Ch. D. 915; 48 L. J. Bcy. 69; 40 L. T. 530; 27 W. R. 712.

9608. —— Review.]—After a petition in bkpcy. had been filed, the creditors duly resolved on a scheme for composition, which was approved by the ct. & an order was made rescinding the receiving order, & that debtor should pay the costs, etc., of the proceedings. The solr.'s bill was taxed & the registrar's *allocatur* was sealed for the sum allowed on taxation. Subsequently the solr. having received notice from the official receiver of an appointment for a review by a bkpcy. taxing master of his costs:—*Held:* an order should be granted staying all proceedings under the notice.—*Re* RODWAY, *Ex p.* PHILLIPS (1884), 28 Sol. Jo. 721; 1 Morr. 228.

Annotation:—**Consd.** *Re* Dale, *Ex p.* Dale (1885), 33 W. R. 476.

SUB-SECT. 4.—DISABILITIES.

9609. Vacating seat in Parliament.]—The provisions of 1869 Act, ss. 121, 122, relating to the vacating of his seat in Parliament by a member of the House of Commons who has been adjudged bkpt., do not apply to the case of a member whose affairs are in liquidation by arrangement.—*Re* RUSSELL, *Ex p.* POOLEY (1872), 7 Ch. App. 519; 41 L. J. Bcy. 67; 26 L. T. 813; 20 W. R. 735, L. JJ.

9610. Effect of administration order.]—A person, who after a judgment obtains an administration order, becomes disqualified for membership of a board of guardians, etc., under Local Govt. Act, 1894 (c. 73), as a person who has "made a composition or arrangement with his creditors."—BRADFIELD *v.* CHELTENHAM UNION, [1906] 2 Ch. 371; 75 L. J. Ch. 618; 95 L. T. 78; 70 J. P. 371; 54 W. R. 611; 22 T. L. R. 639; 50 Sol. Jo. 560; 4 L. G. R. 961; 13 Mans. 207.

9611. Apply to all partners of compounding firm.]—An arrangement with creditors made by a firm disqualifies all the members.—WARD *v.* RADFORD (1895), 59 J. P. 632; 11 T. L. R. 587.

Annotation:—**Consd.** Corrigan *v.* Allison (1900), 64 J. P. 678.

SECT. 12.—POSITION OF SURETIES AND CO-DEBTORS.

NOTE.—*In considering the cases set out in this Section, regard must be had to the Notes at the beginning of the Part & of Sect.* 2, *ante.*

SUB-SECT. 1.—SURETIES FOR OBLIGATIONS NOT ARISING OUT OF COMPOSITION AGREEMENT AND CO-DEBTORS.

9612. Whether sureties discharged by creditor's compounding with principal debtor—Remedies against sureties reserved.]—If a creditor execute a deed of compromise with the principal debtor, he thereby discharges the surety, unless it be stipulated in the deed of composition that the remedies against the sureties shall be reserved.—*Re* RENTON, *Ex p.* GLENDINNING (1819), Buck, 517.

Annotations:—**Consd.** Bell *v.* Banks (1841), 3 Scott, N. R. 497; Owen *v.* Homan (1850), 13 Beav. 196. **Refd.** Kearsley *v.* Cole (1846), 16 M. & W. 128; *Re* Black & Cope, *Ex p.* Trew (1853), 1 Bankr. & Ins. R. 156; *Re* Black, *Ex p.* Graham (1854), 5 De G. M. & G. 356, L. JJ.; *Re* Blakely, *Ex p.* Harvey, *Re* Blakely, *Ex p.* Springfield (1854), 23 L. J. Bcy. 27, n.; Strong *v.* Foster (1855), 17 C. B. 201; Bateson *v.* Gosling (1871), L. R. 7 C. P. 9; Rouse *v.* Bradford Banking Co., [1894] 2 Ch. 32, C. A.

9613. —— ——.]—A. gave a promissory note, payable to B., for which A. had received no consideration, as a security for goods to be sold to B. on credit, & B. indorsed the note over to the creditors. B. afterwards executed a deed of composition with the creditors, by which he undertook to pay his debt to them by instalments, & it was stipulated that they should not be prevented by that arrangement from suing on any securities which they held, & that on any default in paying the instalments the deed should be void:—*Held:* the delay granted to B. by the agreement, did not discharge A.—NICHOLS *v.* NORRIS (1831), 3 B. & Ad. 41; 9 L. J. O. S. K. B. 172; 110 E. R. 15.

Annotations:—**Refd.** Kearsley *v.* Cole (1846), 16 L. J. Ex. 115; Bateson *v.* Gosling (1871), L. R. 7 C. P. 9.

9614. —— ——.]—To an action on a bond, deft. pleaded that J. made the bond, & deft. also made it, as his surety, & that, after it was so made, J., being unable to meet his debts, entered into a deed with his creditors, of whom pltf. was one, by which deed he assigned all his property upon trust, for the benefit of pltf. & his other creditors, to certain trustees, & that pltf. did by the deed covenant with J., that pltf. would not at any time thereafter commence or prosecute any action or other proceeding against J., for or by reason of any debt then due & owing by him to pltf., & thereby pltf. gave time to J. in respect of the debt & writing obligatory, in respect whereof deft. was such surety. Pltf. replied by setting out the deed *in hæc verba*. The deed contained (*inter alia*) a proviso that nothing therein contained should prejudice or affect any claim, demand, or remedy which the several parties thereto, & creditors of J., then had or should have by virtue of any mtge., lien, charge, or other incumbrance against any person who might be liable for the payment of any of the debts of J., in the character of a surety or otherwise, & it witnessed that, in consideration of the assignment thereinbefore made, the several parties thereto & creditors of J., covenanted with J., that they would not at any time commence or prosecute any action, suit, or other proceeding against J., for any debt then due from him to them & that, in case of any such action or suit being commenced or prosecuted by them, contrary to the terms of the deed, the deed might be pleaded as a

PART XXIII. SECT. 11, SUB-SECT. 4.

o. *Under Local Government Act,* 1894 (c. 73).]—The disqualification enacted by the above Act is not limited to compositions & arrangements made under Bkpcy. Acts, but applies to arrangements & compositions entered into by debtors with creditors by deeds registered under Deeds of Arrangement Act, 1887.—CORRIGAN *v.* ALLISON (1900), 64 J. P. 678.—IR.

PART XXIII. SECT. 12, SUB-SECT. 1.

9612 i. *Whether sureties discharged by creditor's compounding with principal debtor—Remedies against sureties reserved.*]—Executing an assignment by the holder of a bill, without special reservation of rights as to sureties, discharges them.—COMMERCIAL BANK OF CANADA *v.* WILSON (1861), 11 C. P. 581.—CAN.

9612 ii. —— —— *Covenant not to sue.*]—A covenant not to sue entered into by a creditor with insolvent principal debtor, without the surety's consent, but reserving all remedies by the creditor against others, does not discharge such surety.—HALL *v.* THOMPSON (1859), 9 C. P. 257.—CAN.

general release in bar of any such action or suit :—*Held :* the replication was good.—STEVENS *v.* STEVENS (1850), 5 Exch. 306 ; 155 E. R. 131.

9615. —— —— Reservation not expressed in deed.]—It is not universally necessary in order to reserve on a composition deed remedies against sureties that the reservation should be expressed in the deed.—*Re* BLAKELY, *Ex p.* HARVEY, *Re* BLAKELY, *Ex p.* SPRINGFIELD (1854), 4 De G. M. & G. 881 ; 23 L. J. Bcy. 26 ; 43 E. R. 752, L. JJ.

9616. —— —— Proof of reservation by parol evidence.]—Parol evidence of the understanding of the parties to the deed, that the remedies against the sureties should be reserved, cannot be admitted.—*Re* RENTON, *Ex p.* GLENDINNING (1819), Buck, 517.

Annotations :—**Mentd.** Bell *v.* Banks (1841), 3 Scott, N. R. 497 ; Kearsley *v.* Cole (1846), 16 M. & W. 128 ; Owen *v.* Homan (1850), 13 Beav. 196 ; *Re* Black & Cope, *Ex p.* Trew (1853), 1 Bankr. & Ins. R. 156 ; *Re* Black, *Ex p.* Graham (1854), 5 De G. M. & G. 356, L. JJ. ; *Re* Blakely, *Ex p.* Harvey, *Re* Blakely, *Ex p.* Springfield (1854), 23 L. J. Bcy. 27, n. ; Strong *v.* Foster (1855), 17 C. B. 201 ; Bateson *v.* Gosling (1871), L. R. 7 C. P. 9 ; Rouse *v.* Bradford Banking Co., [1894] 2 Ch. 32, C. A.

9617. —— —— Surety for interest—Right to redeem.]—In a mtge. deed by the principal debtor a third party entered into a covenant to pay interest only on the money thereby secured. Subsequently the principal executed a deed under 1861 Act, s. 192, which amounted to a *cessio bonorum*, & contained a general release from his creditors, followed by a proviso reserving any rights they might have against any other persons in respect of any debt due by debtor, either alone or jointly with any other person :—*Held :* the surety was not discharged from payment of interest which had accrued due since the date of the composition deed. *Semble :* the surety might insist on redeeming the mtge., & so release himself from his liability.—GREEN *v.* WYNN (1869), 4 Ch. App. 204 ; 38 L. J. Ch. 220 ; 20 L. T. 131 ; 17 W. R. 385, L. C.

Annotations :—**Consd.** Bateson *v.* Gosling (1871), L. R. 7 C. P. 9. **Refd.** Forbes *v.* Jackson (1882), 19 Ch. D. 615 ; *Re* Whitehouse, Whitehouse *v.* Edwards (1887), 37 Ch. D. 683.

9618. —— —— Proviso operating as covenant not to sue.]—A deed of arrangement under 1861 & 1869 Acts, contained a release of debtor, subject to a proviso reserving the rights of creditors holding securities :—*Held :* this operated as a covenant not to sue, & not as an extinguishment of the debt so as to bar the remedy against the surety, notwithstanding the deed contained an absolute assignment of all debtor's property & effects to the trustees, & also provisions for enabling them to carry on the trade for the benefit of the estate.—BATESON *v.* GOSLING (1871), L. R. 7 C. P. 9 ; 41 L. J. C. P. 53 ; 25 L. T. 570 ; 20 W. R. 98.

Annotations :—**Consd.** Cragoe *v.* Jones (1873), L. R. 8 Exch. 81 ; Ellis *v.* Wilmot (1874), L. R. 10 Exch. 10. **Refd.** *Re* Whitehouse, Whitehouse *v.* Edwards (1887), 37 Ch. D. 683 ; Duck *v.* Mayeu, [1892] 2 Q. B. 511, C. A.

9619. —— —— Joint & several promissory note.]—To a declaration on a promissory note, deft. pleaded that the note was the joint & several note of himself & G., that pltf., by deed poll without deft.'s consent, released G. from the note & all actions, etc., & thereby also released deft. from same :—*Held :* a deed of release, executed by pltf. & others, creditors of G., containing an express clause that the release to G. should not operate to discharge any one jointly liable with G. on securities to the creditors, did not release deft.—NORTH *v.* WAKEFIELD (1849), 13 Q. B. 536 ; 18 L. J. Q. B. 214 ; 13 L. T. O. S. 115 ; 13 Jur. 731 ; 116 E. R. 1368.

Annotation :—**Refd.** *Re* Armitage, *Ex p.* Halifax Joint Stock Banking Co. (1876), 35 L. T. 554.

9620. —— —— Claim by drawer against acceptor of bill of exchange—Deed pleadable in bar.]—Declaration by drawer against acceptor of a bill of exchange. Plea, a composition deed made between deft. of the first part, a trustee of the second part, & the executing or assenting creditors on behalf of themselves & all the creditors of deft. of the third part, by which deft. covenanted with the trustee to appropriate half of his future net income from his profession of attorney until 5s. in the pound should be realised & paid to his creditors, the amount of such income to be ascertained & paid at certain times therein mentioned, & the creditors covenanted with deft. to accept the deed in satisfaction of their debts, claims, & demands against deft., & released deft. & his future estate from their debts, claims & demands, provided that the release should not prejudice or prevent any of the creditors from claiming or realising any security held by them, or from suing any person other than debtor liable to payment thereof for the recovery thereof, less the amount received by them under the deed, nor prejudice the rights or remedies of any such creditors except as against debtor :—*Held :* notwithstanding the proviso reserving remedies against sureties, the deed was pleadable in bar.—KEYES *v.* ELKINS (1864), 5 B. & S. 240 ; 5 New Rep. 218 ; 34 L. J. Q. B. 25 ; 11 L. T. 474 ; 11 Jur. N. S. 111 ; 13 W. R. 180 ; 122 E. R. 820.

Annotations :—**Distd.** Thompson *v.* Knight (1866), L. R. 2 Exch. 42. **Apld.** Hatch *v.* Hatch (1872), 28 L. T. 506. **Refd.** Ray *v.* Jones (1865), 19 C. B. N. S. 416.

9621. —— Whether release of debts extends to co-debtor.]—Where a composition deed under 1861 Act, s. 192, contains a release of debts, the release does not extend to co-debtors.—ANDREW *v.* MACKLIN (1865), 6 B. & S. 201 ; 34 L. J. Q. B. 89 ; 11 Jur. N. S. 409 ; 13 W. R. 291 ; 122 E. R. 1171.

Annotations :—**Consd.** Megrath *v.* Gray, Gray *v.* Megrath (1874), L. R. 9 C. P. 216. **Refd.** Simpson *v.* Henning (1875), L. R. 10 Q. B. 406, Ex. Ch.

9622. —— Deed executed with full knowledge of surety—On understanding that surety not discharged.]— Deft. guaranteed the banking account of M. by a continuing guarantee. M. subsequently made a composition with his creditors which he paid. Pltfs. sued deft. for a balance remaining due. Deft. pleaded the composition as a discharge, & pltfs. by their replication stated that they accepted & received the composition at the request & with the full knowledge, privity & consent of deft. & upon the express agreement & understanding that pltfs. should not thereby discharge deft. from his liability upon the guarantee. The jury found the facts stated in the replication were true :—*Held :* the replication was good, & pltfs. were entitled to recover.—DAVIDSON *v.* M'GREGOR (1841), 8 M. & W. 755 ; 11 L. J. Ex. 164 ; 151 E. R. 1244.

Annotation :—**Consd.** Higgins *v.* Pitt (1849), 4 Exch. 312.

9623. —— —— Joint & several promissory note.]—A firm were holders of a joint & several promissory note made by a father & son. The son assigned all his property to trustees for the benefit

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q. *Whether co-surety discharged by co-surety compounding with his creditors.*]—Two parties became joint cautioners for a cash-credit. During the currency of the obligation, one of them having become insolvent, was discharged by his creditors, among whom was the bank by which the cash-credit was granted, of all claims & debts due to them at that date. No intimation of the discharge was made to the co-cautioner. The discharge having been held to liberate insolvent from his cautionary obligation :—*Held :* the co-cautioner was thereby liberated in full.—BRITISH LINEN CO. *v.* THOMSON (1853), 25 Sc. Jur. 200.—SCOT.

Sect. 12.—*Position of sureties and co-debtors: Subsects.* 1 & 2.]

of his creditors, who were expressed to be parties to the assignment & to be named in a schedule, & the deed purported to contain an absolute release of the debts without any reservation of rights against sureties. One of the trustees was a partner in the above firm, & the deed was executed by him & the other trustees, but not by any other creditor. It was also executed by the son, with the privity & concurrence of the father. Upon its execution as an act of bkpcy., an adjudication was pronounced against the son :—*Held :* even assuming the father to have joined in the note as a surety merely, & the partner to have executed the deed as a creditor & not merely as a trustee, the father's liability was not discharged.—*Re* BLAKELY, *Ex p.* HARVEY, *Re* BLAKELY, *Ex p.* SPRINGFIELD (1854), 4 De G. M. & G. 881 ; 23 L. J. Bcy. 26 ; 43 E. R. 752, L. JJ.

9624. —— No reservation of rights against outgoing partner—Composition taken from new firm.]—Two partners were liable on joint & several bonds given to secure partnership debts. One partner retired & a new partner was taken in, the new firm covenanting to indemnify the outgoing partner against all partnership debts & liabilities. The estate of the new firm was liquidated by arrangement under 1869 Act, & the obligees accepted a composition payable by instalments :—*Held :* a novation of the bond debts had taken place, the new firm becoming the principals, & the out-going partner a surety, & the composition by giving time to the principal debtors, without the consent of the surety, discharged the surety.—WILSON *v.* LLOYD (1873), L. R. 16 Eq. 60 ; 42 L. J. Ch. 559 ; 28 L. T. 331 ; 21 W. R. 507.

Annotations :—**Expld.** Ellis *v.* Wilmot (1874), L. R. 10 Exch. 10. **Distd.** *Re* Littler, *Ex p.* Manchester & Liverpool District Banking Co. (1874), L. R. 18 Eq. 249. **Dbtd.** *Re* Jacobs, *Ex p.* Jacobs (1875), 10 Ch. App. 211, L. JJ. **Distd.** Simpson *v.* Henning (1875), L. R. 10 Q. B. 406. **Refd.** Swire *v.* Redman (1876), 1 Q. B. D. 536. **Mentd.** Bradford Old Bank *v.* Sutcliffe, [1918] 2 K. B. 833, C. A.

9625. —— No reservation of rights against surety—Reservation leaving surety remedy over against debtor.]—A surety is not discharged by the creditor voting for a composition under 1869 Act, with the principal debtor, without reserving his rights against the surety. *Semble :* the rights of creditors against sureties cannot be reserved in a composition, under the Act, with the principal debtor, so as to leave the surety a remedy over against debtor, as this would prevent debtor's complete discharge.—*Re* JACOBS, *Ex p.* JACOBS (1875), 10 Ch. App. 211 ; 44 L. J. Bcy. 34 ; 31 L. T. 745 ; 23 W. R. 251, L. JJ.

Annotations :—**Apld.** *Re* London Chartered Bank of Australia, [1893] 3 Ch. 540. **Expld. & Distd.** Mortgage Insce. Corpn. *v.* Pound (1895), 64 L. J. Q. B. 394. **Refd.** *Re* Fothergill, *Ex p.* Corry (1876), 45 L. J. Bcy. 153, C. A. ; Dane *v.* Mortgage Insce. Corpn., [1894] 1 Q. B. 54, C. A. **Mentd.** Simpson *v.* Henning (1875), L. R. 10 Q. B. 406 ; *Re* FitzGeorge, *Ex p.* Robson (1905), 53 W. R. 384.

9626. —— —— Surety entitled to be put in creditor's place—Insurance of bank deposit.]—By an instrument purporting to be a "policy of insurance," it was witnessed that defts. guaranteed to the "assured," pltf., payment of a sum of money deposited by her in a bank in Australia, if the bank should make default in paying same. The bank made default in payment of the sum deposited. Subsequently to such default a scheme of arrangement between the bank & its creditors was, under the provisions of an Act of the colony, sanctioned by a meeting of creditors & the colonial ct. By such scheme the bank was to be wound up & a new bank constituted, the creditors becoming entitled to certain rights against the new bank in satisfaction of their debts. Pltf. did not assent to the scheme, which, however, was binding upon her by the colonial Act :—*Held :* (1) defts. remained liable to pltf. under their contract, notwithstanding the scheme of arrangement ; (2) (LORD ESHER, M.R., & LOPES, L.J.) the contract was one of insurance against a certain event, *viz.*, the bank's default, &, that event having happened, defts. were liable to pay the sum insured, but would be entitled, the contract being one of indemnity, upon payment to be subrogated to the rights of pltf. under the scheme of arrangement ; (3) (KAY, L.J.) whether the contract was one of suretyship or one of insurance, the scheme of arrangement, which operated to discharge the bank under the Act & not by way of accord & satisfaction, did not defeat the right which had vested in pltf. under the contract upon the default made by the bank.—DANE *v.* MORTGAGE INSURANCE CORPN., LTD., [1894] 1 Q. B. 54 ; 63 L. J. Q. B. 144 ; 70 L. T. 83 ; 42 W. R. 227 ; 10 T. L. R. 86 ; 9 R. 96, C. A.

Annotations :—**Distd.** *Re* Denton's Estate, Licenses Insce. Corpn. & Guarantee Fund *v.* Denton, [1903] 2 Ch. 670. **Apld.** *Re* Law Guarantee Trust & Accident Soc., Liverpool Mortgage Insce. Co.'s Case, [1914] 2 Ch. 617, C. A. **Refd.** Finlay *v.* Mexican Investment Corpn., [1897] 1 Q. B. 517 ; Seaton *v.* Heath, Seaton *v.* Burnand, [1899] 1 Q. B. 782, C. A. ; Parr's Bank *v.* Albert Mines Syndicate (1900), 5 Com. Cas. 116 ; *Re* Denton's Estate, Licenses Insce. Corpn. & Guarantee Fund *v.* Denton, [1904] 2 Ch. 178, C. A. ; Shaw *v.* Royce, [1911] 1 Ch. 138.

9627. —— Agreement by principal debtor to pay creditor in full—Without knowledge or consent of surety.]—Pltf. having advanced money to M., he obtained from him (*inter alia*) a promissory note in which deft. joined as surety. Subsequently a resolution was passed at a meeting of M.'s creditors that they would accept a composition. Pltf. assented to the resolutions, but M. agreed with pltf. in writing, without the knowledge or consent of deft., to discharge in full his indebtedness to pltf. M. failed to pay the composition & also the debt owing to pltf. Thereupon pltf. sued deft. on the promissory note :—*Held :* by the bargain which pltf. had made with M. he had lost both his original debt & his composition, & deft. was released from his suretyship.—MAYHEW *v.* BOYES (1910), 103 L. T. 1, C. A.

9628. Right of surety to recover from principal debtor—Deed reserving remedies against sureties.]—Pltf. became a surety for advances to be made by a banking co. to deft. Deft. afterwards executed a composition deed, to which pltf. & the banking co. were parties, whereby he assigned his property to trustees for the benefit of his creditors, & the deed contained a stipulation for a reserve of remedies against sureties for deft. Pltf. having been compelled to pay the debt to the banking co. :—*Held :* he was entitled to recover back the amount in an action for money paid, from deft.—KEARSLEY *v.* COLE (1846), 16 M. & W. 128 ; 16 L. J. Ex. 115 ; 8 L. T. O. S. 234 ; 153 E. R. 1128.

Annotations :—**Distd.** Owen *v.* Homan (1851), 3 Mac. & G. 378. **Consd.** Price *v.* Barker (1855), 4 E. & B. 760 : Webb *v.* Hewitt (1857), 3 K. & J. 438. **Refd** Bateson *v.* Gosling (1871), L. R. 7 C. P. 9 ; Cragoe *v.* Jones (1873), L. R. 8 Exch. 81 ; *Re* Wolmershausen, Wolmershausen *v.* Wolmershausen (1889), 62 L. T. 541.

r. *Whether accommodation drawer & indorser discharged by indorsee compounding with acceptor.*]—In an action by indorsees of a bill of exchange against the accommodation drawer & indorser :—*Held :* the receipt by pltfs. of composition notes of the acceptor, in pursuance of an arrangement in bkpcy., was not equivalent to payment, & did not suspend pltfs.' right of action against deft. during the currency of the notes.—PROVINCIAL BANK OF IRELAND *v.* DUNNE (1878), 2 L. R. Ir. 21.—IR.

9629. —— —— No abandonment unless contract to that effect.]—A necessary consequence of a reservation in a composition deed of a creditor's remedies against a surety is the continuance of the surety's right to be indemnified by the principal debtor, & this right will not be held to be abandoned unless a contract to abandon it is proved.

One of the creditors who acceded to a composition deed was also a residuary legatee of a surety for compounding debtors to another creditor. One of compounding debtors happened to be the surety's exor. :—*Held :* the residuary legatee's accession must be taken to have been in respect of his direct debt only, & did not preclude him from insisting on the surety's estate being indemnified by debtors.—CLOSE *v.* CLOSE (1853), 4 De G. M. & G. 176 ; 43 E. R. 474, L. JJ.

9630. —— Claims of sureties against principal debtor not reserved—Drawer of bill of exchange suing acceptor.]—Declaration by the drawer of a bill of exchange against the acceptor, not stating that it was payable to order. Plea of a composition deed containing the usual reservation of the rights of creditors against sureties. Replication, that the bill was payable to order, & at the time of the making of the composition deed was outstanding in the hands of third parties, to whom pltf. had since paid the amount of it, & that pltf. had not assented to or signed the deed :—*Held :* the claims of sureties against the principal debtor were not preserved by the deed, & pltf. was bound by it in the circumstances mentioned in the replication, which was bad.—HOOPER *v.* MARSHALL (1869), L. R. 5 C. P. 4 ; 39 L. J. C. P. 14 ; 21 L. T. 639.

Annotation :—**Apld.** Hatch *v.* Hatch (1872), 28 L. T. 506.

9631. —— Surety compounding for cash—Principal debtor compounding by debentures for full amount—Right of surety to debentures for composition paid.]—By a scheme of arrangement under 1869 Act, s. 28, all proceedings in a liquidation were stayed, & an agreement was approved whereby the property of debtors was transferred to a co. formed to continue their business, who were to issue to every creditor, to the amount of his debt, B. debentures payable to bearer, & only payable, except at the co.'s option, out of the residue of profits after payment of certain other charges, or on the winding up of the co. Creditors to a large amount were the holders of bills drawn by liquidating debtors, on which the acceptors, who stood in the position of surety for them, had, after proof by such creditors in the liquidation, paid them a composition of 4*s.* in the pound. The surety claimed to take 4*s.* in the pound of the debentures to be issued to the creditors, on the ground that such debentures were a satisfaction of their debts in full :—*Held :* the debentures must be considered as taken, not in satisfaction of the debts, but of the dividends to be received in respect thereof, & the surety's only right was to pay the debt in full, & take over the debentures, or possibly (MELLISH, L.J.), if the debentures were really worth more than 16*s.* in the pound, which they were not, to require the debentures to be sold, & the surplus paid to him.—*Re* FOTHERGILL, *Ex p.* TURQUAND (1876), 3 Ch. D. 445 ; 45 L. J. Bcy. 153, C. A.

SUB-SECT. 2.—SURETIES FOR OBLIGATIONS ARISING OUT OF COMPOSITION AGREEMENT.

9632. When bound—Covenant good in law.]—A covenant by a friend of bkpt. to pay all his creditors their full debts, in consideration that they will not proceed any further under the commission, is good in law.—KAYE *v.* BOLTON (1795), 6 Term. Rep. 134 ; 101 E. R. 474.

9633. —— Deed delivered as escrow.]—Before the execution of a composition deed, it was agreed, in the presence of the surety for the payment of the composition, that it should be void unless all the creditors executed it. The surety, at the same interview, afterwards executed the deed in the ordinary way, without saying anything at the time of execution; the deed was then delivered to one of the creditors, in order that he might get it executed by the rest of the creditors :—*Held :* this was to be considered a delivery of the deed as an escrow, & all the creditors not having executed it, the surety was not bound.—JOHNSON *v.* BAKER (1821), 4 B. & Ald. 440 ; 106 E. R. 998.

Annotations :—**Consd.** Spicer *v.* Burgess (1834), 3 L. J. Ex. 285 ; Bowker *v.* Burdekin (1843), 11 M. & W. 128. **Mentd.** London Freehold & Leasehold Property Co. *v.* Suffield (1897), 66 L. J. Ch. 790, C. A.

9634. How liability enforced—Jurisdiction of court.]—The Ct. of Bkpcy. has no jurisdiction to enforce the payment of a composition by a surety, who has covenanted with a trustee on behalf of the creditors for its payment.—*Re* DALE, *Ex p.* MIRABITA (1875), L. R. 20 Eq. 772 ; 44 L. J. Bcy. 119 ; 33 L. T. 60 ; 23 W. R. 869.

9635. When discharged—Provision for avoidance of deed on bankruptcy of principal debtor—Principal debtor becoming bankrupt on own petition.]—By a composition deed under 1861 Act, s. 192, debtor & defts., as his sureties, jointly & severally covenanted with pltf., as trustee for the creditors, to pay to him so much as would suffice to pay a composition of 7*s.* 6*d.* in the pound to all the creditors, by three instalments of 2*s.* 6*d.* each at four, eight, & twelve months. The deed contained a proviso that, " in case default should be

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PART XXIII. SECT. 12, SUB-SECT. 2.

s. *When bound — Whether demand necessary.*]—Declaration that defts. undertook to give their promissory notes payable at certain periods, for 10*s.* in the pound of the debts due by F. A plea alleged that pltfs. did not demand of defts. to execute & deliver the note :—*Held :* a demand was necessary, & the plea was good.—MATTHEWSON *v.* HENDERSON (1863), 13 C. P. 96.—CAN.

t. —— *Extent of liability.*]—S., having agreed to pay creditors a composition, certain persons, of whom deft. was one, bound themselves as sureties *in solidum* & as co-principal debtors, but " each to the extent only set opposite his name," for payment by S. of the amount of the composition. The sums set opposite the respective names amounted to £1,800. S. paid £1,700 14*s.* 6*d.*, leaving a balance unpaid of £185 :—*Held :* the sureties were sureties for the full amount of the composition, & not merely for the sum of £1,800, & deft. was liable to pay his proportionate share of the deficiency.—KAPLAN *v.* SYFRET (E. R.) & CO. (1914), C. P. D. 1104.—S. AF.

a. —— *Partial failure in arrangement.*]—Where J. & others had agreed to give their notes to the creditors of E. in composition for his debts, & had executed a deed to that effect, in the expectation that E. would receive back from the assignees one half of the stock of goods assigned by him, & that C. would receive the other half, he & E. thus becoming co-partners in the goods, & the goods were afterwards all delivered to C., with the knowledge & assent of E. :—*Held :* their deed could not be avoided, because there was subsequently a partial failure in the arrangement on the faith of which they had made it.—MATTHEWSON *v.* HENDERSON (1864), 15 C. P. 90.—CAN.

b. —— *Variation of contract.*]—Creditors, under a composition, sought to recover from the sureties of debtor an instalment greater than the debt they were entitled to rank for, according to the sched. to the composition deed : —*Held :* pltfs. were not precluded from recovering, on the ground that there had been a variation of the contract.—SELLICK *v.* GROSWEINER (1906), 38 N. B. R. 73.—CAN.

9634 i. *How liability enforced—Jurisdiction of court.*]—Parties undertook to pay the instalments of a composition, but they failed so to do :—*Held :* the ct. had no power to compel sureties to pay the amount they had undertaken to pay, the contract not being between the ct. & the sureties, but between them & the arranging trader.—*Re* AN ARRANGING TRADER (1867), 1 I. L. T. Jo. 716.—IR.

Sect. 12.—*Position of sureties and co-debtors: Subsect.* 2.]

made in payment of any or either of the instalments, or in case before the composition should be fully paid to the trustee, debtor should be adjudicated bkpt., or make or attempt to make any assignment of his estate for the benefit of his creditors, or any arrangement with his creditors different to that arrangement, then & in every such cases these presents, & the release, & every other clause & provision therein contained, should be thenceforth at an end & void." In an action against the sureties to recover the second instalment, the principal debtor having been adjudicated bkpt. on his own petition:—*Held:* the bkpcy. did not render the deed void as against the sureties, but the proviso made it voidable, at the election of the creditors.—HUGHES *v.* PALMER (1865), 19 C. B. N. S. 393; 34 L. J. C. P. 279; 12 L. T. 635; 11 Jur. N. S. 876; 13 W. R. 974; 144 E. R. 839.

Annotation:—**Mentd.** New Zealand Shipping Co. *v.* Société des Ateliers et Chantiers de France (1918), 87 L. J. K. B. 746, H. L.

9636. —— Provision for release if inspectors made debtor bankrupt—Debtor made bankrupt by non-assenting creditors.]—A general meeting of creditors held under 1869 Act, s. 126, duly resolved to accept in full satisfaction of the debts due to them, a composition payment in instalments, the last of which was to be guaranteed by deft. Debtor was until payment to carry on his business under inspection, & an inspectorship deed between debtor & the creditors was made, which empowered the inspectors, if it should appear to them from the state or position of debtor's affairs or otherwise that the instalments would not be duly met, to apply to the ct. to adjudge debtor bkpt., or to require him to assign his property to them. Deft.'s guarantee was in terms absolute, but the inspectorship deed contained a proviso that he should be released "in the event of debtor being adjudicated a bkpt., or from assignment of his property being made under the provisions of the deed." Before payment of the last instalment a creditor, who was no party to the above-mentioned resolution & deed & was not bound by them, made debtor a bkpt., & the last instalment was not paid. Pltf., to whom, on behalf of the creditors, parties to the resolution, the guarantee had been given, then sued upon it:—*Held:* (1) the bkpcy. of debtor subsequently to the composition did not of itself, as an incident of the ordinary law of bkpcy., supersede the deed, & release the guarantor; (2) an adjudication of bkpcy. other than one effected on the application of the inspectors did not discharge deft. from liability on the guarantee.—GLEGG *v.* GILBEY (1877), 2 Q. B. D. 209; 46 L. J. Q. B. 325; 35 L. T. 927; 25 W. R. 311, C. A.

Annotation:—**Expld.** *Re* Bedell, *Ex p.* Gilbey (1878), 8 Ch. D. 248, C. A.

9637. —— Debtor adjudicated bankrupt & composition annulled.]—An order adjudicating debtor bkpt. & annulling a composition with his creditors releases a surety, who has given security for payment of the composition, & the security becomes void so far as relates to such liability.—WALTON *v.* COOK (1888), 40 Ch. D. 325; 58 L. J. Ch. 180; 60 L. T. 91; 37 W. R. 189.

9638. Right to prove—In debtor's bankruptcy—Right to put creditors to election to accept or reject composition deed in toto.]—A surety entitled to prove in debtor's bkpcy. for what he has paid in respect of a composition, has no right to put the creditors to an election whether they will carry out the composition *in toto* or reject it *in toto*.—*Re* BEDELL, *Ex p.* GILBEY (1878), 8 Ch. D. 248; 47 L. J. Bcy. 49; 38 L. T. 728; 26 W. R. 768, C. A.

Annotations:—**Mentd.** *Re* Barnes, *Ex p.* Quilter (1882), 30 W. R. 739, C. A.; *Re* Barnes, *Ex p.* Tilleard (1882), 30 W. R. 568; Hood *v.* Newby (1882), 21 Ch. D. 605, C. A.

Payments made & preference given to sureties in respect of their becoming such.]—*See* Nos. 9429–9431, *ante*.

c. —— *Refusal to sign composition bills—Order on sureties to sign.*]—Where parties signed an undertaking to indorse bills to secure a composition, but afterwards refused to do so, on the ground that they did not understand what they were called upon to sign, & that debtor led them astray as to his circumstances:—*Held:* they were not at liberty to withdraw the undertaking which they had signed, & an attachment should issue against them within a week, if they did not sign the bills.—*Re* FAHY (1861), 13 Ir. Jur. 322.—IR.

d. —— —— ——.]—An arranging debtor & sureties signed a consent, afterwards made a rule of ct., whereby they undertook to sign composition bills pursuant to debtor's proposal accepted by creditors & confirmed by the ct. Upon the bills being tendered to debtor for his signature, he refused to sign them, & subsequently the bills were tendered to the sureties for their signatures, & they also refused to sign them, upon insufficient grounds. The ct. ordered the sureties to sign the bills.—*Re* H. (1877), 11 I. R. Eq. 334.—IR.

e. —— —— —— *Before signature by debtor.*]—Two debtors offered a composition, payable in four equal instalments, which offer was accepted, & two sureties undertook to secure the payment of the third & fourth instalment respectively:—*Held:* the sureties should not be ordered to sign bills to secure such instalments before debtors themselves had signed.—*Re* M. & R. (1896), 30 I. L. T. 137.—IR.

f. —— —— —— *Mistake.*]—A person, who had signed an undertaking to become sole surety for the last instalment offered by an arranging debtor subsequently signed another undertaking on the representation that there was to be a second surety, but as no second surety was forthcoming he refused to sign the composition bills:—*Held:* the undertaking to sign as sole surety had been cancelled by the subsequent document, & as the surety *bond fide* & honestly believed there was to be a second surety he should not be compelled by an order of the ct. to sign the bills.—*Re* AN ARRANGING DEBTOR (1909), 43 I. L. T. 213.—IR.

g. —— —— —— *Where compounding debtor one of two.*]—After the adjudication in bkpcy. of two partners, one of whom had absconded, the partner who remained in the country offered a composition payable in three equal instalments, which offer was accepted by the creditors. A last instalment was to be secured by the joint & several promissory notes of the arranging debtor, & two sureties, by whom undertakings to sign the notes had been given. One surety afterwards refused to sign the bills on the ground of irregularity & misrepresentation:—*Held:* the surety should be ordered to sign, though the offer of composition had in reality been made only by one of the persons who had been adjudicated bkpts.—*Re* LARMOUR & HUSBAND (BANKRUPTS) (1908), 42 I. L. T. 269.—IR.

9637 i. *When discharged—Arrangement turned into bankruptcy.*]—Pltf. sued on a note given by deft. as security for a third instalment on a composition. Thereafter debtor, having failed to pay the first instalment, was made bkpt.:—*Held:* pltf. could not recover.—HERON *v.* GOUGH (1876), 10 I. L. T. Jo. 48.—IR.

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